

IN THE SUPREME COURT OF NEW ZEALAND

**SC 80/2015
[2015] NZSC 196**

BETWEEN ALAN IVO GREER
Applicant

AND RAY SMITH
First Respondent

JACK HARRISON
Second Respondent

Court: Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ

Counsel: Mr Siemer in person

Judgment: 18 December 2015

JUDGMENT OF THE COURT

The application for discharge or variation is dismissed.

REASONS OF THE COURT

(Given by William Young J)

[1] Mr Vince Siemer seeks to review a decision of O'Regan J by minute of 20 October 2015 to refuse access to court documents.¹ Mr Siemer has applied for its discharge or variation and in doing so has invoked s 28(3) of the Supreme Court Act 2003 (the Act).²

[2] The Act and the Supreme Court Rules 2004 (the Rules) do not explicitly address (a) how requests for access to court files should be determined in the first instance and (b) what, if any, review rights are available. The present review application provides an opportunity for us to reconsider the way in which we deal with such issues.

¹ *Greer v Smith* SC 80/2015, 20 October 2015.

² For this reason, O'Regan J has participated in the present exercise.

The relevant provisions of the Act and Rules

[3] The possibly relevant provisions of the Act are as follows:

17 Constitution of Court

- (1) The Supreme Court comprises—
 - (a) the Chief Justice; and
 - (b) not fewer than 4 nor more than 5 other Judges, appointed by the Governor-General as Judges of the Supreme Court.

...

25 General powers

...

- (2) In any proceeding, the Supreme Court can make any ancillary or interlocutory orders (including any orders as to costs) it thinks fit.

...

27 Exercise of powers of Court

- (1) For the purposes of the hearing and determination of a proceeding, the Supreme Court comprises 5 Judges of the Court.
- (2) Any 2 or more permanent Judges of the Supreme Court can act as the Court—
 - (a) to decide whether an oral hearing of an application for leave to appeal to the Court should be held, or the application should be determined just on the basis of written submissions;
 - (b) to determine an application for leave to appeal to the Court.

...

...

28 Interlocutory orders and directions may be made and given by one Judge

- (1) In a proceeding before the Supreme Court, any permanent Judge of the Court may make any interlocutory orders and give any interlocutory directions the Judge thinks fit (other than an order or direction that determines the proceeding or disposes of a question or issue that is before the Court in the proceeding).
- (2) Any permanent Judge of the Supreme Court may review a decision of the Registrar made within the civil jurisdiction of the Court under

a power conferred on the Registrar by a rule of Court, and may confirm, modify, or revoke that decision as the Judge thinks fit.

- (3) The Judges of the Supreme Court who together have jurisdiction to hear and determine a proceeding may—
 - (a) discharge or vary an order or direction made or given under subsection (1); or
 - (b) confirm, modify, or revoke a decision confirmed or modified under subsection (2).

36 Appointment of officers

- (1) A Registrar of the Supreme Court must be appointed under the State Sector Act 1988.

...

37 Powers and duties of officers

The Registrar, Deputy Registrars, and other officers of the Supreme Court have the powers and duties prescribed by rules made under section 51C of the Judicature Act 1908.

...

40 Reviews of decisions of Registrars about fees

- (1) A person aggrieved by a decision of the Registrar or a Deputy Registrar [as to fees] may apply to a Judge of the Supreme Court for a review of the decision.
- (2) An application must be made within—
 - (a) 20 working days after the date on which the applicant is notified of the decision; or
 - (b) any further time the Judge allows on application made for that purpose before or after the expiration of that period.
- (3) The application may be made informally.
- (4) The review—
 - (a) must be conducted by rehearing;
 - (b) may be dealt with on the papers, unless the Judge decides otherwise.
- (5) The Judge may confirm, modify, or reverse the decision.

...

[4] The relevant provisions of the Supreme Court Rules 2004 are as follows:

5 Directions

- (1) The Court may, in relation to any matter that arises in a case, give any directions that seem necessary for the just and expeditious resolution of the matter.
- (1A) The Court or a Judge may extend or shorten the time appointed by these rules, or fixed by any order, for doing any act or taking any proceeding or any step in a proceeding on any terms that the Court or the Judge thinks just.
- (2) If any case arises for which no form of procedure is prescribed by these rules, the Court must dispose of the case as nearly as practicable in accordance with provisions of these rules affecting any similar case, or, if there are no such rules, in the manner that the Court thinks best calculated to promote the ends of justice.

...

7 Power under rules to determine ancillary matters may be exercised by a Judge

A power conferred on the Court by these rules to give directions or to decide a matter, other than the determination of an application for leave to appeal or an appeal, may be exercised by a permanent Judge of the Court.

[5] For present purposes, the salient features of the scheme are as follows:

- (a) The Registrar is expressly given only the powers which are provided for in the Supreme Court Rules. This is consistent with the position of the Registrar of the Court of Appeal (see s 73 of the Judicature Act 1908) but contrasts with the position in relation to Registrars of the High Court whose powers are more expansively, although not necessarily more helpfully, set out in s 28 of the Judicature Act.
- (b) The Act and Rules do not explicitly address access to Court records, who makes decisions as to such access and the review of such decisions.

[6] The Act and Rules are not exhaustive of the relationship between the Judges and the Registrar. The Court consists of the Judges and the Registrar is an officer of the Court. It is implicit in this, and consistent with the inherent powers of the Judges of any court, that the Judges have the general right to direct and supervise the

Registrar in relation to the business of the Court providing such direction and supervision is not inconsistent with the scheme of the Act and Rules.

[7] In *Mafart v Television New Zealand*³ this Court was required to address the role of judges in relation to Court records. Of particular relevance is the following passage from the judgment of the Chief Justice:

[18] A Court of record is under an obligation to maintain the record of its proceedings. ... While the maintenance of the record is as a matter of practice carried out by the Registrars of the Court, they are acting for the Court in this ministerial work and under the supervision of the Judges who comprise the Court.

...

[20] Once created, the records remain under the control of the Court by reason of its inherent power to control its processes and practices, until disposed of either according to the practice of the Court or under legislation. Where rules of Court provide for access to Court records, the inherent supervisory power is regulated by the rules. ...

...

[24] Before the adoption of the civil and criminal search rules, in 1973 and 1974 respectively, no rules made under the Judicature Act or the Crimes Act [1961] regulated the inherent judicial control of access to Court records. Eichelbaum CJ in *R v Philpott*, in a passage approved by the Court of Appeal in *R v Mahanga*, expressed the view that the principal purpose of the rules was:

... to confirm and enhance the Court's supervisory powers over such material, and to rationalise the basis for dealing with the not infrequent requests for access to it.

[8] The current position in the Supreme Court in relation to access to court records corresponds to that which obtained in the High Court before search rules were adopted in 1973 and 1974. Consistently with this, it would be open to the Court to delegate to the Registrar the power to determine applications for access to Court records and for the Court, or Judges of the Court, to review such decisions. Alternatively, it is open to the Court to decide that such decisions should be made in the first instance by a Judge. Recently the Court has adopted the latter option.

³ *Mafart v Television New Zealand* [2006] NZSC 33, [2006] 3 NZLR 18 (citations omitted).

[9] Although *Mafart v Television New Zealand* proceeded on the basis that the application in that case to search court records in a long determined criminal case was a civil proceeding, we do not see an application to search Supreme Court records as a “proceeding” within the contemplation of s 27(1) of the Act and thus able be determined only by a court of five Judges. When looked at in context, it is clear that s 27(1) refers to the determination of a substantive appeal. Nor do we see the issue as fitting easily within s 28(1). In the first place, an application for access to court records may well be made after a proceeding has been determined and such proceeding is not easily categorised as being “before the Supreme Court” at the time of application. As well, we would treat the “interlocutory orders” and “interlocutory directions” referred to in s 28(1) as confined to orders addressed to the determination of the proceedings at hand, a proposition which draws some implicit support from s 28(3) (which presupposes that the proceeding to which the order is ancillary will be material to the later determination of the proceeding). As well, if the decision as to access is made by the Registrar acting under delegated authority, such decision is not made pursuant to a power conferred by a rule of Court and is accordingly not within s 28(2).

[10] The approach which the Court proposes to take in relation to access to court records is as follows:

- (a) Applications for access to court records otherwise than by the parties to proceedings should be directed to a Judge.
- (b) A decision by the Registrar on access to Court records made by parties to proceedings is reviewable by a Judge
- (c) There being no rules of court directly applicable, decisions on access will be guided by the rules which apply to access to High Court and Court of Appeal court records.

[11] For the reasons given we conclude that there is no statutory right to seek a review of a decision by a Judge directly determining an application for access to court records or reviewing a decision by a Registrar determining such an application.

Accordingly there is no statutory jurisdiction to review the minute of O'Regan J. His approach was in accordance with the practice which we have described. In these circumstances we see no occasion to review it.