IN THE COURT OF APPEAL OF NEW ZEALAND

CA278/2014
[2016] NZCA 43

BETWEEN	VINCENT ROSS SIEMER Appellant
AND	THE ATTORNEY-GENERAL Respondent

Hearing:	8 October 2015 (further submissions received 1 February 2016)
Court:	Wild, French and Kós JJ
Counsel:	A J Ellis for Appellant A M Powell and E J Devine for Respondent
Judgment:	4 March 2016 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is allowed. The order made by the High Court is quashed and replaced with an order that the appellant must obtain the leave of the High Court before commencing or continuing any proceeding in the High Court or any inferior court.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Generally speaking, a person may issue civil proceedings in the courts as of right. However, if a person has persistently and without any reasonable grounds

instituted vexatious legal proceedings, the High Court may make an order under s 88B of the Judicature Act 1908 preventing that person from issuing further proceedings without first obtaining the leave of the Court to do so.

[2] On the application of the Attorney-General, the High Court (Ronald Young and Brown JJ) made such an order against Mr Siemer.[1]

[3] Mr Siemer now appeals the decision. The Attorney-General cross-appeals some aspects of the High Court's reasoning, including the terms of its order.

Application for recusal

[4] Prior to the hearing of the appeal, Mr Ellis filed an application on behalf of Mr Siemer requesting Wild J recuse himself. The grounds of the recusal application were:

(a) Mr Siemer had in the past made a formal complaint against Wild J;

(b) serious allegations against Wild J were made in Mr Siemer's website; and

(c) Wild J was too closely involved with Mr Siemer's earlier litigation, minutes he had written being quoted by the High Court in the decision under appeal.

[5] The objections to Wild J hearing the appeal were all without substance. It is well established that the fact a litigant has made a complaint or allegation against a judge does not warrant recusal.[2] As for Wild J's involvement in earlier litigation, Wild J did not sit as a High Court judge in any of the proceedings issued by Mr Siemer. Out of 52 judgments of the Court of Appeal involving Mr Siemer, there are only 12 where Wild J sat either as part of a panel of three or alone. There is nothing in any of those judgments that would cause any apprehension to a

---

1 *Attorney-General v Siemer* [2014] NZHC 859.

2 *Siemer v Heron* [2011] NZSC 116, [2012] 1 NZLR 293 at [14]; *Siemer v Attorney-General* [2013] NZCA 391 at [6] and [7].

fair-minded observer in terms of the test for apparent bias in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*.[3]

[6] Justice Wild accordingly issued a minute declining the request.[4] That prompted a renewed application by Mr Ellis for recusal, on the grounds that Wild J's minute disclosed "new material" on which bias or apparent bias could be alleged. The "new material" was a reference in the minute to some aspects of the original recusal application being considered "scandalous". Although the minute did not specify which aspects were considered scandalous, it was obvious the reference was to defamatory and abusive comments from Mr Siemer's website, which were quoted in the application. In renewing the application, Mr Ellis submitted the allegations on Mr Siemer's website are a compilation of the reported views of other lawyers and that for Wild J to ascribe them to Mr Siemer demonstrated a pre-determined attitude towards Mr Siemer and a lack of neutrality.

[7] The quotes from the website contained in the original recusal application were undeniably scandalous. The quoted material even included defamatory and abusive allegations against another Judge who was not part of the appeal panel. It should not have been included in the application for recusal.

[8] There being nothing of substance in the renewed application, Wild J issued a second minute declining again to recuse himself.[5]

[9] At the commencement of the hearing, Mr Ellis advised that, in light of Wild J's refusal to recuse himself, his instructions were not to make oral submissions, except in reply. Mr Ellis was, however, willing to answer questions from the Bench. Later in reply, Mr Ellis stated the clarity of the full written submissions filed by both parties meant comprehensive oral submissions were not needed.

---

3 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.

4 *Siemer v Attorney-General* CA278/2014, 6 October 2015.

5 *Siemer v Attorney-General* CA278/2014, 7 October 2015.

[10] For completeness, we note that also at the commencement of the hearing, the Court advised Mr Ellis of its concern that he as counsel had prepared and filed an application containing this scandalous material and that the Court was considering how to address this. We drew this to Mr Ellis' attention because the wording of Wild J's second minute may have given the misleading impression that the Court would not be taking the matter any further. We also emphasised this issue was for another day and that the sole focus of the hearing was on Mr Siemer's appeal and the Attorney-General's cross-appeal.

[11] We now turn to consider the merits of the appeal and cross-appeal.

Background

[12] Section 88B(1) of the Judicature Act states:

> **88B Restriction on institution of vexatious actions**
>
> (1) If, on an application made by the Attorney-General under this section, the High Court is satisfied that any person has persistently and without any reasonable ground instituted vexatious legal proceedings, whether in the High Court or in any inferior court, and whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no civil proceeding or no civil proceeding against any particular person or persons shall without the leave of the High Court or a Judge thereof be instituted by him in any court and that any civil proceeding instituted by him in any court before the making of the order shall not be continued by him without such leave.
>
> …

[13] In applying for an order under s 88B, the Attorney-General relied on 19 proceedings Mr Siemer had filed in the High Court between 15 October 2003 and 5 March 2012. All had their genesis in a dispute that arose in 2000 between Mr Siemer and Mr Stiassny, a receiver who had been appointed to a company in which Mr Siemer and Mr Siemer's wife had invested. As submitted by the Attorney-General, the litigation grew almost exponentially and on a scale not previously seen in New Zealand to include not only claims against Mr Stiassny and the company, but also lawyers, the Solicitor-General, the Attorney-General, judges

who heard and determined the cases, as well as the Judicial Conduct Commissioner to whom Mr Siemer made complaints about the judges.

[14] For the purposes of the appeal, it is not necessary for us to traverse the detail of the various proceedings. It is sufficient to note the High Court accepted 15 of the 19 proceedings were vexatious because they had been instituted for the collateral purpose of re-litigating issues that had already been finally resolved.[6]

[15] The High Court was further satisfied the statutory pre-requisites for the making of an order under s 88B were met. It made orders in the following terms:[7]

> (a) Mr Siemer is not to institute any civil proceedings against any person in the High Court and in any inferior Court without leave of the High Court where the other party is:
>
> (i) Mr Michael Stiassny;
>
> (ii) Ferrier Hodgson — Accountants;
>
> (iii) any Associate Judge or any Judge of the District Court, High Court, Court of Appeal or Supreme Court;
>
> (iv) the Attorney-General;
>
> (v) the Solicitor-General;
>
> (vi) the New Zealand Law Society;
>
> (vii) the Judicial Conduct Commissioner;
>
> (viii) any barrister and/or solicitor of the High Court of New Zealand;
>
> (b) Mr Siemer is not to institute any proceeding which relates directly or indirectly to his dispute with Mr Stiassny, Ferrier Hodgson, Mr Robert Fardell and Paragon Oil Systems;

---

6 The 15 proceedings were *Siemer v Stiassny* HC Auckland CIV-2008-404-104, 20 March 2008; *Siemer v Stiassny* HC Auckland CIV-2008-404-6822, 30 November 2009; *Siemer v Attorney-General* DC Auckland CIV-2009-004-1534, 20 November 2009; *Siemer v Chief Justice of the New Zealand Supreme Court* HC Auckland CIV-2009-404-8435, 22 August 2011 (in which Woodhouse J struck out five proceedings: CIV-2009-404-8435, CIV-2009-404-8438, CIV-2010-404-84, CIV-2010-404-7025, CIV-2010-404-7026); *Siemer v Legal Complaints Review Officer* HC Auckland CIV-2010-404-986, 25 February 2011; *Siemer v Chief Justice of the New Zealand Supreme Court* HC Auckland CIV-2010-404-1909, 11 February 2011; *Siemer v Harvey* [2012] NZHC 1434; *Siemer v Elias* HC Auckland CIV-2011-404-1183, 30 August 2011; *Siemer v Judicial Conduct Commissioner* [2012] NZHC 2710; *Siemer v Judicial Conduct Commissioner* [2012] NZHC 1481; and *Siemer v Stiassny* HC Auckland CIV-2012-404-1133.

7 *Attorney-General v Siemer*, above n 1, at [204].

(c) all proceedings currently before the High Court and any inferior Court involving any of the above parties in (a)(i)–(viii) or involving the dispute identified in (b) (whether directly or indirectly) will not be continued by Mr Siemer without leave of the High Court.

(We use the term "inferior Court" because that is the phrase used in s 88B and to ensure all courts below the High Court are included in this order.)

Grounds of appeal

Does the order prevent Mr Siemer from issuing judicial review proceedings?

[16] Mr Ellis acknowledged this was not a formal ground of appeal as such, but submitted it would be helpful for the Court to clarify the scope of the order.

[17] Mr Ellis contended "civil proceedings" for the purposes of s 88B should be interpreted as not including judicial review proceedings against the Crown. In advancing that argument, Mr Ellis submitted such an interpretation was mandated by s 27(2) of the New Zealand Bill of Rights Act 1990.[8] He also relied on the definition of "civil proceedings" that appears in the Crown Proceedings Act 1950.[9] The definition used in that Act, which is also incorporated into the High Court Rules,[10] expressly excludes applications for review under the Judicature Amendment Act 1972.

[18] We do not accept this analysis, which is contrary to existing case law.[11]

[19] As noted by counsel for the Attorney-General, Mr Powell, the starting point for the interpretation of "civil proceedings" in s 88B must be the statute in which the section is contained, the Judicature Act. Significantly, the Judicature Act contains a different definition of "civil proceedings" to that in the Crown Proceedings Act. Section 2 of the Judicature Act defines "civil proceedings" as "*any* proceedings in

---

8 Section 27(2) provides: "Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination".

9 Section 2(1).

10 Rule 1.3.

11 *Attorney-General v Brogden* [2001] NZAR 158 (HC) at [55]–[57]; *Attorney-General v Hill* (1993) 7 PRNZ 20 (HC) at 22.

the court, other than criminal proceedings".[12] In our view, to adopt the interpretation advanced by Mr Ellis would be contrary to the plain meaning of the words of the definition and also contrary to the purpose of a s 88B order. Its purpose is to protect defendants from groundless litigation. That purpose would be frustrated if a person found to have persistently filed vexatious proceedings were nonetheless permitted to bring judicial review proceedings without leave. This is starkly illustrated in the present case where the proceedings found to have been vexatious include judicial review proceedings. There is no reason why a different definition from the Crown Proceedings Act should supplant the definition in the Judicature Act. We conclude judicial review proceedings are within the scope of the order made against Mr Siemer.

Did the High Court err in not making the order subject to any expiry date?

[20] In its decision, the High Court accepted that any restriction on the fundamental right to bring proceedings should be as narrow as possible.[13] Mr Ellis submitted that, in applying that principle, the High Court should have considered whether to impose a time limit, such as two years, on the life of the order. The failure to do so was, he submitted, a failure to take into account a relevant consideration.

[21] For his part, Mr Powell accepted the High Court could have imposed a temporal restriction but said it was not bound to do so. He submitted the Court chose to restrict the scope of the order by other means.

[22] In our view, the short answer to the point is that it was not necessary for the High Court to consider a temporal restriction because it has the inherent jurisdiction to revoke or vary the order at any time in the future should there be, for example, a change of circumstance rendering the order or its conditions no longer appropriate or justified.

---

12 Emphasis added.

13 *Attorney-General v Siemer*, above n 1, at [202].

Did the High Court err in failing to consider Mr Siemer's obligation to exhaust domestic remedies?

[23] Mr Siemer has filed various complaints about aspects of the litigation with a number of international treaty bodies. Mr Ellis explained that international organisations require applicants to exhaust their domestic remedies first, and that Mr Siemer's pursuit of the litigation in New Zealand from 2005 onwards was accordingly justified on that basis. In Mr Ellis' submission, the effect of characterising the proceedings as vexatious was to deny Mr Siemer access to his international remedies and so breach New Zealand's international obligations. This was a mandatory relevant consideration that the High Court was required to take into account but did not, thereby falling into error.

[24] In our view, the argument is without merit. We note the United Nations Human Rights Committee has expressly held it is "a well established principle of international law and of the Committee's jurisprudence" that "the local remedies rule does not require resort to appeals that objectively have no prospect of success".[14] We are satisfied it was not necessary for Mr Siemer to embark as he did on a relentless campaign of collateral attacks in order to gain access to international organisations. We therefore reject this ground of appeal.

Did the High Court err in failing to consider freedom of expression?

[25] Mr Ellis submitted it was a recurrent theme of the High Court judgment that Mr Siemer was abusive of the judges in the proceedings he issued against them. Mr Ellis contended the High Court failed to take account of the right of freedom of expression and to articulate "why that right was trumped" by considerations of collateral attack. In his submission, the High Court's failure to consider freedom of expression, and its failure to conduct any proportionality analysis under s 5 of the New Zealand Bill of Rights Act created the impression that in characterising the proceedings in question as vexatious the High Court was simply protecting judges against criticism.

---

[14] Human Rights Committee Views: Communication No 210/1986 CCPR/C/35/D/210/1986 (1989) [*Pratt and Morgan v Jamaica*] at [12.3].

[26] We do not accept those arguments. The statements of claim in question contained abuse and intemperate criticism of the judicial officers involved. But that of itself was not the reason the High Court found those proceedings to be vexatious. As submitted by Mr Powell, the persistent vexatiousness of Mr Siemer's proceedings lay in his refusal to accept decisions he disagreed with, manifested in further proceedings collaterally attacking those decisions. The abusive comments directed towards the judges were relevant because they demonstrated how far removed he was from any of the very limited grounds on which the law allows decisions to be revisited.

[27] We reject this ground of appeal.

Is the inquiry under s 88B limited to determining whether proceedings have been commenced vexatiously?

[28] The High Court held it would only take into account those proceedings it considered were *commenced* vexatiously, as opposed to those that were *conducted* vexatiously.[15]

[29] Mr Ellis' complaint was that, despite saying it was going to adopt that approach, the High Court departed from it and in relation to at least one of the proceedings at issue relied on the fact the proceeding was not only vexatiously commenced, but also continued vexatiously.

[30] We agree there is an element of inconsistency in the decision on this point. But there is, in our view, a more fundamental issue, namely whether s 88B required the High Court to confine itself to consider only the commencement of the proceedings. It is unclear whether the High Court thought it was so constrained or whether it was simply electing to take that approach as the path of least resistance to an argument raised by Mr Siemer. In his cross-appeal, the Attorney-General submitted if the High Court did consider the inquiry limited to the commencement of the proceedings, it was wrong.

---

15 *Attorney-General v Siemer*, above n 1, at [63].

[31] Section 88B requires the High Court to be "satisfied that any person has persistently and without any reasonable ground instituted vexatious legal proceedings".

[32] Unlike similar provisions in other jurisdictions,[16] s 88B does not contain any reference to vexatious conduct of proceedings. It uses the word "instituted". The use of that word and the absence of any reference to "conduct of proceedings" was relied upon by Mr Siemer to argue in the High Court that under s 88B the proceedings must be vexatious from the outset. In his submission, a proceeding that is commenced properly but conducted in a vexatious manner is therefore outside the ambit of s 88B.

[33] The issue has already been determined by this Court in *Brogden v Attorney-General*.[17] In *Brogden* the Court stated that in deciding whether to make an order under s 88B:[18]

> What is required is an appropriate assessment of the whole course of the respondent's conduct of the litigation in question, including the manner in which and apparent purpose for which each proceeding has been conducted, including resort to the appeal process where that has been done without any realistic prospect of success. We note the adoption by the High Court in this case of the observation made in *Attorney-General v Hill* (1993) 7 PRNZ 20, 22 that the concern is not with whether the proceeding was instituted vexatiously but whether it is properly described as a vexatious proceeding. Of course, if the litigant is found to have had an improper purpose in commencing proceedings, a finding that the litigation was vexatious is more likely. The test is, however, whether, overall, the various proceedings have been conducted by the litigant in a manner which properly attracts that epithet.

[34] We see no reason to depart from this statement of principle, which is consistent with a 1969 decision of this Court in *Wiseman v Attorney-General,*[19] as well as the High Court decision of *Attorney-General v Hill*.[20]

---

16 The High Court cited in respect of Western Australia: *Crown Solicitor for the State of Western Australia v Michael* WASC CIV 2079 of 1994, 30 July 1998, pursuant to the Vexatious Proceedings Restriction Act 1930 (WA). In respect of Canada, the Court cited *Foy v Foy (No 2)* (1979) 26 OR (2d) 220 (ONCA), pursuant to the Vexatious Proceedings Act RSO 1970 c 481 (O). Subsequent to those cases, both jurisdictions introduced new provisions expressly providing for the vexatious conduct of proceedings: s 4 of the Vexatious Proceedings Restriction Act 2002 (WA), and s 150(1) of the Courts Of Justice Act SO 1984 c 11 (O) (now s 140(1) of the Courts of Justice Act RSO 1990 c C. 43 (O)).

17 *Brogden v Attorney-General* [2001] NZAR 809.

18 At [22].

[35] The key purposes of s 88B are the need to protect defendants from groundless litigation, to protect the limited resources of the judicial system for use in the resolution of genuine proceedings and the need to protect the vexatious litigant from their own vexatious conduct.[21] In our view, consistent with those underlying purposes, the phrase "instituted vexatious legal proceedings" should be interpreted broadly so as to encompass not only proceedings that are vexatious from their inception, but also those that become vexatious because of the way they are conducted. Nothing in the wording mandates a contrary approach.

[36] We therefore confirm the inquiry under s 88B of the Judicature Act is not restricted to determining whether a proceeding has been commenced vexatiously, but extends to considering whether a proceeding has been conducted vexatiously. In so far as the High Court may have held otherwise, it was wrong.

Scope of the order

[37] As mentioned, the High Court did not impose a general ban on any proceedings Mr Siemer might issue in the future but limited the order to proceedings against specified persons or organisations. It did so because it considered Mr Siemer's litigation all originated from a single core dispute and therefore the appropriate outcome was to restrict the bringing of proceedings arising from that dispute (directly or indirectly) without leave.

[38] Counsel told us they were unaware the Court was contemplating qualifying the order in this way and that the terms of the order came as something of a surprise. In our view, the Court should have conferred with counsel on the contents of the list.

[39] It will be recalled the persons listed in the order were:

(a) Michael Stiassny;

(b) Ferrier Hodgson — Accountants;

---

19 *Wiseman v Attorney-General* CA10/68, 28 May 1969.
20 *Attorney-General v Hill*, above n 11.
21 *Attorney-General v Reid* [2012] NZHC 2119, [2012] 3 NZLR 630 at [25].

(c) any Associate Judge or any Judge of the District Court, High Court, Court of Appeal or Supreme Court;

(d) the Attorney-General;

(e) the Solicitor-General;

(f) the New Zealand Law Society;

(g) the Judicial Conduct Commissioner; and

(h) any barrister and/or solicitor of the High Court of New Zealand.

[40] On appeal both parties challenged the scope of the list. Mr Ellis said the list of specified persons is too wide. Mr Powell, as part of the cross-appeal, said it is too narrow. Mr Powell asked that we quash the order and replace it with an unqualified general order protecting any prospective defendant. Alternatively, as a fall-back position, he contended if there is to be a list, there should be some additions to that list.[22]

[41] It was common ground that an appeal against the High Court's decision to qualify the order in the way it did is an appeal against the exercise of a discretion. Accordingly, appellate intervention would only be warranted if the High Court had ignored a relevant factor, taken into account an irrelevant factor, made an error of principle or was plainly wrong.[23]

[42] Mr Ellis contended the High Court should not have included the New Zealand Law Society and any barrister or solicitor of the High Court. However, other than submitting that Mr Siemer had never sued the New Zealand Law Society and has only ever sued two lawyers, Mr Ellis was unable to identify any error on the part of the High Court. While Mr Siemer may never have sued the New Zealand Law Society, he has made complaints to that organisation about

---

22 The Attorney-General sought the addition of a class of "any employee of the Ministry of Justice".

23 *May v May* (1982) 1 NZFLR 165 (CA) at 170; *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

lawyers involved in the various cases and sued the statutory body charged with reviewing disciplinary actions against lawyers. In our view, the High Court accurately described lawyers and the New Zealand Law Society as being part of the widening circle of persons drawn into the core dispute and therefore their inclusion in the list was consistent with the High Court's approach.

[43] In contending the current order should be replaced with a general order, Mr Powell argued it was the underlying purposes of s 88B (the need to protect defendants and the court system) that should be used to inform the scope of the order to be made. In Mr Powell's submission, the litigant's previous persistence was not relevant to that decision and accordingly the High Court had erred.

[44] Mr Powell further submitted the current order is too narrow to provide the necessary protection to potential defendants and the court system. What lay behind Mr Siemer's litigation was his refusal to accept the finality of decisions that are adverse to him and there are ample grounds to apprehend that any future litigation Mr Siemer might bring would be similarly influenced. Mr Powell submitted no system of civil justice can accommodate an unrestricted right to sue remaining in the hands of a person who has demonstrated he will not accept the final judgment of the courts if he thinks it is wrong.

[45] We agree with that submission, which is further supported by Mr Siemer's conduct during the 23-month period since the order was made. Although he has not commenced any vexatious proceedings, he has at appellate level vexatiously conducted another proceeding: *Siemer v Brown*. Mr Siemer initiated the *Siemer v Brown* litigation properly, as a challenge to a police search of his home.[24] However, despite that proper commencement, it is evident Mr Siemer conducted the subsequent appeals vexatiously, continuing unabated the pattern of challenging every adverse ruling and then seeking to have final judgments recalled.[25] We are able to take into account the vexatious conduct of appeals in our overall assessment of Mr

---

[24] *Siemer v Brown* [2014] NZHC 3175.

[25] *Siemer v Brown* [2015] NZCA 69; *Siemer v Brown* [2015] NZSC 41; *Siemer v Brown* [2015] NZSC 50; *Siemer v Brown* [2015] NZCA 161; *Siemer v Brown* [2015] NZSC 62; *Siemer v Brown* [2015] NZSC 86; *Siemer v Brown* [2015] NZCA 276; *Siemer v Brown* [2015] NZSC 102; *Siemer v Brown* [2015] NZSC 126; *Siemer v Brown* [2015] NZSC 157; *Siemer v Brown* [2015] NZSC 173.

Siemer's litigious behaviour.[26] Significantly, *Siemer v Brown* is unrelated to the core *Siemer v Stiassny* dispute.

[46] We are satisfied the High Court erred by, first, not giving counsel an opportunity to be heard on the issue of the scope of the order and, second, by failing to take into account the need to protect defendants unrelated to the core dispute. We are mindful of the importance of the right to issue proceedings and the importance of ensuring that any restrictions placed on that right are limited to the minimum possible. However, in our view, having regard to the underlying purposes of s 88B identified by Mr Powell, the current order is too narrow and does not provide the necessary protections contemplated by Parliament. A general order is warranted.

Outcome

[47] In our view, none of the grounds of appeal has merit. The appeal is accordingly dismissed.

[48] The cross-appeal is allowed. The order made by the High Court is quashed and replaced with an order that the appellant must obtain the leave of the High Court before commencing or continuing any proceeding in the High Court or any inferior court.

[49] As regards the costs of this appeal, Mr Siemer is legally aided and therefore no costs award is made.

Solicitors:
Marshall Bird & Curtis, Auckland for Appellant
Crown Law Office, Wellington for Respondent

---

[26] *Heenan v Attorney-General* [2009] NZAR 763 (HC) at [30]; *Attorney-General v Collier* [2001] NZAR 137 (HC) at [32]; *Brogden v Attorney-General*, above n 17, at [22]; *Attorney-General v Reid*, above n 21, at [54].