IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA556/2019
[2022] NZCA 262

BETWEEN	VINCENT ROSS SIEMER Appellant
AND	COMPLETE CONSTRUCTION LIMITED Respondent

CA72/2020

BETWEEN	VINCENT ROSS SIEMER Appellant
AND	ATTORNEY-GENERAL Respondent

CA86/2021

BETWEEN	VINCENT ROSS SIEMER Appellant
AND	REGISTRAR OF THE SUPREME COURT Respondent

Hearing:	20 October 2021
Court:	Gilbert, Courtney and Goddard JJ
Counsel:	Appellant in Person for CA556/2019 J M Skinner and E W Davies for Respondent in CA556/2019 A J Ellis for Appellant in CA72/2020 A M Powell and R McMenamin for Respondent in CA72/2020 Appellant in Person in CA86/2021 A M Powell and R M McMenamin for Respondent in CA86/2021
Judgment:	22 June 2022 at 11.30 am

JUDGMENT OF THE COURT

A The appeal in CA72/2020 is allowed.

B We order that *Siemer v Auckland High Court* [2019] NZHC 3393 is set aside.

C The appellant in CA72/2020 is entitled to costs for a standard appeal on a band A basis and usual disbursements.

D The appeal in CA86/2021 is allowed in part. The matter is remitted to the High Court for reconsideration.

E We order that the order made in the High Court minute of 12 February 2021 is set aside.

F We make no order as to costs in CA86/2021. However, the appellant is entitled to usual disbursements.

G The appeal in CA556/2019 is allowed.

H The appellant's application to set aside the bankruptcy notice is remitted to the High Court for hearing.

I The costs order in the High Court is set aside.

J We make no order for costs in CA556/2019. However, the appellant is entitled to usual disbursements.

REASONS OF THE COURT

(Given by Courtney J)

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Introduction

[1] These three appeals raise questions about how the transitional provisions of the Senior Courts Act 2016 (SCA) affect civil restraint orders made under the (now repealed) s 88B of the Judicature Act 1908.[1]

[2] The SCA came into force on 1 March 2017. Sections 166–168 replaced the provisions of s 88B of the Judicature Act with a new regime for the civil restraint of vexatious litigants. Under the new regime indefinite orders can no longer be made. Orders restricting a person from commencing or continuing civil proceedings are now limited to either a period of up to three years or a period not exceeding five years if the Judge is satisfied that there are exceptional circumstances justifying the longer period.[2] The SCA contains transitional provisions for orders made under enactments that were repealed by the SCA. Under these provisions such orders are to "have full effect as if they had originated" under the SCA.[3] It is accepted that the transitional provisions apply to s 88B orders.

[3] The appellant in each appeal is Mr Vincent Siemer. On 4 March 2016 an order was made under s 88B preventing Mr Siemer indefinitely from instituting civil proceedings without leave.[4] Mr Siemer raises various grounds of appeal in respect of each decision under challenge, but in all the appeals the question of whether the s 88B order should be treated as being for three years or five years and whether the term of the order ran from the date it was made or from the date the SCA came into force arises in some way.

[4] The appeals are:

(a) *Siemer v Attorney-General* (CA72/2020): appeal against Downs J's refusal of leave to appeal the declinature of Mr Siemer's request for access to court documents.[5]

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1 Repealed as from 1 March 2017 by Senior Courts Act 2016, s 182(2).
2 Senior Courts Act, s 168(2).
3 Senior Courts Act, Sch 5, cl 10(2).
4 *Siemer v Attorney-General* [2016] NZCA 43, [2016] NZAR 411.
5 *Siemer v Auckland High Court* [2019] NZHC 3393, [2019] 25 PRNZ 561.

(b) *Siemer v Registrar of the Supreme Court* (CA86/2021): appeal against Downs J's decision striking out Mr Siemer's application for judicial review of various decisions made by the Registrar of the Supreme Court.[6]

(c) *Siemer v Complete Construction Ltd* (CA556/2019): appeal against Associate Judge Smith's decision directing that Mr Siemer's application to set aside a bankruptcy notice be treated as having been determined against Mr Siemer by Jagose J's decision refusing leave to bring the application.[7]

[5] We address the issue relating to the s 88B order before considering the specific issues arising in each appeal.

The effect of the Senior Courts Act on s 88B orders

The relevant statutory provisions

[6] Section 88B of the Judicature Act provided:

> **88B Restriction on institution of vexatious actions**
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> (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.
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> (2) Leave may be granted subject to such conditions (if any) as the Court or Judge thinks fit and shall not be granted unless the Court or Judge is satisfied that the proceeding is not an abuse of the process of the Court and that there is prima facie ground for the proceeding.
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> (3) No appeal shall lie from an order granting or refusing such leave.

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6 *Siemer v Registrar of the Supreme Court* HC Auckland CIV 2021-404-100, 12 February 2021 (Minute of Downs J).

7 *Complete Construction Ltd v Siemer* [2019] NZHC 2273.

[7] The corresponding provisions in the SCA, ss 166–168, contain a structured framework for the making of an order restricting a person from commencing or continuing a civil proceeding:

> **166 Judge may make order restricting commencement or continuation of proceeding**
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> (1) A Judge of the High Court may make an order restricting a person from commencing or continuing a civil proceeding.
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> (2) The order may have—
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> (a) a limited effect (a **limited order**); or
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> (b) an extended effect (an **extended order**); or
>
> (c) a general effect (a **general order**).
>
> (3) A limited order restrains a party from commencing or continuing civil proceedings on a particular matter in a senior court, another court, or a tribunal.
>
> (4) An extended order restrains a party from commencing or continuing civil proceedings on a particular or related matter in a senior court, another court, or a tribunal.
>
> (5) A general order restrains a party from commencing or continuing civil proceedings in a senior court, another court, or a tribunal.
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> (6) Nothing in this section limits the court's inherent power to control its own proceedings.
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> **167 Grounds for making section 166 order**
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> (1) A Judge may make a limited order under section 166 if, in civil proceedings about the same matter in any court or tribunal, the Judge considers that at least 2 or more of the proceedings are or were totally without merit.
>
> (2) A Judge may make an extended order under section 166 if, in at least 2 proceedings about any matter in any court or tribunal, the Judge considers that the proceedings are or were totally without merit.
>
> (3) A Judge may make a general order if, in at least 2 proceedings about any matter in any court or tribunal, the Judge considers that the proceedings are or were totally without merit.
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> (4) In determining whether proceedings are or were totally without merit, the Judge may take into account the nature of any interlocutory applications, appeals, or criminal prosecutions involving the party to be restrained, but is not limited to those considerations.

(5) The proceedings concerned must be proceedings commenced or continued by the party to be restrained, whether against the same person or different persons.

(6) For the purpose of this section and sections 168 and 169, an appeal in a civil proceeding must be treated as part of that proceeding and not as a distinct proceeding.

168 Terms of section 166 order

(1) An order made under section 166 may restrain a party from commencing or continuing any proceeding (whether generally or against any particular person or persons) of any type specified in the order without first obtaining the leave of the High Court.

(2) An order made under section 166, whether limited, extended, or general, has effect for a period of up to 3 years as specified by the Judge, but the Judge making it may specify a longer period (which must not exceed 5 years) if he or she is satisfied that there are exceptional circumstances justifying the longer period.

[8] The relevant transitional provision appears in sch 5, cl 10(2):

> All jurisdictions, offices, appointments, Orders in Council, orders, warrants, rules, regulations, seals, forms, books, records, instruments, and generally all acts of authority that originated under the relevant Act or another enactment continued or repealed by this Act, and that are subsisting or in force on the commencement of this clause, have full effect as if they had originated under the corresponding provisions of this Act and, where necessary, must be treated as having originated under this Act.

Divergent views on the effect of the transitional provision

[9] In the High Court divergent views have emerged as to the effect of the transitional provisions on s 88B orders. They are represented by the decisions in *Rafiq v Whata*[8] and *Siemer v New Zealand Law Society*.[9]

[10] In *Rafiq*, delivered on 29 May 2019, Venning J held that an indefinite order under s 88B was most consistent with the exceptional circumstances requirement under s 168(2), which would justify treating such an order as a general order for a five-year period.[10] The Judge acknowledged the argument that a s 88B order should be effective for only three years at the most (as the default position under s 168(2)), given that the Judge making the s 88B order would not have turned their mind to the

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8 *Rafiq v Whata* [2019] NZHC 1193.
9 *Siemer v New Zealand Law Society* [2019] NZHC 3075.
10 *Rafiq*, above n 8, at [31].

threshold now mandated by s 168(2).[11] But he concluded that the existence of exceptional circumstances could be inferred from the fact that an indefinite order had been made under s 88B:

> [31] However, if a Judge, considering an application by the Attorney-General under s 88B for a lifetime ban, was satisfied that an indefinite rather than a definite order was warranted, it can be inferred the circumstances prompting the application were such that the exceptionality threshold now in place under s 168(2) could have been satisfied. It was open for the Court to make orders for less than a lifetime ban. It follows that an order made as a lifetime ban on the application of the Attorney-General under s 88B is most consistent with the exceptional circumstances requirement under s 168(2) which would justify a general order and the five year ban.

[11] Venning J also considered that a s 88B order ought to be treated as running from the commencement of the SCA, 1 March 2017.[12] The Judge's reasoning was that Parliament could not have intended that s 88B orders made before the commencement of the relevant provisions of the SCA would be treated as having been made under a statute not yet in force; the usual presumption against retroactivity required the Court to treat time as running from the date on which the relevant provisions of the SCA commenced.[13]

[12] On the approach taken by Venning J in *Rafiq*, the s 88B order against Mr Siemer would expire on 1 March 2022.[14]

[13] *Complete Construction v Siemer* was decided in September 2019.[15] The Associate Judge implicitly proceeded on the basis that the reasoning in *Rafiq* was correct and that the s 88B order against Mr Siemer ran for five years from 1 March 2017.

[14] In *Siemer v New Zealand Law Society,* delivered on 25 November 2019, Palmer J reached a different conclusion both as to the effect of cl 10(2) on the length of an indefinite s 88B order and the point from which time would run for such an order.[16] Palmer J was concerned with an application by Mr Siemer for leave to bring

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11 At [30].
12 At [36].
13 At [32]–[36].
14 At [37] the *Rafiq* judgment erroneously refers to the expiration date as 28 February 2022.
15 *Complete Construction Ltd v Siemer*, above n 7.
16 *Siemer v New Zealand Law Society*, above n 9.

judicial review proceedings against the New Zealand Law Society and a barrister in relation to a decision of the Disputes Tribunal. The question was whether Mr Siemer required leave to file the proceeding; if the s 88B order was treated as one for three years running from the date it was made it would have expired on 4 March 2019 and leave would not be required.

[15] Palmer J started from the position that the application of cl 10(2) ought to be undertaken by reference to the fundamental right of access to the courts.[17] He referred to both s 27 of the New Zealand Bill of Rights Act 1990 (BORA) and this Court's recognition in *Brogden v Attorney-General* of the need to balance "the fundamental constitutional importance of the right of access to the [c]ourts" against "the desirability of freeing defendants from the very considerable burden of groundless litigation".[18] In *Brogden* this Court held that s 88B[19] was a reasonable limitation on the right of access to the courts, because access to the courts was not actually denied but merely subject to the gatekeeper or supervisory function of the High Court to ensure that the processes of the court are not abused.[20] Palmer J considered that, likewise, s 166 of the SCA should be treated as consistent with BORA, but that a rights-consistent application of s 166 meant that any order must not be longer than reasonably necessary.[21]

[16] The Judge held that a rights-consistent interpretation required s 88B orders to be treated as three-year orders unless it is clear from the face of the judgment which imposed the order that there were exceptional circumstances justifying a longer period. Otherwise, he said, there would be no basis on which to assume any period more than three years was a reasonable limit now justified by law.[22] The Judge went on to hold that it was not clear on the face of the judgment imposing the s 88B order on Mr Siemer that there were exceptional circumstances that would justify a five-year order.[23]

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17 At [8].
18 At [9], citing *Brogden v Attorney-General* [2001] NZAR 809 (CA) at [20].
19 The judgment refers to s 88A, which was renumbered as s 88B in December 2005.
20 *Brogden*, above n 18, at [23].
21 *Siemer v New Zealand Law Society*, above n 9, at [23]–[24].
22 At [25].
23 At [26].

The Judge also considered that the new time limits under the SCA should be calculated from the beginning of the original order.[24]

[17] *Siemer v Auckland High Court* followed an unsuccessful application by Mr Siemer for access to documents held on the court file relating to the *Rafiq* application. Downs J had refused the request.[25] Mr Siemer applied for leave to appeal. In a decision delivered on 18 December 2019, Downs J considered the approaches taken in both *Rafiq* and *Siemer v New Zealand Law Society*. The Judge refused leave to appeal.[26] In doing so, the Judge adopted Venning J's reasoning in *Rafiq* and proceeded on the basis that Mr Siemer required leave to bring the appeal.

[18] In *Siemer v Registrar of the Supreme Court,* in a minute dated 12 February 2021, Downs J struck out Mr Siemer's statement of claim in judicial review proceedings as an abuse of process.[27] In advising of Mr Siemer's right to appeal the decision, the Judge presupposed that Mr Siemer did not require permission to appeal, though noted the conflicting authority on this point.[28]

The effect of the transitional provision on a s 88B order

[19] Clause 10(2) of sch 5 requires that orders made prior to the SCA continue to have "full effect as if they had originated under the corresponding provisions of this Act". This provision is, undeniably, problematic. It is no longer possible for a civil restraint order to have effect indefinitely. It was therefore common ground that giving "full effect" to such an order "as if" it had originated under the SCA required the order to be treated as either for three years or five. However, no indication is given as to the basis on which to determine the correct term.

[20] The starting point is the general principle stated by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*:[29]

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24 At [27].
25 *Rafiq v Whata* HC Auckland CIV-2019-404-934, 24 October 2019 (Minute of Downs J).
26 *Siemer v Auckland High Court,* above n 5, at [9]–[11] and [15].
27 *Siemer v Registrar of the Supreme Court*, Minute of Downs J, above n 6, at [2]–[3].
28 At [4].
29 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] NZLR 767 at [22].

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.
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> (Footnotes omitted.)

[21] In *Attorney-General v Hill*, a Full Court of the High Court identified the reasons for a regime to restrain vexatious litigants as the entitlement of defendants to protection, the need to use the limited resources of the judicial system for the resolution of genuine proceedings and the interests of the vexatious litigant themselves.[30] The Court in *Hill* considered that the regime established under the Judicature Act was a justified limitation on s 27 of BORA.[31]

[22] The Judicature Act regime was not trouble-free, however. In its 2012 report *Review of the Judicature Act 1908: Towards A New Courts Act*, the Law Commission identified a number of unsatisfactory aspects experienced with the existing regime.[32] These included that it was a remedy of last resort with a high threshold for intervention, that it was inflexible and that relief was available only on application by the Attorney-General and by order of the High Court.[33] The Law Commission recommended a graduated system of civil restraint orders that it considered would allow for a more proportionate response to litigants who persistently bring vexatious proceedings and which would be consistent with BORA. It also considered that such changes might allow intervention at an earlier stage, rather than as a very last resort.[34]

[23] The new regime introduced under the SCA was intended to address these shortcomings. In some ways the new regime is less intrusive than the previous regime, especially in relation to the term of the order that can be made. For the reasons

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30 *Attorney-General v Hill* (1993) 7 PRNZ 20 at 26, citing *Attorney-General v Jones* [1990] 1 WLR 859 at 865.
31 At 22.
32 Law Commission *Review of the Judicature Act 1908: Towards A New Courts Act* (NZLC R126, 2012).
33 At [16.3].
34 At [16.4]–[16.5].

discussed in *Hill*, it is beyond argument that the SCA regime is a justifiable limitation on BORA rights and on the right of individuals to access the courts.

[24] Before turning to consider the interpretation of cl 10(2) of sch 5, we briefly address a submission by Mr Ellis, who appeared for Mr Siemer in *Siemer v Attorney-General* (CA72/2020). Mr Ellis submitted that the making of the s 88B order contravened the terms of arts 14 (equality before the law) and 16 (recognition as a person) of the International Covenant on Civil and Political Rights (ICCPR). We think it unnecessary to engage with this argument. Mr Ellis accepted that because leave could be sought to bring proceedings notwithstanding a banning order, it could not be said that there was a total denial of such rights.

[25] We return to the question whether Parliament intended a s 88B order that is subject to the transitional provisions in cl 10(2) to be treated as one for three years or five. Mr Powell, for the Attorney-General in CA72/2020 and the Registrar of the Supreme Court in CA86/2021, argued that giving "full effect" to an indefinite s 88B order meant treating it as a five-year order under the SCA. In making this submission, Mr Powell acknowledged that it would require an assumption that exceptional circumstances existed. He argued that it was to be presumed that Parliament understood the fundamental right to access to the courts whilst also acknowledging that it does not guarantee the right to bring vexatious proceedings or otherwise abuse the process of the courts.

[26] We start by noting the very different thresholds under s 88B and s 166. Both Venning and Palmer JJ recognised that, in determining the correct term of a s 88B order for the purposes of cl 10(2), five years could only be justified by reference to the pre-requisite of "exceptional circumstances" in s 168.[35] As noted earlier, Venning J approached the satisfaction of the prerequisite as a matter of inference to be drawn from the fact that an indefinite order had been made under s 88B.[36] Palmer J, however, considered that in order to protect Mr Siemer's BORA rights and his right to access the courts, the existence of exceptional circumstances would need to be clear

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35 *Rafiq*, above n 8, at [31]; and *Siemer v New Zealand Law Society*, above n 9 at [14].
36 *Rafiq*, above n 8, at [31].

on the face of the judgment in order to conclude that a term of more than three years would be justified.[37]

[27] We would take a different approach again. Section 88B required proof that the subject of the application had "persistently and without any reasonable ground instituted vexatious legal proceedings". Once that threshold had been met, the term of the order — whether finite or indefinite — was a matter for the Judge's discretion. In comparison, the threshold for the making of s 166 order is lower – the instigation of two or more proceedings that are or were "totally without merit". While the Judge has discretion to impose a term up to three years, a term more than three years but not exceeding five can only be imposed if the Judge is satisfied that there are exceptional circumstances. This requires a judicial assessment as to whether exceptional circumstances do, in fact, exist before the discretion could be exercised to impose an order between three and five years.[38]

[28] Although the threshold under s 88B was high, it did not require consideration as to whether exceptional circumstances existed. Therefore, satisfaction of the threshold for s 88B cannot be determinative of whether exceptional circumstances existed for the purposes of s 168. Nor could that fact be inferred solely from the exercise of the discretion to impose an indefinite order. Even if the grounds on which the Judge exercised the discretion to impose an indefinite order were clear from the judgment, whether they disclosed circumstances that were exceptional so as to justify a term longer than three years would require a fresh judicial assessment. But a fresh judicial assessment is not contemplated; cl 10(2) proceeds on the basis that a s 88B order will be treated *as if* it had originated under the SCA. There is no provision for the grounds on which the order was made to be reviewed and the term determined by reference to a different threshold from that on which it was made.

[29] The law should be predictable so that litigants know their position. Currently, on either approach taken in High Court cases, a litigant who is the subject of a s 88B order would be unable to tell when the order expires without engaging in further

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37 *Siemer v New Zealand Law Society*, above n 9, at [25].

38 See *R v Rajamani* [2007] NZSC 68, [2008] 1 NZLR 723 at [4], which concerned the power in s 374(4A) of the Crimes Act 1961 to proceed with fewer than 11 jurors.

litigation to establish that point. The removal of indefinite orders from the new regime was a significant change and Parliament did not include a provision that would require a further round of litigation to establish the person's status. We therefore conclude that, on a proper construction, the effect of cl 10(2) on s 88B orders is that the default position applies, limiting the term of orders made under s 88B to three years.

[30] As to the time from which the order runs, we agree with Palmer J that, although the term of the order is affected by cl 10(2), the date from which time runs for its duration must remain the date on which it was made. We do not see this aspect of the case as raising any issue as to retroactivity. The issue can be tested by considering what the position would be if a s 88B order had been made on 2 March 2014 for a period of three years. Under the Judicature Act it would expire on 2 March 2017. If the effect of the transitional provision was that s 88B orders ran from the commencement of the SCA the person subject to the order would be restrained from commencing any litigation for a further three years — twice the period imposed by the original order.

[31] We therefore hold that the s 88B order against Mr Siemer expired on 4 March 2019.

Siemer v Attorney-General (CA72/2020)

The High Court decision

[32] In October 2019 Mr Siemer applied under the Senior Courts (Access to Documents) Rules 2017 (Access to Documents Rules) for access to documents held on the file to which Venning J's decision in *Rafiq* related. Downs J refused the application.[39] The Judge noted that there were only three documents on the file: Venning J's judgment (to which Mr Siemer was entitled), the proposed statement of claim and the application for leave to file the statement of claim. He dealt with the application as follows:

> [2] … Venning J concluded the proposed proceeding was frivolous and vexatious. Dissemination of related paperwork is contrary to public interest.

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39 *Rafiq v Whata,* above n 25, Minute of Downs J.

> As Venning J observed, the "proposed statement of claim is abusive and a nonsense".
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> (Footnote omitted.)

[33] Mr Siemer applied for leave to appeal this decision. The Judge recorded the proposed grounds of appeal as being that the decision refusing access to the documents was "mala fide and unlawful" and "nonsensical".[40] He noted Mr Siemer's emphasis on the importance of freedom of expression and open justice. The Judge considered that Mr Siemer would not have required leave to appeal under the Access to Court Documents Rules unless the s 88B order against him was still in force.[41] He did not regard either *Rafiq* or *Siemer v New Zealand Law Society* as binding on him but preferred Venning J's analysis in *Rafiq*. He therefore concluded that the s 88B order was still in force and Mr Siemer required leave to bring his appeal.[42]

[34] The Judge refused leave because:

> [14] There is no reason to permit the proposed appeal. The underlying statement of claim is … "abusive and a nonsense". Mr Siemer has no right of access to it. Consequently, Mr Siemer's rights have not been abridged. Freedom of expression and open justice are quintessential to a liberal democracy. However, the proposed appeal raises no serious issue in relation to either.
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> (Footnote omitted.)

[35] Mr Siemer filed an application for leave to appeal Downs J's decision (if leave was required) and an appeal against the decision (if leave was not required). He sought to have the decision reversed and a declaration that he was not a vexatious litigant.

[36] Pending the hearing of his applications to this Court, Mr Siemer applied for judicial review of Downs J's decision declining leave to appeal the refusal of the request for access to the *Rafiq* documents. Palmer J expressed the view that Mr Siemer's status as a vexatious litigant was res judicata as a result of his decision in *Siemer v New Zealand Law Society* so that this issue could not be revisited.[43] He also

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40 *Siemer v Auckland High Court*, above n 5, at [3].
41 At [4].
42 At [9]–[13].
43 *Siemer v Attorney-General* HC Auckland CIV 2019-404-2797, 28 February 2020 (Minute No 2 of

said that the decision in *Siemer v New Zealand Law Society* was a judgment in rem because it determined Mr Siemer's status.[44] The Judge adjourned the application for judicial review pending disposition of the present appeal.[45] Given our conclusion in relation to the currency of the s 88B order, we find it unnecessary to consider whether Palmer J's decision in *Siemer v New Zealand Law Society* was a judgment in rem.

Appeal

[37] It follows from our conclusion regarding the effect of the transitional provisions in the SCA on s 88B orders that the s 88B order against Mr Siemer ran for three years from the date it was made, expiring on 4 March 2019. Therefore, Mr Siemer did not require leave to appeal the decision refusing him access to the *Rafiq* documents and the Judge erred in concluding that he did.

[38] We note that Mr Siemer's appeal was brought — and submissions made — solely in relation to the Judge's decision refusing leave to appeal the earlier declinature of the request for access to court documents. As a result, the scope of the present appeal is limited to that question and does not extend to whether the earlier decision was supportable. That question is for an appeal against the earlier decision.

[39] The appeal is allowed. We order that *Siemer v Auckland High Court* [2019] NZHC 3393, is set aside. Given our findings, we do not consider a formal declaration as to Mr Siemer's status is necessary. Mr Siemer is entitled to costs for a standard appeal on a band A basis with usual disbursements.

***Siemer v Registrar of the Supreme Court* (CA86/2021)**

The issues

[40] In early February 2021 Mr Siemer sought judicial review of various decisions of the Registrar of the Supreme Court contending that the Registrar had acted unlawfully and unpredictably and was "obstructive and combative". The statement of claim challenged five decisions made by the Registrar of the Supreme Court.

Palmer J) at [8].

44 At [9].

45 At [11].

They related, broadly, to Mr Siemer's application for a fee waiver and his request for a document under the Access to Court Documents Rules.

[41] Downs J struck out the claim under r 5.35B of the High Court Rules 2016. Under r 5.35A if a Registrar believes that, on the face of the proceeding tendered for filing, the proceeding is plainly an abuse of the process of the court, the Registrar may refer the proceeding to a Judge for consideration under r 5.35B. Rule 5.35B(2) provides that the Judge may, on his or her own initiative, make an order or give directions to ensure that the proceeding is disposed of, including an order that the proceeding be struck out.

[42] In striking out the proceeding, the Judge said:[46]

> [3] I am satisfied both claims are plainly an abuse of process. I strike out both for this reason. I reach this conclusion because the proposed claims concern: (a) matters already determined by a Judge (hence constitute a collateral challenge); or (b) the absence of a decision by the Registrar of the Supreme Court; or (c) an unimpeachable matter of fact; or (d) some combination of these.

[43] The Judge was not required to, and did not, give Mr Siemer the opportunity to be heard. He advised him of his appeal rights, as he was required to do.[47] In doing so he assumed that the s 88B order was no longer in force, noting the conflicting authority on that point.[48]

Appeal

[44] On appeal, Mr Siemer argues that the reasons given by Downs J were inadequate because they were too broad and undefined. He also complains that Downs J was not properly assigned the file and did not have jurisdiction, because he was not "the judicial review judge, nor the duty judge."

[45] Mr Powell for the Registrar conceded at the oral hearing that none of the three reasons given by Downs J, recorded above at [42], were supportable and no

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46 *Siemer v Registrar of the Supreme Court* (Minute of Downs J), above n 6.
47 High Court Rules, r 5.35B(3)
48 *Siemer v Registrar of the Supreme Court* (Minute of Downs J), above n 6, at [4].

combination of them could justify the finding that the claim was plainly an abuse of process.

[46] The issue of the fee waiver does not require our consideration because the fee was eventually waived, so this aspect of the appeal falls away.

[47] The argument that Downs J should not have been assigned the file is insupportable. Every Judge has jurisdiction to deal with any matter before the court, and absent any question of disqualification of the Judge who dealt with the matter a decision cannot be challenged on the basis that it was allocated to one Judge rather than another.

[48] The request for access to court documents related to Mr Siemer's request for information about the contents of the court file SC101/2020. The Registrar identified the documents from that file that Mr Siemer could access. Mr Siemer was not satisfied with this response and requested the "register or index" of SC101/2020, referring to the definition of "formal court record" in r 4 of the Access to Documents Rules. The Registrar advised that no such index existed. He subsequently elaborated, advising that in the case of the Supreme Court the reference in the Access to Documents Rules to the index or register is a reference to the list of applications for leave to appeal which is set out in numerous hard copy volumes held by the Registry.[49]

[49] In our view this aspect of the statement of claim could not plainly have been said to be an abuse of process. It would have more appropriately been dealt with under r 15.1 of the High Court Rules, with Mr Siemer having the opportunity to be heard. As a result of the matter being dealt with under r 5.35B, this did not happen and the Judge did not consider the question that arose over the existence of the document. The information before this Court does not allow for fresh consideration of the issue. The appeal therefore succeeds on this point. The matter is remitted to the High Court for reconsideration. The order made in the High Court minute of 12 February 2021 is set aside.

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[49] Supreme Court Rules 2004, r 9.

[50] Since Mr Siemer was self-represented on this appeal no issue arises as to costs. He is, however, entitled to usual disbursements.

***Siemer v Complete Construction Ltd* (CA556/2019)**

The case in the High Court

[51] This appeal arises from a building contract between Mr Siemer and his wife with Complete Construction Ltd (CCL). Following a Building Dispute Tribunal adjudication, CCL obtained judgment against Mr Siemer pursuant to s 73 (2) of the Construction Contracts Act 2002 (CCA) for $7,626.94.[50] On 13 March 2019 CCL issued a bankruptcy notice and served it on Mr Siemer. On 1 April 2019 Mr Siemer filed an "application for set-off", which the High Court treated as an application to set aside the bankruptcy notice. Mr Siemer also filed affidavits in support of the application which described a history of dispute between Mr Siemer and CCL.

[52] The application came before Associate Judge Smith on 2 May 2019. The Associate Judge raised the question of Mr Siemer's status as a result of the s 88B order. Mr Siemer maintained that the order did not affect him because he was merely responding to a bankruptcy application, not commencing any proceeding.[51] He sought a formal ruling from the Associate Judge, who issued a minute holding that , although the service of a bankruptcy notice did not constitute the commencement of a proceeding, Mr Siemer's application to set aside the bankruptcy notice did and was within the scope of the s 88B order.[52] However, the Associate Judge contemplated the possibility of leave being granted retrospectively and directed that any application for leave be referred to a Judge.[53] In a subsequent minute dated 17 June 2019 the Associate Judge drew Mr Siemer's attention to Venning J's decision in *Rafiq*, noting the apparent effect of the judgment that the s 88B order remained in force and that Mr Siemer would indeed require leave to proceed.[54]

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50 *Complete Construction Ltd v Siemer* DC Auckland CIV 2017-004-2583, 16 March 2018.
51 *Complete Construction Ltd v Siemer* CIV-2019-404-423, 2 May 2019 (Minute of Associate Judge Smith).
52 *Complete Construction Ltd v Siemer* CIV-2019-404-423, 7 May 2019 (Minute of Associate Judge Smith) at [6].
53 At [8] and [11].
54 *Complete Construction Ltd v Siemer* CIV-2019-404-423, 17 June 2019 (Minute of Associate Judge Smith).

[53] The issue of leave was referred to Jagose J for determination on the papers. In a minute issued on 14 August 2019 the Judge noted that leave to commence a proceeding is not to be granted to a person subject to a s 88B order "unless the Court or Judge is satisfied that the proceeding is not an abuse of the process of the Court and that there is prima facie ground for the proceeding".[55] The Judge dealt with the leave application by reference only to the requirement for a prima facie ground for the proceedings:

> [4] Mr Siemer wishes to contend the judgment debt is "unenforceable by law", and he has a valid counterclaim and set-off exceeding the amount of the judgment debt. Under the former head, he seeks to argue alleged procedural deficiencies are effective to undermine his substantive liability. Under the latter head, such cross-claim only is material if he could not use it as a defence in the prior proceedings.
>
> [5] But the 'pay now, argue later' principle of Construction Contracts Act liability is well-established, and negates Mr Siemer's former head. And he offers no explanation as to why he could not use his cross-claims in the prior proceedings. That is a distinct question from whether he did not, in the present proceeding by reason of failing to appreciate the applicable timetable.
>
> [6] There thus is no prima facie ground for the proceeding. I therefore refuse leave.
>
> (Footnotes omitted.)

[54] Mr Siemer's application to set aside the bankruptcy notice came on for determination before Associate Judge Smith on 2 September 2019. The Associate Judge noted that Mr Siemer had failed to obtain leave to bring the application.[56] He therefore treated the application to set aside the bankruptcy notice as having effectively been determined against Mr Siemer.[57] As a result, the Associate Judge assumed that the principal remaining issue was whether, for the purposes of r 24.10 of the High Court Rules, the effect of the s 88B order and failure to obtain leave meant that Mr Siemer's application was a nullity, void from when it was filed, or whether it was to be treated as an application that remained valid until leave to file it was refused.

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55 *Complete Construction Ltd v Siemer* CIV-2019-404-423, 14 August 2019 (Minute of Jagose J) at [2], citing Judicature Act 1908, s 88B(2).

56 *Complete Construction Ltd v Siemer*, above n 7, at [1].

57 At [22].

[55] This was relevant because it would determine the date of any act of bankruptcy and the time within which CCL could apply for adjudication.[58] If Mr Siemer's application to set aside was valid, an act of bankruptcy based on failure to pay the judgment debt within 10 working days of service would have occurred when Jagose J refused Mr Siemer's leave application on 14 August 2019, rather than in April 2019. The Associate Judge treated the application as valid and as having been determined against Mr Siemer on 14 August 2019.[59]

[56] The Associate Judge awarded costs against Mr Siemer on a 2B basis. Although costs would normally have been awarded on a 1B basis, he considered that the lack of merit in Mr Siemer's application warranted the higher award.[60]

Appeal

[57] Mr Siemer was granted leave to appeal Associate Judge Smith's decision on the following grounds:[61]

> (a) Was leave of the High Court required for Mr Siemer to apply to set aside the bankruptcy notice served on him by Complete Construction Limited on 25 March 2019, as determined by Associate Judge Smith in his minute dated 7 May 2019 and confirmed in his judgment dated 12 September 2019?
>
> (b) If leave of the High Court was required, what consideration, if any, should be given to the fact that Mr Siemer was "merely responding to a step taken by the Judgment Creditor" as described by Associate Judge Smith in his minute dated 2 May 2019?
>
> (c) Was it appropriate to award costs against Mr Siemer for the hearing on 2 September 2019, or at all?

[58] For the reasons already discussed Mr Siemer did not require leave to file his application to set aside the bankruptcy notice. Issue (a) is therefore answered in his favour.

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58 Under the Insolvency Act 2006, s 16, CCL had three months from an act of bankruptcy to apply for adjudication. Under r 24.10 of the High Court Rules, if an application to set aside a bankruptcy notice cannot be heard until after the time when an act of bankruptcy would be complete, the time is treated as extended until the application has been determined.

59 *Complete Construction Ltd v Siemer*, above n 7, at [20]–[22].

60 At [31].

61 *Complete Construction Ltd v Siemer* CIV-2019-404-423, 11 October 2019 (Minute of Woolford J) at [20]. Mr Siemer applied for leave to amend these grounds but this was declined in *Siemer v Complete Construction Ltd* [2020] NZCA 470.

[59] Issue (b) falls away as a result of the answer to issue (a). However, we comment briefly on what the situation would be if leave were required under the SCA, since this question may arise in the future. An order made under s 166 precludes the commencing or continuing of "civil proceedings" without leave. This phrase is only defined in relation to the Crown.[62] Otherwise, "civil" is defined as meaning "not criminal" and "proceeding" is defined as meaning:[63]

> … any application to the court for the exercise of the civil jurisdiction of the court other than an interlocutory application.

[60] Associate Judge Smith considered that, while a bankruptcy notice is not regarded as a civil proceeding because it does not trigger any process for the exercise of the High Court's civil jurisdiction, an application to set aside a bankruptcy notice does have that effect and is properly viewed as the commencement of a proceeding.[64]

[61] We do not agree with this view. The prescribed form of a bankruptcy notice requires the judgment debtor to do one of three things: (a) pay the judgment creditor; (b) secure or enter into a new agreement with the judgment creditor, or alternatively obtain the High Court's approval of terms of payment; or (c) "satisfy the High Court that [he or she] has a counterclaim, set-off or cross-demand" that equals or exceeds the amount claimed by the judgment creditor and which could not have been put forward in the action in which the judgment was obtained.[65]

[62] A judgment debtor who wishes to pursue the options in (b) or (c) must be viewed as merely responding to the bankruptcy notice. A judgment debtor who is subject to a s 166 order and who wishes to obtain the court's approval of terms of payment (option (b)) cannot reasonably be regarded as commencing a proceeding, and so therefore does not require leave. A judgment debtor who wishes to pursue option (c) must be treated the same way. We therefore consider that none of the responses permitted by a bankruptcy notice should be viewed as civil proceedings for the purposes of s 166.

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62 High Court Rules, r 1.3: in relation to the Crown the phrase "civil proceedings" has the same meaning as in s 2(1) of the Crown Proceedings Act 1950.

63 High Court Rules, r 1.3.

64 *Complete Construction Ltd v Siemer*, above n 7, at [7], relying on *Re Westpac New Zealand Ltd, ex parte Boulton* [2014] NZHC 693, (2014) 22 PRNZ 183 at [12].

65 High Court Rules 2016, sch 1, Form B2, reflecting the terms of s 17 of the Insolvency Act.

[63] Mr Siemer did not require leave to file his application to set aside the bankruptcy notice and was entitled to have the application heard in the normal way. Because of the way the matter was dealt with, that did not happen. Mr Siemer seeks to have the matter remitted to the High Court so that the application can be properly heard.

[64] CCL asserts that under s 79 of the CCA the application could never have succeeded, and the appeal should therefore be dismissed. Section 17 of the Insolvency Act provides that if a debtor can demonstrate they have a counterclaim, set-off or cross-demand that equals or exceeds the amount claimed by the judgment creditor and which could not have been put forward in the action in which the judgment was obtained, no relevant act of bankruptcy will be disclosed and the bankruptcy notice will not stand.[66] CCL points out that despite this, s 79 of the CCA prevails overs s 17 of the Insolvency Act.[67] Section 79 provides that in any proceeding for a recovery of debt under ss 23, 24 or 59 of the CCA, the court must not give effect to any counterclaim, set-off or cross-demand if judgment has been entered for that amount and there is no dispute over the claim for that amount.

[65] Although this issue was raised squarely by CCL's counsel in its submissions, Mr Siemer did not respond to it. He was focused very much on the procedural deficiencies in the Court below.

[66] Mr Siemer's application may ultimately fail as a result of the effect of s 79 of the CCA. However, that is a decision that must be made by the High Court after a fair hearing so that Mr Siemer has the opportunity to advance his argument fully and to exercise any right of appeal.

[67] We turn to issue (c), which relates to Associate Judge Smith's award of costs against Mr Siemer. CCL had sought solicitor/client costs in reliance on s 59(2) of the CCA. However, Associate Judge Smith considered that s 59(2) was not intended to apply to the costs of enforcing a judgment obtained pursuant to adjudication. On

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66 *Sharma v ANZ Banking Group (New Zealand) Ltd* (1992) 6 PRNZ 386 at 389.

67 *Laywood v Holmes Construction* [2009] NZCA 35, [2009] 2 NZLR 243 at [61], approving *Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd* (2005) 18 PRNZ 97.

that basis he determined costs by reference to the High Court Rules.[68] However, whilst acknowledging that the case would usually attract costs on a 1B basis because of the modest amount involved the Associate Judge took the view that the lack of merit in Mr Siemer's position meant that the interests of justice would be better met by an award of category 2B costs.

[68] CCL supports the Judge's costs award. Mr Siemer complains that the award ought not to have been made because it related to a hearing that served no purpose and ought not to have proceeded.

[69] Given Venning J's decision in *Rafiq*, the Associate Judge could not be criticised for raising the issue of leave. Nor could Jagose J be criticised for identifying the substantive problems with the application to set aside and dealing with the leave application as he did. However, Mr Siemer did not, in fact, require leave to make his application. He was not afforded a fair hearing of the application. Yet costs were awarded against him on the basis that his application, which had not been properly heard and determined, lacked merit. Mr Siemer ought not to have had costs awarded against him.

[70] The appeal in CA556/2019 is allowed.

[71] The application to set aside the bankruptcy notice is remitted to the High Court for hearing.

[72] As Mr Siemer was self-represented he is not entitled to costs but is entitled to usual disbursements.

Results

[73] The appeal in CA72/2020 is allowed. We order that *Siemer v Auckland High Court* [2019] NZHC 3393, is set aside. Mr Siemer is entitled to costs for a standard appeal on a band A basis and usual disbursements.

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[68] *Complete Construction Ltd v Siemer*, above n 7, at [31].

[74] The appeal in CA86/2021 is allowed in part as set out at [49] of this judgment. The matter is remitted to the High Court for reconsideration. We order that the High Court minute of 12 February 2021 is set aside. We make no order as to costs in CA86/2021. However, Mr Siemer is entitled to usual disbursements.

[75] The appeal in CA556/2019 is allowed. The application to set aside the bankruptcy notice is remitted to the High Court for hearing. The costs order in the High Court is set aside. We make no order as to costs, but Mr Siemer is entitled to usual disbursements.

Solicitors:
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