IN THE NEW ZEALAND SUPREME COURT **SC 59 /2014**

UNDER	**The Judicature Act 1908, the Supreme Court Act 2003 and relevant to the proposed Courts Act in Parliament**
IN THE MATTER OF	**An Application for Judicial Review under the Judicature Amendment Act 1978 and s 27 of the New Zealand Bill of Rights Act 1990**
BETWEEN	**VINCENT ROSS SIEMER** Legal News Publisher 27 Clansman Terrace Gulf Harbour Appellant
AND	**REGISTRAR of the SUPREME COURT** Lambton Quay at Ballance St Wellington First Respondent
AND	**MINISTRY OF JUSTICE** PO Box 2940 Wellington 6140 Second Respondent
And	***NEW ZEALAND ATTORNEY GENERAL*** *Invited to make submissions in the public interest*

SUBMISSIONS IN SUPPORT OF LEAVE TO APPEAL

23 June 2014

Submitted by: Vince Siemer, plaintiff
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Gulf Harbour
Email: vsiemer@hotmail.com

MAY IT PLEASE AND ENLIGHTEN THE COURT:

"Justice should not only be done but should manifestly and undoubtedly be seen to be done" – *R v Sussex Justices (and emblazoned on the facade of the New Zealand Court of Appeal)*

1. In 2012, the Law Commission issued a paper proposing a revamping of the court structure in New Zealand – a "modernisation" and "consolidation" of the Judicature Act 1908, the District Courts Act 1947 and **the Supreme Court Act 2003**. The Executive Summary stated:[1]

> *"There are several significant changes put forward in the paper. These include: greater transparency as to the processes and responsibilities undertaken of key players in the court system; .. firm steps to clarify and enable access to court record information; .."*

2. The Government response immediately accepted 71 of the Law Commission's 89 recommendations, overwhelmingly falling on the side of transparency and, to this end, making two *additional* proposals. According to the Cabinet Social Policy Committee of the Office of the Minister of Justice:

> *"The first is clarification of court record information, which aims to help give government agencies, where appropriate, clear legislative authority to access elements of the court record."*

3. Hence, the Law Commission sees greater transparency in the NZ courts as a significant and necessary change and the government see current lack of transparency and access to court records as a greater problem than the Law Commission.

4. In a Constitutional framework (which New Zealand does not have) this would seemingly not be an issue. But in New Zealand, while the Courts have unrestrained powers to access records of the Executive and Legislature, there exists no reciprocal powers. On a broader level, the Judiciary have exerted the position they are bound, *not* by the **Public Records Act 2005** which expressly binds all branches of government, but by their own custom:[2]

> *"the view expressed by the Chief Justice in Marfart v Television New Zealand Ltd [2006] NZSC 33 is that, to a large extent, the content of the court record is determined, not by the requirements of any enactment (eg, the Public Records Act, the Crimes Act 1961), but by court practice."*

5. The Proposed Appellant concurs with the Law Commission and government proposals and summary and adds that the evidence in this appeal demonstrates unequivocally the Supreme Court Registrar is operating on the conflicting premise that the absence of legislation binding the Supreme Court acts as a prohibition against the world accessing public court records despite expressly recognising he would be legally

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[1] www.justice.govt.nz/publications/global-publications/g/ New Zealand Ministry of Justice
[2] Letter of Chief Legal Counsel Jeff Orr, Ministry of Justice, dated 23 March 2009

bound to permit access if he was Registrar of "the other Higher Courts which have specific enabling regulations".[3]

6. The Registrar's legal edict which flies in the face of elementary principles of court transparency is apparently broadly held within the Court because it has been maintained over many months against unrelated requests,[4] and was enforced after taking legal advice.[5]

7. This lack of transparency lies at the heart of why the Proposed Appellant launched www.newzealandsupremecourt.co.nz. He seeks to provide the legal community and public with the legal arguments actually being made to the Supreme Court in order to offset the vacuum of information and abundance of half-truths in a court system where, to paraphrase H.L. Mencken, "Judges are law students who mark their own papers and write their own press". In so doing, he seeks only to publish that which is taken for granted in democracies around the world other than New Zealand.

8. The New Zealand Supreme Court Registrar has, in an unexpected way, validated the concerns expressed by the Law Commission and the Government, as well as the Appellant's reason for publishing that which the Registrar has sequestered.

9. An absence of enabling legislation does not act as a legal bar to public record access at the Supreme Court and the fact that the Supreme Court Registrar established this prohibition after taking legal advice underscores an elementary rule of law problem, particularly if the advice came from a judge of the Court (which is not known).

10. Finally on this, the Registrar's refusal to allow public access to Supreme Court records runs contrary to the 8 December 2003 submissions all judges of this Honourable Supreme Court made to Parliament against judicial accountability proposed in the ***Judicial Matters Bill*** on grounds the "openness of the judicial process" provided adequate safeguards against judicial misconduct going unremarked and unchecked. From Paragraph [27] of Your Honours' submissions to Parliament:

> *"Those means are supported by the principle of open justice and the requirement now hardening into a rule of law, that judges give reasons for decisions of any moment. The openness of the judicial process reduces the prospect of misconduct and of it going unremarked and unchecked. 'Sunshine is the best disinfectant'."*

JUDICIAL REVIEW AND THE FAILURES AT THE HIGH COURT

11. Judicial Review of such a decision, being "guaranteed" by the **New Zealand Bill of Rights Act 1990** – legislation which requires New Zealand judges give preferred status to this Act in interpreting legal rights – did not garner a mere mention in the High Court ruling of Clifford J which summarily struck out judicial review of the Supreme Court

[3] Letter of the Supreme Court Registrar dated 30 October 2013
[4] Letters of 30 October 2013 and 2 May 2014 are two known examples
[5] Email of the Supreme Court Registrar Gordon Thatcher, 2 October 2013

Registrar's prohibition against the world accessing public records of the Supreme Court (**"the Judgment"**).

11. The abject failure of the High Court judge to consider the clear relevance of this seminal piece of legislation is as clear as the wording of the Act:

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

12. That this right to judicial review is to be given preferred consideration by the courts is confirmed by section 6 of the same Act:

> 6. *Interpretation consistent with Bill of Rights to be preferred—*
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

13. The ethos of the courts is apparently such that the High Court judge's preference for obiter comment from a Supreme Court decision[6] which expressly did not make a finding on jurisdiction for Judicial Review was so great that His Honour did not see fit to engage in any reasoned *consideration* of the seminal guarantee to Judicial Review afforded by the New Zealand Bill of Rights Act 1990 before negating this right.

14. Yet this provincial approach becomes more worrisome when one reads the sole authority upon which the conclusions of the Judgment rely. While *Marfart v Television New Zealand Limited [2006] NZSC 33* expressly did not consider the question of judicial review, it did accept the jurisdiction of the High Court to judicially review decisions of the Court Registrar denying access to court records at [25]. This fact suggests strongly any comment in *Marfart* relied upon by Clifford J to **negate** the jurisdiction for judicial review was out of proper context as well as obiter.

15. The Proposed Appellant submits it was wrong in law for the High Court Judge to negate the guarantee of Judicial Review provided by legislative acts of Parliament[7] in favour of obiter comment from an authority which conversely recognised the right and jurisdiction AND DO SO despite the judge conceding there was no clear mechanism in the alternative to challenge the approach taken by the Registrar.[8]

16. If the Proposed Appellant is deemed by the Court to be wrong on this, he submits the failure of the High Court Judge to consider the plain relevance of the New Zealand Bill of Rights Act 1990 was a fatal failure in law when negating the right to judicial review in favour of an inexact alternative – again, where the sole authority the Judge relied upon accepted the right to judicially review registrars in similar circumstances.

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[6] *Marfart v Television New Zealand Limited [2006] NZSC 33*

[7] In addition to the New Zealand Bill of Rights Act 1990, the Judicature Amendment Act 1978 provides this right

[8] In paragraph [29] of the Judgment, Clifford J conceded that the rules which conceivably might provide the mechanism (rr 5 & 7 of the Supreme Court Rules 2004) might not legally apply to this case.

OBITER COMMENT v JUDICIAL REVIEW

17. The Judgment relied solely upon *Marfart v Television New Zealand Limited [2006] NZSC 33* to negate the right to Judicial Review despite the fact the Supreme Court in that judgment dealt with a single appeal question which was very narrow as well as clearly defined in the first paragraph of this authority:

> "[1] Does the Court of Appeal have jurisdiction to hear an appeal from a High Court determination of an application under the Criminal Proceedings (Search of Court Records) Rules 1974? That is the single question addressed on the present appeal."

18. Any authoritative value attributed to this judgment outside the expressed scope of the question at issue must be considered suspect. Any comment unrelated to this succinctly defined question to be determined is, by definition, obiter.

19. There are many legal distinctions in the current appeal beyond the judicial review conflict which depart significantly from the issues in *Marfart* – prominent among them, the existence of enabling legislation, the relevance of criminal statutes and rules and the elevation of administrative decisions of the Registrar being beyond the jurisdiction of judicial review by High Court judges (which, by definition, includes the Court of Appeal and Supreme Court).

20. In the Judgment, "passages" from *Marfart* were cited as "central" to the negation of the right to judicially review administrative Registrars, including:[9]

> "Where rules of Court provide for access to Court records, the inherent supervisory power is regulated by the rules."

21. This acceptance is not compatible with the Judgment finding at [29] that the only Supreme Court Rules which might apply (rules 5 & 7), might equally not apply.

22. The Judge's personal view of an unsupported "principle" appears to have obscured the necessary considerations of law which were required – including a proper consideration of *Marfart*. Quoting from the Judgment:

> [27] **As a matter of principle,** therefore, the exercise by the Registrar of such a power, being under the supervision of the Judges who comprise the Court, is to be reviewed by those Judges. **In my view,** that form of review is best understood as being part of the Supreme Court's inherent supervisory powers relating to matters, such as Mr Siemer's application for access to Court records, properly before it. The Registrar's decision to decline Mr Siemer's request will be reviewable by a Supreme Court Judge in like manner as, **for example,** the way in which decisions by the Registrar refusing to accept applications for leave to appeal are reviewed.
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> [28] Furthermore, as Mr Keith **submitted,** it is clear that judicial review is not available to challenge the actions of the Higher Courts.

[9] Paragraph [20]

WHY LEAVE TO THE SUPREME COURT IS NECESSARY

29. It is the case that the High Court judge determined the power of the Supreme Court is such that new, never before used and merely surmised "inherent powers" of the Supreme Court trump the seminal guarantee to judicial review provided by s27 (2) of the New Zealand Bill of Rights Act 1990. His Honour Judge Clifford relied upon the single authority of *Marfart*, despite that authority stating at [25]:

> "Although the rule only provides an appeal to an applicant who is refused access by the registrar, **judicial review** could be sought by others affected."

30. *Marfart* did not otherwise address, expand upon or restrict the right to judicially review court registrars.

31. Given this legal framework, the High Court judge's negation of his own jurisdiction provided by Parliament in s27(2) of the New Zealand Bill of Rights Act 1990 appears to borne of an unnatural reticence, supported by no law.

32. Relevantly, *Marfart* also reveals a similar negation of jurisdiction by Court of Appeal judges to review a not dissimilar refusal to allow access to public records in the High Court – a negation of jurisdiction which the Supreme Court overturned.

33. It is reasonable this known aversion by the Court of Appeal to exert its jurisdiction in respect to the High Court registrar pales in comparison to the reluctance likely to grip it on the question of exerting a jurisdiction in respect to the Supreme Court registrar despite there being no distinction in law between the two. This presents a distinct possibility that the Court of Appeal will not be disposed to properly consider the issue.

34. The proposed appeal ground is an important legal one which will quite likely end up in the Supreme Court eventually if leave is not now granted. It concerns rights which are among the most important that all free persons in western democracies have, which is why Parliament sought not only to guarantee these rights in the New Zealand Bill of Rights Act 1990 but, equally important to this appeal, directed preferred status be given to this Act by the courts in interpreting legal rights. The reality that the High Court judge afforded the New Zealand Bill of Rights Act 1990 no consideration in negating the right to judicially review the Supreme Court Registrar suggests the Court of Appeal will likely struggle with this failure without the appointment of an Amicus Curiae, adding cost and delay to the process.

35. Lastly, the Judgment leaves no doubt that despite striking out the judicial review, the High Court judge was troubled by the legality of the Registrar's decision at issue. His Honour left no doubt that he considered it is ultimately the responsibility of the Supreme Court, and not the Court of Appeal, to provide remedy.

Vince Siemer, Appellant

This document is filed by the Appellant, whose address for service is **27 Clansman Terrace, Gulf Harbour 0930**