ORDER PERMANENTLY FORBIDDING PUBLICATION OF THE NAMES OR IDENTIFYING PARTICULARS OF NR AND MR PURSUANT TO S 39(1) OF THE HARASSMENT ACT 1997.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA461/2014
[2016] NZCA 429

BETWEEN	NR Appellant
AND	DISTRICT COURT AT AUCKLAND First Respondent
AND	MR Second Respondent

Hearing:	5 May 2016
Court:	Winkelmann, Simon France and Woolford JJ
Counsel:	No appearance for Appellant First Respondent abides R J Hollyman and A J B Holmes for Second Respondent
Judgment:	12 September 2016 at 11.30 am

JUDGMENT OF THE COURT

A MR's application to file further evidence is allowed.

B NR's appeals concerning the restraining order are dismissed.

C MR's appeal in relation to the restraining order is allowed and the original period of five years is reinstated.

D NR's appeal in relation to judicial review is dismissed.

E NR's appeal in relation to the District Court costs decision is dismissed.

F **MR's appeal seeking reinstatement of the District Court's award of indemnity costs is allowed.**

G **NR's appeal against the award of costs in the High Court proceeding is dismissed.**

H **NR must pay MR costs for a standard appeal on a band A basis and usual disbursements.**

I **Order made permanently forbidding publication of the names or identifying particulars of NR and MR pursuant to s 39(1) of the Harassment Act 1997.**

REASONS OF THE COURT

(Given by Simon France J)

Table of Contents

Introduction

[1] MR (M) was formerly a sex worker. NR (R) was a client. M became concerned about R's level of interest in her and terminated the relationship.

R thereafter pursued a course of conduct that led M successfully to seek a restraining order in the District Court under the Harassment Act 1997 (the Act).[1]

[2] R appealed the order, which was confirmed by the High Court, but its length was reduced to one year, which effectively meant it expired immediately.[2] Both parties, with leave, appeal the High Court decision.[3] There are also a number of ancillary appeals. These will be addressed in part two of this judgment. Part one will focus on issues relating to the making of the restraining order.[4]

R's non-appearance at appeal hearing

[3] Five appeals involving R were scheduled for hearing. R has filed various documents in relation to these matters, some of which have been rejected because their content was assessed as scandalous. R does not accept the integrity of this Court or its members, having made various allegations against all the permanent members.

[4] R did not appear for the hearing of the appeals. We have made inquiries and are satisfied the appropriate notices have been given. On or about 26 April 2016 R filed a document entitled "Appellant's submissions for the hearing on 5 May 2016" so it is apparent he was aware of the fixture. We resolved at the hearing to proceed to determine the appeals without having the benefit of R's input.[5]

[5] There have been various applications by the parties to file evidence. They were dealt with by the Court in its leave decision.[6] However, M makes a further application to file two further documents. They are documents that were filed by R in other proceedings. The documents are able to speak for themselves. Leave to adduce evidence introducing the documents is granted.

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1 *MLR v NR* DC Auckland CIV-2012-004-1034, 9 May 2013 at [25] per Judge Sharp.
2 *NR v District Court at Auckland* [2014] NZHC 1767 at [128] per Duffy J.
3 *NR v District Court at Auckland* [2015] NZCA 426 at [39]–[40].
4 R also has a number of other appeals that relate to different proceedings but all stemming from the same facts. They are addressed in a separate judgment being issued at the same time as this judgment: *NR v MR* [2016] NZCA 430.
5 R is not to be taken as abandoning his appeals. He said as much in a document filed and has gone to considerable effort to file bundles for the appeals. We assume his dissatisfaction with the Court led him to not appear.
6 *NR v District Court at Auckland*, above n 3, at [44]–[45].

Part one — the restraining order appeals

Legal framework

[6] Before detailing the facts it is convenient to outline briefly the legal context to which the facts relate.

[7] Section 9 of the Act provides that a person who is being harassed by another may apply for a restraining order in respect of that other person. A court may make such an order if satisfied that harassment is occurring and is causing or threatening to cause the recipient distress in circumstances that would cause a reasonable person to be distressed.[7]

[8] Section 3(1) defines harassment:

> **3 Meaning of "harassment"**
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> (1) For the purposes of this Act, a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.

[9] It can be seen that the existence of two specified acts within a 12-month period is a threshold that must be established.

[10] "Specified act" is defined in s 4. In general terms it includes watching, loitering near, or hindering access to, where the person lives and works, or any other place they habitually frequent. It also embraces following or stopping the person, making contact with them or giving them offensive material. Finally there is a catch-all definition which is conduct that causes the person to fear for their safety in circumstances where the reasonable person would similarly fear for their safety.[8]

[11] Section 17 provides that when establishing the threshold requirement of two specified acts, regard cannot be had to any conduct done for a lawful purpose.

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7 Harassment Act 1997, s 16(1).
8 Section 4(1)(f).

[12] Application for a restraining order is by way of a short prescribed form accompanied by a narrative affidavit setting out the facts relied upon.[9] It is permissible to cross-examine a deponent. R required M to attend for cross-examination. M applied to give her evidence behind a screen with questions asked by R to be put through an amicus. R opposed. When the Court allowed the use of the screen, R said he no longer wished to cross-examine M, whose evidence was therefore unchallenged.

[13] R gave evidence and was cross-examined.

[14] The factual events on which M relied in her application were not particularly in dispute. Rather, R claimed he acted for a lawful purpose, namely, that he wished to discuss legal proceedings with her concerning an alleged breach of contract and/or he acted for the purpose of achieving a resolution of the issues between them.

Facts

[15] M was a sex worker at a club. R frequented the club and became her client. The contact was generally for two hours once a week and had been occurring for around two months. On 8 February 2012 R offered M a smart phone similar to his own. In the course of demonstrating how to use the phone by using his own, R inadvertently disclosed an internet search that showed he had been trying to obtain information about M using the registration number of M's car. M worked under a pseudonym to protect her true identity.

[16] M became upset and asked R to leave. R resisted and sought to persuade M as to the innocuous nature of his conduct and its innocent purposes, but M persisted with her request that he leave. Eventually R was persuaded by others to leave. He thereafter made various attempts by different means to contact her, all of which M declined.

[17] Judge Sharp in the District Court appended to her judgment a chronology of contact or attempted contact. Her Honour noted that the chronology contained

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[9] The District Court Rules 2009 applied to M's application. See pt 7 of those Rules which addressed proceedings under the Harassment Act 1997.

"many more" than two specified acts and certainly established a pattern of behaviour directed against M.[10] It is sufficient for present purposes to give an overview of the conduct, which we divide into three phases.

[18] The first phase is the period immediately following M requiring R to leave the club on 8 February. From that day to around 12 March 2012, R concentrated on contacting M through the club. He made repeated efforts to book to see her, to be allowed to talk to her, and to leave a note to be given to her. On occasions he parked outside the club waiting for her. Throughout this period R did not know M's real name or contact details. The communications disclose a changing attitude from requests for forgiveness, to acknowledgement of affection, to abuse of M. His persistence caused the club to ban him.

[19] The second phase commenced around 2 May 2012, so after a lull of two months. R engaged a private detective to discover M's real name and contact details. Over the next one to two weeks, he got someone to contact M's former landlord and then her mother. He then contacted M directly by phone, text and email. R demanded meetings, or otherwise matters would end in court and everything would be public. The conclusion of this period seems to have come with M filing the application for a restraining order.

[20] The third phase began around 3 July 2012. It is what can be termed the litigation phase and consists of two strands. The first is R's defence of the restraining order application. In essence, he challenged every step and brought ancillary applications, such as for contempt against both M and her lawyers, or to have M's lawyers barred from acting. It took a year before the substantive application could be heard. The experienced District Court Judge began her judgment by observing:[11]

> The history of this proceeding is truly mindboggling. It so far consists of two full boxes of papers and files and a multitude of Court documents filed by [R], which are not actually the subject of this harassment application but run in tandem with it because [R] has variously issued proceedings in defamation, as I understand it, in contempt of Court and a number of interlocutory applications, many of which have already been heard and

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10 *MLR v NR*, above n 1, at [14].
11 At [2].

> determined and some of which have already been to the High Court and back.

[21] Her Honour went on to note there were complaints to the Law Society against M's lawyer's conduct and to the Commissioner of Legal Services requesting M's legal aid to be withdrawn.[12]

[22] The second strand to the litigation phase is the civil proceeding R initiated against M alleging, among other things, breach of contract, breach of confidence and defamation. Each proceeding has thereafter been characterised by a large number of interlocutory applications, challenges and appeals.

[23] Lest it be thought R's conduct concerning his own proceeding represented any genuine attempt at litigation, R wrote that it amused him. He was "mildly curious" about the outcome and was "ready to pay for [his] entertainment". Judge Gibson, who struck out R's civil proceedings, found that they were being conducted for the improper purpose of harassing M.[13] In the harassment proceeding Judge Sharp concluded R was just "playing" with M.

Preceding judgments

The District Court

[24] As noted, Judge Sharp approached the issue of a pattern of behaviour on a broad basis, considering there were many activities within R's course of conduct that established the threshold of two specified acts.[14] In this regard, Judge Sharp focussed particularly on the first two phases prior to the start of litigation.

[25] The Judge had the advantage of observing R both as a witness and in his conduct of the litigation. Her Honour observed:

> [18] Since she filed this harassment application it is very clear that his obsession with her has escalated. [R] has filed many other civil proceedings, some of which, including interlocutory applications, have no merit. He has used them to make inappropriate and scandalous remarks, and these can be seen in the table which is

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12 At [2].
13 *[R] v [M]* DC Auckland CIV-2012-004-1388, 13 December 2013 at [8].
14 *MLR v NR*, above n 1, at [14].

> attachment D to counsel's submissions (which I have ordered attached to this Judgment).
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> [19] In short, [R]'s acts must have been utterly terrifying for [M] and would be terrifying for anybody in her situation. It is not for this Court to posit why he should have been and remains so obsessed with her, but I observed him very carefully when he gave evidence and made submissions to me. Several adjectives spring to mind and all of them, in my view, exacerbate her good reason for feeling frightened of him and distressed. [R] is clever, articulate; he is loquacious; he is manipulative. Some of his behaviours have been Machiavellian in the extreme. He is flippant. It is very clear from his evidence both in Court today and what he has filed, that he is misogynistic. Some of his remarks about the manner in which women behave when upset are truly concerning. If I were better qualified as a psychologist or something of that nature, I would wonder whether [R] does not suffer from a narcissistic disorder. That would certainly explain the manner of his conduct towards this applicant. If that is not so then I do not know what the reason is, but it is worrying.

[26] Concerning R's claim of lawful purpose, Judge Sharp rejected the proposition that R was motivated by a desire to discuss his civil litigation.[15] She noted that R only began to claim damage and loss once he realised M was not going to budge on refusing any further contact.[16] Her Honour's assessment was that the attempts to contact M were all "to fulfil his obsession with her".[17]

[27] Finally, in addressing the need for a restraining order, Judge Sharp concluded it had been the initiation of the restraining order application that caused the contact to cease.[18] Further:[19]

> The offensive and scandalous remarks that he has made during the Court processes show me that he is not to be relied upon when he indicates that he has no intention of contacting her again in the future and that she does not need a restraining order to protect her.

[28] Judge Sharp concluded the order should extend to M's family and was needed for a period of five years.[20]

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15 At [20].
16 At [20].
17 At [20].
18 At [22].
19 At [22].
20 At [25].

The High Court

[29] Duffy J undertook a more detailed analysis of which parts of the conduct constituted specified acts and rejected the proposition that many of the events in the chronology met the test.[21] Included amongst this analysis were findings that:

(a) attempts at contact could only be specified acts if they satisfied the s 4(1)(f) catch-all of conduct causing the victim to reasonably fear for her safety;[22]

(b) fear for safety is a reference to physical and mental well-being and does not include fears as to loss of reputation or privacy;[23]

(c) legal proceedings, and acts and behaviours relating to them, fall outside the scope of specified acts;[24]

(d) the initial efforts made at the club to contact M were not specified acts as they were failed attempts and did not provide a reasonable basis for M to fear for her safety;[25]

(e) the waiting outside the club and the two emails sent to the club did amount to specified acts;[26] and

(f) the actions of engaging a private detective and having someone ring M's mother were specified acts.[27]

[30] Duffy J next considered the issue of whether a pattern of behaviour was established and whether a restraining order was necessary.[28] This analysis was limited to the conduct that had been assessed by her Honour to constitute specified

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21 *NR v District Court at Auckland*, above n 2, at [42]–[70] and [77]–[115].
22 At [43].
23 At [50]–[51].
24 At [70].
25 At [81]–[89].
26 At [90]–[92].
27 At [94]–[95].
28 At [116].

acts.[29] For reasons to be given, we are satisfied it was an error to limit the assessment in that way, but, even on this more limited basis, her Honour found a pattern of behaviour meeting the requirement of causing distress to exist.[30]

[31] Concerning the necessity for an order, her Honour assessed this as at the time of the initial application and held it established.[31] However, the term of the order was reduced to one year.[32] This was because the application for the restraining order stopped "the specified acts" and thereafter there was only the litigation phase conduct.[33] Duffy J considered the harassing conduct up to that point had been low to moderate. Given the conduct had, as a result of the restraining order application, either stopped or reduced (depending on whether regard was had to the litigation phase) there was no basis for a five year order. The effect of the reduced term of one year was to end protection immediately.[34]

Decision

The role of specified acts

[32] The High Court judgment has proceeded on an incorrect approach to the function of specified acts. Duffy J's analyses of the pattern of conduct, of necessity and of duration were wrongly limited to those matters that met the definition of specified acts. It is seemingly for this reason that there was such a focus on identifying which of the conduct came within the definition of specified act.

[33] The Act does not limit the analysis of pattern of behaviour and harassment to specified acts. The role of specified acts is first as a gatekeeper, there needing to be two such acts within a 12-month period to engage jurisdiction.[35] Thereafter a court is to assess all of the defendant's conduct.[36] The other role of specified acts is to define the scope of an order. Section 19(1) provides that the effect of a restraining

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29 At [117]–[120].
30 At [121].
31 At [122].
32 At [128].
33 At [127].
34 At [125]–[129].
35 Harassment Act, s 3(1).
36 A similar view was taken by Clifford J in *Clarke v Watts* [2014] NZHC 822 at [15]. We use the terminology of "defendant" for clarity's sake but note that R was the "respondent" to M's application.

order is that the person subject to the order may not do, or threaten to do, any specified act in relation to those protected by it.

[34] The wording of s 3(1) is that harassment occurs if a person engages in a pattern of behaviour "that *includes* doing any specific act".[37] The pattern must include such acts but is not limited to them. The existence of a pattern is to be assessed by looking at all conduct. Once a pattern of behaviour is found to exist, its nature is to be assessed against the criteria set out in s 16(1)(b) and (c) which provide:

> **16 Power to make restraining order**
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> (1) Subject to section 17, the court may make a restraining order if it is satisfied that—
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> …
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> (b) the following requirements are met:
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> (i) the behaviour in respect of which the application is made causes the applicant distress or threatens to cause the applicant distress; and
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> (ii) that behaviour would cause distress, or would threaten to cause distress, to a reasonable person in the applicant's particular circumstances; and
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> (iii) in all the circumstances, the degree of distress caused or threatened by that behaviour justifies the making of an order; and
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> (c) the making of an order is necessary to protect the applicant from further harassment.

[35] It can be seen the Act requires the pattern of behaviour to be causing the applicant distress in circumstances where the reasonable person would likewise feel distress. Further, there is a requirement to ensure the level of distress merits interfering with the defendant's rights of free movement and speech, and that the order is necessary to protect the applicant in the future. The establishment of a relevant pattern of behaviour is therefore very much only the starting point.

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[37] Emphasis added.

[36] The effect of our interpretation of the role of specified acts is that two aspects of the High Court decision were in error. First, it was unnecessary to focus in such detail on what constituted specified acts since there were, on any approach, many instances of conduct which uncontroversially were specified acts. In cases such as this we suggest that will usually be the case. Second, whether or not some of the conduct was a specified act, it was nevertheless able to be considered as part of the analysis of a pattern of behaviour, and when considering the necessity for an order and its duration.

[37] We have no doubt that what we have termed the litigation phase, whether it comprised specified acts or not, was able to be considered as part of the analyses of a pattern of behaviour, and the necessity and duration of the order. Obviously, if the litigation is genuine, it is likely to proffer little, if anything, by way of support for an application for a restraining order and could be put to one side. We agree with Duffy J that the right of citizens to bring litigation is important and the Act cannot be used as an alternative means of controlling vexatious litigation.

[38] However, beyond that, absolute rules are not required. In the present case, for example, it is plain that the litigation is a continuation by another means of a pattern of harassment that had been established before the litigation began. R himself says as much, describing it as "entertainment". We consider the Act would be deficient if it could not take account of such conduct. The effect of the alternative approach is seen in the High Court outcome where the order was reduced because, notwithstanding an extraordinary manipulation of the courts' processes, it was considered harassment had ended.[38]

[39] A balance will need to be struck when according weight to this aspect of a defendant's conduct. On the one hand, there is the right to bring proceedings and, on the other, there is the right of people to be free from this type of pernicious conduct which can totally destroy their quality of life. Courts will be aware of the need to balance both interests.

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[38] *NR v District Court at Auckland*, above n 2, at [126].

[40] A restraining order can be structured to prevent overreach. Section 17 provides that a specified act may not be used to "establish harassment" if it was done for a lawful purpose. Although on its face s 17 is limited to the threshold phase, we consider the lawfulness of the purpose of any specified act is also relevant to the scope of the restraining order. It is unlikely that a restraining order prevents, for example, the initiation of genuine litigation even though that may involve at least indirect contact with the applicant.

[41] We note in *Beadle v Allen* the restraining order was expressly qualified to allow the subject of the order to communicate with specified professional bodies in order to make formal complaints about the applicant, who was a doctor.[39] Whether an exemption of that sort is strictly necessary is open to debate, but it provides important clarity to the parties and is to be encouraged for that reason. Again, however, it is not an issue here. The various proceedings R has brought have all been struck out and it is difficult to imagine a new situation of genuine litigation could arise between R and M given M's plain intention to not have any contact or dealings with R.

[42] Whether litigation can ever be a threshold specified act is not a matter that requires resolution here. We accordingly prefer to reserve assessment until there is a situation where it is genuinely in issue.

A pattern of behaviour against M involving two specified acts?

[43] In some of the material filed, R seems to take issue with the proposition that he did not dispute the factual narrative, only its interpretation. If that is part of his appeal it is not substantially correct.[40] First, he did not challenge by cross-examination M's evidence. Second, and more significantly, he agreed when giving his own evidence that key events had occurred. For example, M's account of R loitering in his car outside the club was something reported to her but, in his evidence, R agreed it was him. Likewise, R agreed he hired the private detective and then made contact.

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39 *Beadle v Allen* [2000] NZFLR 639 (HC) at [75(a)].

40 We acknowledge Judge Sharp observed in her judgment that R now disputed some facts but our review of the record suggests it was not to a major extent: *MLR v NR*, above n 1, at [5].

[44] There can be no doubt this conduct involves a pattern of behaviour of the relevant kind. The context is that a business arrangement existed between R and M. Once M indicated her wish for the arrangement to stop, there was no legitimate reason for R to continue to pursue contact.[41] Further, the efforts made to unmask M's true identity leave no ongoing room for doubt. They were aimed at breaking down the separation between M's business and private lives.

[45] There are other inappropriate and troubling aspects to R's conduct. The change in the tone of his communications from initial protestations of affectation and requests for forgiveness, to allegations of misconduct and abuse shows an emotional component inconsistent with any claim of disinterested, lawful purpose. Likewise, the fact that the private investigator was employed after a lull of two months shows there is a level of ongoing obsession inconsistent with the relatively trivial nature of any dispute that existed, or could reasonably be thought to exist.

[46] The District Court and High Court both rejected R's claim of lawful purpose. R says his claim was mischaracterised by both. He says his conduct was an attempt:

> to contact [M and] had the reasonable and lawful purpose of making [her] aware of [his] claims in an effort to resolve the dispute between the parties privately, which was (or at least ought to be) in everyone's interest. It is a public policy that parties should be encouraged to settle their disputes without litigation.

[47] The lower Courts have not misunderstood the essence of the lawful purpose claim. Both understood R to claim there was a genuine dispute between him and M over the cost to R of the phone, and over the money he spent on the particular occasion of 8 February 2012. The evidence told against the genuineness of this being the motivation for R's conduct and that is what underlies the rejection of his defence by both Courts.

[48] The evidence has been sufficiently canvassed in the numerous judgments. However, as an example of it pointing away from R's claim of lawful purpose, M proffered back the phone but R refused to accept it. Further, R's evidence about the phone was inconsistent. He denied it was a gift and instead described it obscurely as

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[41] We note for support ss 16 and 17 of the Prostitution Reform Act 2003.

a "disposable accessory to, and or additional payments for, the service she was to provide". R accepted he had refused to take the phone back and had said if she did not want it, it should go to a charity. Otherwise M should keep it "as compensation for the inconvenience". His explanation for bringing civil litigation in relation to the phone was wholly unconvincing.

[49] R gave evidence before Judge Sharp and the transcript discloses he had a complete opportunity to explain his position, which was not accepted. Contrary to R's understanding of the situation, there is no obligation on a judge to address every point raised. Once lawful purpose was rightly rejected, the conclusion that this was a clear case of serious harassment was irresistible.

Duration?

[50] The remaining issue is the duration of the order. It will be apparent we differ from the High Court because we do not agree the harassment stopped at the time the restraining order was sought. Rather, it simply took a different form: the litigation itself. It is difficult to capture succinctly the nature of the litigation that R has engaged in and the manner in which it has been conducted. It has been vexatious but, more than that, we have no doubt it has been designed to harass.

[51] By way of overview, within the restraining order proceeding, R at various times applied for a strike-out, for the proceedings to be stayed as an abuse of process, for evidence to be struck out, for a notice of opposition to be struck out, for rescission of an order allowing a notice of opposition to be filed out of time, for a stay pending hearing of judicial review, for indemnity costs, for lifting of non-publication orders, and for orders fining M and her lawyer for contempt.

[52] As of course is his right, R sought to both appeal and judicially review most decisions, including the interlocutory decisions, the substantive decisions and the costs decisions.

[53] Separately R brought his own civil proceedings as a response to the application for a restraining order. The causes of action were breach of contract and unjust enrichment, defamation, malicious civil prosecution, breach of confidence or

breach of privacy, and breach of the Consumer Guarantees Act 1993. These proceedings were struck out,[42] and the strike-out upheld on appeal.[43] The District Court costs award in the civil proceedings was reviewed but not appealed.[44] Awards of increased and indemnity costs have been made to M along the way, reflecting both a lack of intrinsic merit and the manner in which the proceedings have been conducted.

[54] In addition to the civil claim noted above, R filed separate proceedings alleging contempt against M and her lawyer. These too were struck out by the High Court as untenable, vexatious and an abuse of process.[45] Indemnity costs were awarded.[46] Over all the proceedings there have been five substantive judgments — two in the District Court and three in the High Court.

[55] R's conduct cannot just be seen as a somewhat vexatious approach to litigation. It has all the hallmarks of seeking to cause further distress to M. Early on, R described it as entertainment. His conduct in relation to cross-examination of M at the restraining order hearing is equally telling. In March 2013 Judge Cunningham recorded that R did not oppose the appointment of an amicus or the use of a screen.[47] However, when the application for use of a screen was heard in May 2013 he opposed it but the application was granted.[48] The matter then immediately continued on to the substantive hearing at which time R indicated he no longer wished to cross-examine M.

[56] This is an example of using the proceedings to cause distress. The prospect of facing R was obviously traumatic for M. It is difficult to see R's insistence on it and then his forsaking of any cross-examination once denied visual confrontation as being anything other than a desire to cause discomfort.

[57] It is important not to characterise every step in the litigation by R as gratuitous or designed solely to harass M. R no doubt perceives injustice in the

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42 *[R] v [M]* DC Auckland CIV-2012-004-1388, 11 November 2013 at [50] per Judge Gibson.
43 *NR v MR* [2014] NZHC 863 at [123] per Andrews J.
44 *NR v District Court at Auckland* [2014] NZHC 1919 per Katz J.
45 *N v M* [2014] NZHC 239 at [84] per Woodhouse J.
46 At [83].
47 *[M] v [R]* DC Auckland CIV-2012-004-1034, 14 March 2013 at [31].
48 *[M] v [R]* DC Auckland CIV-2012-004-1034, 9 May 2013 (pre-trial application) at [2].

decisions and pursues his litigation for that reason also. It would be artificial to seek to separate out the two motivations. What is clear, however, is that the disproportionality between the underlying events and this subsequent litigation, and the untenable nature of so many of the claims, points to harassment being a motive underlying it all.

[58] For this reason the litigation phase is properly considered as informing the need for a restraining order and the length of time it is needed. It is useful to recall the purposes provision of the Act,[49] namely, to recognise that what may appear to be innocuous is often not.[50] Further, that decisions made under the Act are to have regard to the need for adequate protection for victims.[51] We recognise there is a controversial component to having regard to court proceedings when undertaking this analysis. As we noted earlier, care is needed and the right to commence and pursue litigation cannot be unduly impeded. But nor can there be a blanket rule allowing harassment to be continued under the cloak of litigation. The matters that influence us to consider in this case that the litigation is a relevant consideration are the fact that harassment was happening prior to the litigation phase, the hopeless nature of the litigation and the consistent response to it by several Judges, and the manner in which it has been conducted by R. The litigation continues unabated and legitimately informs the necessary length of any order. Safeguards can be put in place to protect genuine litigation.

Conclusion on harassment proceedings

[59] We dismiss R's appeal. We allow M's appeal and restore the five-year term for the harassment order.

[60] We make it plain that the order does not prevent R from pursuing his existing litigation involving M. The legitimacy of any further available steps can be addressed by the court involved. Any fresh proceedings, however, carry the risk of breaching the order unless they can be shown to be legitimate and therefore for a

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49 Harassment Act, s 6.
50 Section 6(1)(a).
51 Section 6(1)(b).

lawful purpose. On the facts and history of this matter, it is very unlikely any further proceedings against M stemming from the initial relationship would meet that test.

Part two — other appeals

[61] R brought concurrent judicial review proceedings in relation to the restraining order process. He now appeals Duffy J's decision to decline relief on any of the matters reviewed.[52] R also appeals the costs decision of Duffy J in relation to both the District Court and High Court proceedings.[53]

Judicial review

[62] The procedural matters R reviewed include:

(a) a decision to allow M to file out of time a notice of opposition to his application to strike out the restraining order proceeding;

(b) the decision to reject that strike-out application;

(c) a decision rejecting a challenge to some of the evidence adduced by M; and

(d) the decision to allow M to testify behind a screen.

[63] In addition, there was a judicial review challenge to the substantive harassment decision and a decision relating to R's application to lift publication restrictions.[54] We address each in turn.

[64] R filed an application to strike out the restraining order proceedings. On 6 November 2012, Judge Hinton heard argument during a list as to whether the strike-out should be heard separately or together with the substantive proceeding. It appears that a notice of opposition to the strike-out had not been filed. Counsel for

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52 *NR v District Court at Auckland*, above n 2, at [148] and [156].

53 At [174].

54 Duffy J lists other matters that R wished to review but the effect of which was wholly spent: see at [140] and [146]. If they are included within this appeal, they are not matters meriting further consideration.

M made an oral application for leave to file such a notice out of time and concurrently filed a brief notice. Judge Hinton granted leave and accepted the notice.[55]

[65] R submitted on review that there was no power to accept an oral application and no basis in the particular case to allow the application. Further, because the application was only made at the hearing, R said he was prejudiced in his ability to respond. Duffy J considered there was no point in revisiting the topic.[56] The effect of allowing a notice of opposition was that the strike-out became contested and then failed. Since the substantive proceeding ultimately succeeded, flaws in relation to the strike-out were necessarily of no practical effect.[57]

[66] Without disputing this analysis, we prefer to observe that the review ground lacked merit. The rules provide for an oral application[58] and accord the court a discretion to enlarge time.[59] We can conceive of no argument R might have made had he had more time that would have caused a court to prohibit M from defending the strike-out. The reality is that the strike-out was heard at a separate subsequent hearing that afforded R every opportunity to advance his argument. The District Court did not err. It was a correct exercise of discretion to allow the oral application immediately whilst providing for a subsequent hearing of the application to which it related.

[67] The decision to reject the strike-out application was overtaken by the substantive hearing. Any review of the strike-out decision was pointless. Duffy J was correct to say so.

[68] The challenge to the admissibility of evidence concerned the use by M of what R considered to be privileged documents. At issue are emails which R says attract settlement negotiation privilege, which R wished to assert. R also contended that the documents were being used selectively, in that sentences were being taken out of context. He also submits he was prejudiced by the absence of a formal

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55 *[M] v [R]* DC Auckland CRI-2012-004-1034, 6 November 2012 at [10] per Judge Hinton.
56 *NR v District Court at Auckland*, above n 2, at [137].
57 At [137].
58 District Court Rules 2009, r 3.52.23.
59 Rule 1.18.1.

application by M to be allowed to use the emails. This meant R could never address the material in one proceeding and, rather, on each occasion was forced to challenge the admissibility after it had been proffered. M contended in reply that no privilege attached, or that there was waiver either expressly or because R himself referred to the documents.

[69] The communications were appended to an affidavit of M. They consist of communications between R and M's lawyers. On their face they are capable of giving rise to a privilege argument. That issue became moot, however, when R withdrew his interlocutory challenge to the admissibility of the evidence.[60] One of the bases identified by R for abandoning his challenge was that the application "would serve no significant purpose to [R]" at the substantive hearing.

[70] On review, Duffy J addressed this issue by considering whether the challenged evidence was needed in order to establish any of the specified acts on which her Honour relied. Her Honour concluded it was not and so she need not address the correctness of the privilege argument.[61] Although we do not doubt her Honour's analysis as far as it went, given that we have taken a wider view of what evidence is relevant, the analysis may not hold across the further evidence we take into account.

[71] In another part of the judgment, Duffy J observed it was unclear to her whether R had waived privilege.[62] Whilst acknowledging the withdrawal of his interlocutory challenge, her Honour also correctly noted that at the hearing R renewed his challenge.[63] Counsel for M suggested that, rather than arguing about it, the material be accepted on a provisional basis and R be asked about it. A final assessment as to admissibility could then later be made. As Duffy J notes, that final assessment was never done.[64]

[72] We consider the abandonment of the pre-trial application was a waiver. Having put the matter in issue, R said he no longer wished to maintain a challenge

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60 By memorandum dated 29 April 2013.
61 *NR v District Court at Auckland*, above n 2, at [124] and [141].
62 At [106].
63 At [104].
64 At [106].

because there was no point to it. There is nothing inadvertent in this; it was an unqualified withdrawal of any challenge to the admissibility of the material on the grounds that it was privileged. It is not therefore necessary to consider the merit of the privilege argument itself. It would have required some detailed analysis of the purposes of the communication and whether a situation of arguably apparent privilege was being abused in a way that meant the privilege could not be relied upon, or did not exist.

[73] R next challenged the decision to allow screens on the basis that a proper evidential foundation was not laid. M had relied only on the affidavits she had filed which included evidence of fear of M. R says there was no objective evidence to support her application for a screen.

[74] Duffy J again identified why it was not necessary for her to address the point on review.[65] This was because the specified acts on which her Honour relied were sourced in undisputed facts. They were not therefore influenced by the screens decision, only R's consequent decision not to challenge M's evidence.[66] Without disagreeing with this, we prefer to address the challenge itself.

[75] Section 103 of the Evidence Act 2006 sets out the grounds on which an order for an alternative way of giving evidence may be made. Within that provision there are ample bases on which to make such an order in this case. A witness's fear of intimidation is the obvious one.[67] Whilst there may often be expert evidence filed to support such an application, it is not essential. The Court may have regard to the applicant's own evidence and the context of the proceeding. A screen can often be seen as a fair balance between the competing interests. For reasons traversed earlier in the judgment, the general context here favoured the making of the order. It would have been clear to the Judge that matters had progressed well beyond what might normally be expected given the genesis of the dispute. There was a disproportionality and irrationality to it all that gave general support to use of a screen to enable M a fair opportunity to present her evidence. Her evidence on three separate occasions spoke of her distress and fear, and of R's intimidating manner.

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65 At [147].
66 At [147]–[156].
67 Evidence Act 2006, s 103(3)(d).

We are satisfied there was no basis on which to conclude Judge Sharp erred in relation to the screen.

[76] The judicial review challenge to the substantive decision added nothing to the appeal and was rightly ignored by Duffy J.[68]

[77] Next, there was a challenge to what is called the publication decision of Judge Cunningham.[69] At some point, the names and identifying details of both parties were suppressed. R then applied to have this order rescinded but replaced with a fresh one to be made in favour of suppressing his name. Judge Cunningham declined to determine the application on the basis that any further decision on suppression should await resolution of the substantive application.[70]

[78] R's appeal/review to the High Court seemed to be based on the proposition that the District Court Judge misunderstood his position. He had only filed an application concerning publication once he learned that M had filed an ex parte application. R was concerned to preserve his position. On review, Duffy J declined to deal with the matter because it was preferable that she would look at the issue of publication afresh.[71] We observe from the reading of the file that R has consistently accepted non-publication of M's name if he is afforded the same protection and we do not understand him to have changed from this. No change to existing orders is proposed and there is accordingly nothing for this Court to determine.

[79] Finally, on these other matters, it appears R is appealing the failure of Duffy J to address his claim that Judge Sharp was biased in the "apparent bias" sense. We accept this was a matter raised by R (amongst a very large number) and was not directly addressed by Duffy J.

[80] The apparent bias claim was said to be evidenced by: comments about R's unrepresented status; the Judge cutting R short during his submissions; the Judge initiating arguments for M and assisting counsel for M's cross-examination; the

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68 *NR v District Court at Auckland*, above n 2, at [148].
69 *[M] v [R]* DC Auckland CIV-2012-404-1034, 12 November 2012 per Judge Cunningham.
70 At [20].
71 *NR v District Court at Auckland*, above n 2, at [139].

Judge using "we" in reference to her Honour and counsel; and the Judge using favourable descriptions of M such as "young woman" but making unfavourable comments about R.

[81] We do not have a transcript of the hearing. The written record that is available, being the cross-examination transcript and her Honour's rulings, do not display the characteristics claimed. It is plain that Judge Sharp formed an unfavourable impression of R but that is not bias — it is the Judge's task to form views. We are not in a position to assess whether R was "cut off" but the reality is that there is a limited amount of court time available, and participants and their counsel would often wish for more. The Judge had the benefit of extensive paperwork filed by R. Although R may not see it this way, there should have been little complexity to what was essentially a factual dispute and there is nothing that leads us to consider he did not have an adequate opportunity to present his case.

[82] Given this was not a matter addressed by Duffy J, we consider that the appropriate approach is for us to review the material available. The Court is in the same position as Duffy J would have been in. Having done so, we are not persuaded there is any merit to this ground of review.

Costs

[83] Judge Sharp awarded indemnity costs.[72] R appealed and Duffy J allowed the appeal and substituted an award of scale costs.[73] M appeals this decision. R also appeals, seemingly on the basis there should have been no award of costs at all or, alternatively, he should have received an award of costs. He also appeals the decision of Duffy J to award scale costs for the High Court proceeding. There is no cross-appeal on this.

[84] We begin by observing an award of indemnity costs in these circumstances will be rare. R was the defendant and under no obligation to facilitate M's efforts to obtain a restraining order against him. He is entitled to defend the matter and some allowance is to be given for the fact he is a lay litigant. Inexperience, coupled with

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72 *MS R v R2* DC Auckland CIV-2012-004-1034, 14 June 2013 at [8] per Judge Sharp.
73 *NR v District Court at Auckland*, above n 2, at [174].

frustration due to a misunderstanding of the correct processes, can often be present but is not necessarily indicative of ill will.

[85] That said, the District Court concluded R's conduct of his defence was not legitimate and he was using the litigation to "play" with M. In terms of assessing the case for increased or indemnity costs, that conclusion means the various steps can rightly be assessed with a critical eye.

[86] Judge Sharp identified several occasions along the one year period it took to get this application heard where R acted unnecessarily or improperly.[74] These included repeated interlocutory applications; a hopeless strike-out application; a not genuine notice to cross-examine M (including an unmeritorious opposition to the use of a screen); invalidly asserting privilege; and failing to notify M certain interlocutory applications were not going to be pursued, thereby causing much unnecessary work.

[87] Duffy J differed in two respects from Judge Sharp. First, for reasons already discussed, her Honour assessed the merits of R's case more favourably than the District Court did and than we do on appeal. Second, her Honour considered there was legitimacy in some of R's impugned interlocutory steps. In particular, it was open to R to oppose an oral application for leave to file a notice of opposition out of time, the strike-out was motivated by a desire to obtain better particulars and a better understanding of M's case, and the mode of evidence order was of questionable legitimacy.[75] For reasons already given, we disagree on this last point concerning the screens. We agree with Judge Sharp it was an unmeritorious opposition explicable only by the general motive to cause distress.

[88] As for the other points, different views can be taken. We tend to a middle ground that sees the applications as unnecessary and probably vexatious, but also recognises the Court's responsibility to keep firm control on proceedings. There are specific District Court Rules for Harassment Act proceedings designed to keep the

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74 *MS R v R2*, above n 72, at [4]–[7].
75 *NR v District Court at Auckland*, above n 2, at [160], [169] and [171]–[173].

process simple and their tenor reflects the purposes of the Act, which is to provide effective protection for victims.

[89] R's was an appeal against the exercise of a discretion. Duffy J considered there were new circumstances that required the reviewing Court to intervene. These new circumstances were the greater merits of R's case as assessed by Duffy J, but which have now been supplanted by this Court's reasons. Accordingly, the issue becomes whether there remains any basis to interfere with Judge Sharp's assessment.

[90] We accept M's submission that there is not. The objective facts are that the matter took a long time to reach a substantive hearing and that this period was notable for the large number of applications and argumentative affidavits from R. We have earlier cited Judge Sharp's comments at the start of the judgment about the "mindboggling" file that already existed. There is next the Judge's assessment as to R's motives. It is an assessment based on exposure to R. It is not inconsistent with the record and there is no basis for an appellate court to form a different view.

[91] Against that background, we are of the view that Judge Sharp's costs order was open to her and accordingly should be reinstated.

[92] We have reviewed the file to identify other grounds that R may wish to have advanced if present. A theme of his applications was a belief that M was being "litigation funded" either by her original solicitors or someone else. He based this on the belief that M could not afford the litigation, so someone else must be paying. R consistently made applications for disclosure of funding arrangements but understandably had no success. Since M was seeking only an order, there is no prospect anyone was funding the litigation.

[93] Another theme was R's persistent challenge to the conduct of M's lawyers, whom he regularly accused of misleading the Court or acting so as to make it difficult for R to properly participate. This was the basis, as we understand it, on which R claims he should receive a costs award. However, we observe none of the

complaints have seemingly been accepted and there is no reason why costs should not follow the event in the ordinary way.[76]

[94] Finally, we observe that if R is appealing the High Court award of scale costs, we see no merit in it. We assume this appeal was premised on the state of affairs existing at the end of the High Court case in which R had success. At that point matters were at the most favourable for R and may have led him to consider he deserved a more favourable costs outcome. However, the outcome of this appeal removes any basis to challenge an award in M's favour.

Result

[95] M's application to file further evidence is allowed.

[96] R's appeals concerning the restraining order are dismissed.

[97] M's appeal in relation to the restraining order is allowed and the original period of five years is reinstated.

[98] R's appeal in relation to judicial review is dismissed.

[99] R's appeal in relation to the District Court costs decision is dismissed.

[100] M's appeal seeking reinstatement of the District Court's award of indemnity costs is allowed.

[101] R's appeal against the award of costs in the High Court proceeding is dismissed.

[102] R must pay M costs for a standard appeal on a band A basis and usual disbursements.

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[76] Both the funding question and the conduct of M's counsel have been further considered by this Court in *NR v MR* [2014] NZCA 623, (2014) 22 PRNZ 636. R's applications were dismissed with an increased costs award being made.

[103] For privacy reasons we make an order permanently forbidding publication of the names or identifying particulars of NR and MR pursuant to s 39(1) of the Harassment Act.

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