IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA387/2022
[2024] NZCA 435

BETWEEN	ATTORNEY-GENERAL First Appellant	
	REGISTRAR OF THE SUPREME COURT Second Appellant	
AND	VINCENT ROSS SIEMER Respondent	

Hearing:	24 October 2023
Court:	French, Mallon and Wylie JJ
Counsel:	P J Gunn and R E R Gavey for Appellants Respondent in person T C Stephens KC and S A Davies as counsel to assist the Court
Judgment:	11 September 2024 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part:

(a) The ruling that the documents at [15] are inadmissible is set aside. The documents are admissible.

(b) The appeal against the High Court's decision consolidating the proceeding in CIV-2021-485-177 with the proceeding in CIV-2021-404-1955 is dismissed.

B We make no order for costs.

REASONS OF THE COURT

(Given by Mallon J)

Table of contents

Introduction

[1] Pursuant to the Senior Courts Act 2016, a litigant who has commenced two or more proceedings that are "totally without merit" may be made subject to an order preventing them from bringing further civil proceedings without the court's leave.[1] We refer to this as a s 166 order. Mr Siemer is the subject of two applications for such an order. Those applications have been brought by the Attorney-General and the Registrar of the Supreme Court.

[2] The principal issue on this appeal is whether the Attorney-General can adduce court minutes and judgments issued in proceedings commenced by Mr Siemer or his wife as evidence in support of the applications.[2] Duffy J in the High Court determined

---

1 Senior Courts Act 2016, ss 166–169.

2 The Attorney-General seeks admission of both the reasons for the judgment and the judgment made. We therefore use the term "judgment" as including the "reasons for judgment" in this judgment. In this Court, submissions advanced by the Attorney-General are on behalf of the appellants. The appeals are opposed by Mr Siemer and he incorrectly contends that the Registrar of the Supreme Court does not have standing to appeal. He also contends that the Crown is not permitted to run separate, concurrent litigation with overlapping allegations under the same statutory regime. This concern is effectively addressed by consolidation.

that such judgments and minutes were inadmissible.[3] The other issue on this appeal is whether Duffy J erred by consolidating the two applications.

[3] On the principal issue we have concluded that the court minutes and judgments are admissible. We consider the High Court Judge was wrong to find that they were inadmissible under s 50 of the Evidence Act 2006. That section provides that evidence of "a judgment or a finding of fact in a civil proceeding" is inadmissible in another civil proceeding to "prove the existence of a fact that was in issue in the proceeding in which the judgment was given". That is not the purpose for which the judgments and minutes are adduced. Rather they provide an authentic and reliable record of relevant earlier proceedings, the causes of action argued and their outcome, which the judge hearing the applications will review in forming his or her view as to whether a s 166 order should be made.

[4] Similarly, we consider that the Judge was wrong to conclude in the alternative that the court minutes and judgments were inadmissible as hearsay evidence or opinion evidence.[4] The court minutes and judgments are not adduced to prove the truth of their contents. Where those documents express conclusions that the proceedings they concern are without merit, they are not adduced as expert opinion evidence on which the court hearing the Senior Courts Act application is asked to rely. The documents provide the court hearing the application with an authentic and reliable record of the outcome of proceedings against which the court determines whether the criteria for granting an order are met and the order should be made. Nor does any unfair prejudice arise from this.[5]

[5] On the second issue, we have concluded it was open to the Judge to consolidate the proceedings in which the two applications are made. Consolidation was not precluded by the fact that one of the applications was an originating application and the other was an interlocutory application brought against Mr Siemer by the Registrar

---

3 *Attorney-General v Siemer* [2022] NZHC 917 [judgment under appeal]. The application to adduce the court judgments and minutes was filed by the Attorney-General and considered in the judgment under appeal. Leave to appeal was granted to both the Attorney-General and the Registrar of the Supreme Court by Cooke J in the High Court: see *Siemer v Registrar of the Supreme Court* [2022] NZHC 1724 [leave decision].

4 Evidence Act 2006, ss 4, 17 and 23–25.

5 Section 8.

of the Supreme Court. Nor had the Judge overlooked that the Registrar's interlocutory application and the judicial review were ready to be heard but the Attorney-General's application was not. There was an overlap of factual and legal issues that meant consolidation was efficient for the Court and the parties and would ensure that the common issues were dealt with consistently.

[6] We set out below our reasons for the conclusions we have reached. We note that Mr Stephens KC was appointed as counsel to assist the Court on this appeal in view of the fact that the issues raised in the appeal are of practical significance beyond the present case and because Mr Siemer was self-represented.[6] His assistance meant that the Court had the benefit of full submissions in contradiction to the Attorney-General's submissions in addition to the submissions Mr Siemer advanced on his own behalf.

Background

[7] Mr Siemer has been a prolific litigator. In 2016 a general order preventing him from bringing proceedings without the leave of the High Court was made.[7] That order was made under the Judicature Act 1908, the jurisdiction for such an order prior to the enactment of the Senior Courts Act. Under that jurisdiction, a general order could be made if the litigant had persistently and without reasonable excuse instituted vexatious legal proceedings.[8] The order made against Mr Siemer was not subject to a time limit but could be revoked or varied pursuant to the High Court's inherent jurisdiction.[9]

[8] Under the replacement Senior Courts Act jurisdiction an order restricting a person from commencing or continuing a civil proceeding without first obtaining the leave of the High Court can be of a limited, extended or general kind.[10] A limited order can be made if two or more civil proceedings about the same matter are or were

---

6 Mr Stephens was directed to advance arguments in support of the High Court judgment on both aspects of the appeal: see *Attorney-General v Siemer* CA387/2022, 5 April 2023.

7 *Siemer v Attorney-General* [2016] NZCA 43, [2016] NZAR 411 [CA Judicature Act order]. An order was made by the High Court, but this Court expanded the scope of the order on appeal: see *Attorney-General v Siemer* [2014] NZHC 859 [HC Judicature Act order].

8 Judicature Act 1908, s 88B.

9 CA Judicature Act order, above n 7, at [22].

10 Senior Courts Act, ss 166 and 168. A limited order restrains a party on a particular matter, an extended order restrains a party on a particular or related matter, and a general order restrains a party from commencing or continuing any civil proceedings.

totally without merit.[11] An extended or general order can be made if two or more civil proceedings about any matter are or were totally without merit.[12] The order can be made for a period up to three years or for a longer period in exceptional circumstances but no more than five years.[13]

[9] Pursuant to the transitional provisions of the Senior Courts Act the general order made against Mr Siemer under the Judicature Act was treated as if it was made under the Senior Courts Act.[14] This also meant that the general order was treated as being limited to a three-year period and therefore came to an end on 4 March 2019.[15] As a consequence, from that date Mr Siemer was able to commence proceedings without first obtaining the Court's leave and he did so.

[10] One such proceeding was a judicial review application brought against the Registrar of the Supreme Court. This application related to Mr Siemer's request to view the index of a court file which the Registrar declined on the basis that no such index existed. In response to the judicial review proceeding, the Registrar filed an interlocutory application seeking a limited or extended order under the Act (the Registrar's application).

[11] Other proceedings were also brought. On 11 October 2021 the Attorney-General filed an originating application for a general order seeking to restrain Mr Siemer from commencing or continuing any civil proceeding in a senior court, another court, or a tribunal (the Attorney-General's application).[16]

---

11 Section 167(1).
12 Section 167(2) and (3).
13 Section 168(2).
14 Section 186 and sch 5, cl 10(2).
15 *Siemer v Complete Construction Ltd* [2022] NZCA 262 at [31].
16 Mr Siemer unsuccessfully opposed the decision to allow the Attorney-General's application to be commenced as an originating application: *Siemer v Attorney-General* HC Auckland CIV-2021-404-1955, 3 November 2021; and *Siemer v Attorney-General* [2022] NZCA 200.

Attorney-General's application

[12] As amended, the Attorney-General's application relies on five civil proceedings that she says were totally without merit.[17] They are:

(a) 2018: Mr Siemer attempted to commence proceedings against the Ministry of Justice and a Disputes Tribunal referee. As Mr Siemer was still subject to the 2016 general order at this time, he was required to obtain leave. That leave was declined.[18] A substantially similar proceeding was later pursued by his wife, Jane Siemer. This proceeding was also struck out.[19]

(b) 2020: Mr Siemer attempted to commence judicial review proceedings in the Supreme Court against a Deputy Registrar of the Supreme Court. His application for review of the Registrar's decision to refuse to accept the statement of claim for filing was dismissed.[20]

(c) 2020: Mr Siemer attempted to commence two High Court proceedings seeking to quash earlier decisions of High Court judges. Both proceedings were struck out.[21] Mr Siemer's attempt to appeal one of those judgments was dismissed as an abuse of process.[22]

(d) 2021: Mr Siemer attempted to file a judicial review proceeding in the Auckland High Court challenging actions of the Registrar of the Supreme Court. The judicial review proceeding was struck out on the papers.[23] Mr Siemer then filed the same proceeding in the Wellington

---

17 The application also refers to proceedings considered when the earlier order was made under the former Judicature Act jurisdiction. Counsel for the Attorney-General explained that, while these provide relevant background, it is the five civil proceedings that are what he describes as "the candidate proceedings" for the general order that is sought.

18 *Siemer v Ministry of Justice* [2018] NZHC 646.

19 *Siemer v The Attorney-General, for Ministry of Justice* [2018] NZHC 3406.

20 *Siemer v Deputy Registrar of Supreme Court of New Zealand* [2020] NZSC 135.

21 *Siemer v Attorney-General* [2020] NZHC 2581; *Siemer v Attorney-General* [2020] NZHC 2756; and *Siemer v Auckland High Court* [2020] NZHC 3072 [*Siemer v Auckland High Court* (HC)].

22 *Siemer v Auckland High Court* [2021] NZCA 487 [*Siemer v Auckland High Court* (CA)]. Mr Siemer's application for leave to appeal a decision of this Court on security for costs in that proceeding was also declined: see *Siemer v Auckland High Court* [2021] NZSC 120 [*Siemer v Auckland High Court* (SC)].

23 *Siemer v Registrar of the Supreme Court* HC Auckland CIV-2021-404-100, 12 February 2021.

High Court. An application by the Registrar of the Supreme Court to strike out the application as an abuse of process proceeded to a hearing. The Judge struck out the proceeding.[24]

[13] The application seeks a five-year order on the basis that Mr Siemer's history as a vexatious litigant together with his recent litigation indicates that no lesser term than the maximum permitted by law will be effective in restraining his behaviour.

The documents at issue

[14] In support of the application the Attorney-General gave notice pursuant to s 130(1) of the Evidence Act that she proposed to offer in evidence documents contained in a bundle that she filed with the application. These documents included various judgments, minutes, pleadings, applications, affidavits and memoranda relating to Mr Siemer's proceedings.

[15] Mr Siemer opposed the admission of these documents. In the High Court Duffy J partially upheld his opposition.[25] This included declining admission of the nine documents that are the subject of this appeal. These documents and Duffy J's decision on them are summarised in the following table:[26]

Tab	Date	Document
3.	25/11/2019	*Siemer v New Zealand Law Society* [2019] NZHC 3075. Judgment of Palmer J concluding that Mr Siemer did not require leave to file an application for judicial review against the NZLS and a barrister because the Judicature Act order had come to an end but expressing concern that "aspects of [the] claim [were] so troubling that they raise[d] the question of whether Mr Siemer should be restricted from commencing civil proceedings afresh".[27] Duffy J considered that Palmer J's view on the lack of merit in the proceeding was inadmissible under ss 50 and 23 of the Evidence Act.[28]

[24] *Siemer v Registrar of the Supreme Court* [2021] NZHC 1604.
[25] Judgment under appeal, above n 3.
[26] The Tab number refers to the tabs in the bundle the Attorney-General filed and which were adopted by the Judge in the judgment under appeal, above n 3. The Judge also considered that it would be unfairly prejudicial under s 8 of the Evidence Act to admit in evidence the reasons for judgments "for the purpose of simply providing evidence of what was said by the Judges who gave those reasons for judgment": see judgment under appeal, above n 3, at [69].
[27] *Siemer v New Zealand Law Society* [2019] NZHC 3075 at [29].
[28] Judgment under appeal, above n 3, at [98].

Tab	Date	Document
8.	19/04/2018	*Siemer v Ministry of Justice* HC Auckland CIV-2018-404-507, 19 April 2018. Minute of Venning J dismissing Mr Siemer's application for leave to commence a proceeding (Mr Siemer was subject to the order under the Judicature Act) on the basis that it was the same proposed proceeding that Peters J had already declined leave for and stating that the Registry should not have accepted the second application for filing.[29] Duffy J considered the minute was inadmissible under ss 50, 17 and 23 of the Evidence Act.[30]
11.	19/12/2018	*Siemer v Attorney-General* [2018] NZHC 3406. Judgment of Hinton J striking out a judicial review claim brought by Jane Siemer concerning complaints Mr and Mrs Siemer had made against a barrister (the same barrister referred to in Tab 3 above) as not reasonably arguable and also an abuse of process.[31] Hinton J also made an extended order against Mrs Siemer under s 166 of the Senior Courts Act for having brought three proceedings that were totally without merit.[32] Duffy J considered the judgment was inadmissible under ss 50, 17 and 23 of the Evidence Act but the sealed judgment was admissible if it met the test for relevance.[33]
19.	06/03/2019	*Siemer v District Court, North Shore* [2019] NZHC 346. Judgment of Downs J refusing leave for Mrs Siemer to file a judicial review claim against the North Shore District Court and the North Shore Disputes Tribunal.[34] Leave was declined as the proposed claim was not arguable. The Judge commented that it was "all but certain Mr Siemer [was] behind this".[35] Duffy J considered the Judge's conclusion that Mr Siemer was behind the claim was inadmissible under s 50 of the Evidence Act.[36] The judgment was otherwise inadmissible as not relevant as it was not a proceeding brought by Mr Siemer.
20.	28/02/2020	*Re Siemer* HC Auckland CIV-2019-404-844, 28 February 2020. Minute of Palmer J recording that he had invited submissions from the Attorney-General and Mr Siemer about whether he should make a s 166 order but had not received submissions from the Attorney-General and so was not making the order.[37] The Judge said the Attorney-General could separately pursue a s 166 order. Duffy J considered the minute was inadmissible under s 23 of the Evidence Act because it was an opinion by Palmer J about how close Mr Siemer had come to a s 166 order.[38]

29 *Siemer v Ministry of Justice* HC Auckland CIV-2018-404-507, 19 April 2018.
30 Judgment under appeal, above n 3, at [105]–[109].
31 *Siemer v The Attorney-General, for the Ministry of Justice*, above n 19.
32 At [108].
33 Judgment under appeal, above n 3, at [114].
34 *Siemer v District Court, North Shore* [2019] NZHC 346.
35 At [14].
36 Judgment under appeal, above n 3, at [126].
37 *Re Siemer* HC Auckland CIV-2019-404-844, 28 February 2020.
38 Judgment under appeal, above n 3, at [129].

Tab	Date	Document
32.	18/12/2019	*Siemer v Auckland High Court* [2019] NZHC 3393. Judgment of Downs J declining Mr Siemer leave to appeal a decision declining him access to the court files of another litigant (the Judge taking a different view to Palmer J in Tab 3 above as to when the order under the Judicature Act expired).[39] Duffy J considered the judgment was inadmissible under ss 50 and 23 of the Evidence Act.[40]
35.	20/11/2020	*Siemer v Auckland High Court* [2020] NZHC 3072. Judgment of Powell J striking out as an abuse of process a proceeding by Mr Siemer seeking "mandamus" against the High Court and Palmer J in relation to his decision in Tab 20 above and seeking removal directly to the Court of Appeal. Powell J noted that Mr Siemer had unsuccessfully sought to appeal and recall Palmer J's minute.[41] Powell J concluded that the mandamus application was "clearly nothing more than an attempted collateral attack" on the decision of this Court.[42] Duffy J considered the judgment was inadmissible under ss 50, 17 and 23 of the Evidence Act.[43]
36.	24/09/2021	*Siemer v Auckland High Court* [2021] NZCA 487. Judgment of this Court striking out an appeal from Powell J's judgment (Tab 35) on the basis that it was frivolous, vexatious and an abuse of process. The Court noted that the appeal was a collateral attack on this Court's decision in Mr Siemer's attempted appeal from Palmer J's minute (Tab 20) and was also "doomed to fail" because the High Court had no jurisdiction to judicially review its own decisions.[44] Duffy J considered the judgment was inadmissible under ss 50, 17 and 23 of the Evidence Act.[45]
37.	20/09/2021	*Siemer v Auckland High Court* [2021] NZSC 120. Judgment of the Supreme Court declining leave to appeal a decision of Brown J in this Court upholding the Deputy Register's decision that declined to waive security for costs for Mr Siemer's appeal from Powell J's judgment (Tab 35) with the Court quoting Brown J that the appeal was "frivolous, vexatious and an abuse of process".[46] Duffy J considered the judgment was inadmissible under ss 50, 17 and 23 of the Evidence Act.[47]

39 *Siemer v Auckland High Court* [2019] NZHC 3393.
40 Judgment under appeal, above n 3, at [141].
41 *Siemer v Auckland High Court* (HC), above n 21, at [7].
42 At [7].
43 Judgment under appeal, above n 3, at [144].
44 *Siemer v Auckland High Court* (CA), above n 22, at [7].
45 Judgment under appeal, above n 3, at [144].
46 *Siemer v Auckland High Court* (SC), above n 22, at [2], quoting *Siemer v Auckland High Court* [2021] NZCA 194.
47 Judgment under appeal, above n 3, at [144].

Relevant law

Evidence Act

[16] Section 130(1) of the Evidence Act permits a party to give notice that they propose to offer a document as evidence without calling a witness to produce the document. Section 130(2) requires a party who receives such notice, and who wishes to object to "the authenticity of the document" or "to the fact that it is to be offered in evidence without being produced by a witness", to give notice of their objection. Section 130(3) provides:

> (3) If no party objects to a proposal to offer a document as evidence without calling a witness to produce it, or if the Judge dismisses an objection to the proposal on the ground that no useful purpose would be served by requiring the party concerned to call a witness to produce the document,—
>
> (a) the document, if otherwise admissible, may be admitted in evidence; and
>
> (b) it will be presumed, in the absence of evidence to the contrary, that the nature, origin, and contents of the document are as shown on its face.

[17] Section 130 therefore provides a mechanism for adducing documents where there is no issue as to authenticity and no useful purpose would be served by requiring a party to call a witness to produce the document. It is therefore directed at allowing documents to be admitted without having to call evidence proving their authenticity.

[18] A minute or judgment of the Senior Courts, if it is to be adduced as evidence in a proceeding, would be the kind of document where no useful purpose would be served by requiring a party to call a witness to produce the minute or judgment. To be adduced as evidence, however, such documents must nevertheless be otherwise admissible. Duffy J considered that s 50, or alternatively ss 8,[48] 17, or 23, of the Evidence Act rendered the minutes and judgments at issue inadmissible.

---

[48] See the Judge's discussion of s 8, above n 26.

[19] Section 50 of the Evidence Act provides:

> **50 Civil judgment as evidence in civil or criminal proceedings**
>
> (1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.
>
> …
>
> (2) This section does not affect the operation of—
>
> (a) a judgment *in rem*; or
>
> (b) the law relating to *res judicata* or issue estoppel; or
>
> (c) the law relating to an action on, or the enforcement of, a judgment.

[20] The issue under s 50 is whether the documents at issue (the minutes and judgments) are relied on by the Attorney-General "to prove the existence of a fact that was in issue in the proceeding in which the judgment was given".[49] We discuss the background to s 50 and relevant case law below.

[21] Section 17 of the Evidence Act provides that a hearsay statement is not admissible unless it meets the requirements for admissibility under ss 18 or 19, or the Evidence Act provides that the hearsay provisions do not apply and the statement is not otherwise inadmissible. A hearsay statement is defined in s 4(1) as a statement that is made by a person other than a witness and "is offered in evidence at the proceeding to prove the truth of its contents".

[22] Section 23 of the Evidence Act provides that a "statement of opinion" is not admissible in a proceeding, except as provided in ss 24 or 25. Section 24 provides:

> **24 General admissibility of opinions**
>
> A witness may state an opinion in evidence in a proceeding if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.

---

[49] Evidence Act, s 50(1).

[23] Section 25 relevantly provides:

> **25 Admissibility of expert opinion evidence**
>
> (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
>
> (2) An opinion by an expert is not inadmissible simply because it is about—
>
> (a) an ultimate issue to be determined in a proceeding; or
>
> (b) a matter of common knowledge.
>
> …

[24] Section 7 provides that all relevant evidence is admissible unless it is inadmissible or excluded under the Evidence Act or another Act. Evidence is relevant if it has a tendency to prove or disprove anything of consequence to the determination of the proceeding.[50] Section 8 provides that evidence must be excluded if its probative value is outweighed by the risk that it will have an unfairly prejudicial effect on the proceeding or will needlessly prolong the proceeding.

[25] Section 128(2) of the Evidence Act is also potentially relevant.[51] It relevantly provides that "[a] Judge may take notice of facts capable of accurate and ready determination by reference to sources whose accuracy cannot reasonably be questioned".

Background to s 50

[26] Section 50 codifies the common law in relation to the admissibility of a judgment or a finding of fact in a civil proceeding. The seminal case at common law was the decision of the Court of Appeal of England and Wales in *Hollington v F Hewthorn and Co Ltd*.[52] It concerned whether a defendant's conviction for careless driving, in respect of a motor vehicle collision that caused the death of a person, was

---

50 Section 7(3).

51 In granting leave to appeal Cooke J noted that s 128(2) of the Evidence Act was potentially relevant: see leave decision, above n 3, at [10].

52 *Hollington v F Hewthorn and Co Ltd* [1943] KB 587 (CA).

admissible as evidence in a civil proceeding for negligence brought by the deceased's estate against him. The Court held the conviction was not admissible because it was "only proof that another court considered that the defendant was guilty of careless driving", which was irrelevant opinion evidence.[53]

[27] This became known as the rule in *Hollington v Hewthorn*. The authors of *Phipson on Evidence* discuss the rule, which is subject to some exceptions that are not presently relevant, as follows:[54]

> At common law a judgment in personam (whether delivered in civil or criminal proceedings) is no evidence of the truth either of the decision or of its grounds (whether findings of fact or the legal consequences of those findings), between strangers, or a party and a stranger, …

[28] While the rule could have been confined to cases in the criminal jurisdiction, it stood for many years as establishing a much broader proposition.[55] As explained by the authors of *Phipson on Evidence*:[56]

> [T]he reasons for the rule have not always been perceived. Such judgments, when tendered against strangers, are sometimes said to be excluded as opinion evidence sometimes as hearsay; but more commonly on the ground of *res inter alios acta* (or *judicata*) *alteri nocere non debet* (things done (or judgment) between strangers should not affect another party), it being considered unjust that someone should be affected and still more be bound, by proceedings in which he could not make defence, cross-examine or appeal.

[29] The rule in *Hollington v Hewthorn* was the subject of some criticism, particularly in relation to the admissibility of convictions in subsequent civil proceedings.[57] The rule was considered by the Torts and General Law Reform

---

53 At 594–595.

54 Hodge M Malek (ed) *Phipson on Evidence* (20th ed, Sweet & Maxwell, London, 2022) at [43-77] (footnotes omitted).

55 *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321, [2003] 3 WLR 841 at [26].

56 Malek *Phipson on Evidence*, above n 54, at [43-78] (footnotes omitted). Similarly, see J D Heydon *Cross on Evidence* (13th ed, LexisNexis, Sydney, 2021) at [5195]; Richard Glover *Murphy on Evidence* (15th ed, Oxford University Press, Oxford, 2017) at [16.1]; and *Land Securities plc v Westminster City Council* [1993] 1 WLR 286 (Ch) at 289.

57 See, for example: *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961 (CA); *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283 (CA) at 319 per Lord Denning MR; *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 543 per Lord Diplock; *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 (CA) at 702 per Lord Hoffmann; and Geoffrey Palmer "The Admissibility of Judgments in Subsequent Proceedings" (1968) 3 NZULR 142.

Committee of New Zealand in 1972.[58] The Committee recommended that the rule be abolished, subject to certain conditions, in relation to the admissibility of criminal convictions in subsequent civil proceedings, but not in relation to whether judgments in civil proceedings should be admissible in subsequent civil proceedings between different parties as evidence of facts on which they were founded.[59]

[30] In relation to evidence of civil proceedings in subsequent civil proceedings between different parties, the Committee said:[60]

> … [I]f the parties in the previous and the later civil proceedings are the same, the admissibility of the earlier civil judgment (or order) is governed by the doctrine of estoppel per rem judicatam, coupled with the doctrine of issue estoppel. So we are here concerned only with the situation where the parties are different in the subsequent civil proceedings.
>
> An issue of fact in one civil action is seldom the same as an issue of fact in another civil action between different parties. When, exceptionally, it is the same, we agree with the English Law Reform Committee that the finding of the first court should not be admissible in the second action. In civil proceedings "the parties have complete liberty of choice as to how to conduct their respective cases and what material to place before the court. The thoroughness with which their case is prepared may depend upon the amount at stake in the action. We do not think it just that a party to the second action who was not a party to the first should be prejudiced by the way the party to the first action conducted his own case, or that a party to both actions, whose case was inadequately prepared or presented in the first action, should not be allowed to avail himself of the opportunity to improve upon it in the second."

[31] The Committee's recommendations were broadly implemented in the Evidence Amendment Act (No 2) 1980, which abolished the rule in relation to the admissibility of criminal convictions.[61] These provisions were later replaced by ss 47 to 49 of the Evidence Act which provides for convictions to be admissible as proof that a person committed the offence in civil proceedings, defamation proceedings and criminal convictions respectively. Reflecting the Law Commission's view in its work on the Evidence Act that civil judgments or findings of fact should remain

---

58 Torts and General Law Reform Committee of New Zealand *The Rule in Hollington v Hewthorn* (July 1972).

59 At [11], [37]–[38] and [45].

60 At [37]–[38], quoting Law Reform Committee *Fifteenth Report: The rule of Hollington v Hewthorn* (Her Majesty's Stationery Office, Cmnd 3391, September 1967) at 6 (footnote and emphasis omitted).

61 See Evidence Amendment Bill 1979 (93-1) (explanatory note) at vii–ix.

inadmissible to prove the existence of a fact in another proceeding, it recommended the provision that became s 50.[62]

New Zealand case law

[32] The issue that is raised in this appeal was considered in relation to the order made against Mr Siemer under the former jurisdiction. Section 88B of the Judicature Act provided that an order preventing a person from instituting any civil proceeding without leave could be made if, on an application by the Attorney-General, "the High Court [was] satisfied that [the] person [had] persistently and without any reasonable ground instituted vexatious legal proceedings".

[33] As in the present case, pursuant to s 130 of the Evidence Act, the Attorney-General tendered court documents from the various proceedings it relied on in support of its application for an order under s 88B against Mr Siemer. Mr Siemer opposed adducing these judgments, relying on s 50(1) of the Evidence Act. The respective arguments were summarised by the High Court (Ronald Young and Brown JJ) as follows:[63]

> [25] … The submission was that the finding of a judge in a civil proceeding that the proceeding was vexatious is not admissible to show that the particular proceeding was in fact vexatious when instituted. The alleged vexatious litigant is entitled to have the court approach the question, whether a s 88B case is made out, independently and afresh with an open mind based on the evidence called before it.
>
> [26] With that point Mr Powell [counsel for the Attorney-General] did not take issue. He accepted that a finding of fact by an earlier court does not bind a later court on that issue. However he took issue with Mr Ellis' [counsel for Mr Siemer] further proposition that, having chosen not to call any witnesses, the Attorney-General could not rely totally on documentary evidence. Mr Powell's case is that it is open to the Court to come to its own conclusion from the documentary record that the ingredients of s 88B exist in respect of Mr Siemer.

---

62 Law Commission *Evidence: Reform of the Law* (NZLC R55 vol 1, 1999) at 67 and 68; and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 vol 2, 1999) at 140.

63 HC Judicature Act order, above n 7.

[34] The Court was satisfied that the documents should be admitted under s 130 and were "otherwise admissible", explaining that s 50 was not engaged as follows:

> [34] The Attorney-General's case relies upon the content of the documents filed in various proceedings brought by Mr Siemer. This includes a number of judgments where there are findings of fact. The Attorney-General's case, however, does not rely upon any conclusions expressed by the judges in those cases as to the existence of any facts. The Attorney-General does not seek to use any findings of fact in those other proceedings to support these proceedings. For example, in some of those other proceedings judges have said Mr Siemer's proceedings are vexatious. We ignore such a conclusion. It is for us to reach our independent conclusion. We are satisfied s 50 is not engaged by the case as advanced by the Attorney-General.

[35] The Court also rejected Mr Siemer's submission that it was wrong for the Attorney-General to rely exclusively on documentary evidence. The Court noted that s 130 was specifically designed to permit evidence in a case without calling a person to produce the documents.[64] It said the Attorney-General had therefore "produced admissible evidence on which his case will be judged".[65] It went on to note that the Attorney-General had not produced all of the documents in each of the 19 cases that were relevant to the s 88B application.[66] It said that the Attorney-General was entitled to present to the Court the evidence he considered best established his case and Mr Siemer was free to present any documents he considered were relevant that were not produced by the Attorney-General.[67]

[36] The High Court went on to review the documents relied on by the Attorney-General, including reviewing the reasons and outcome in judgments, determining that some of them had not been instituted vexatiously while others had been. It was satisfied that the application should be granted.

[37] Although Mr Siemer appealed to this Court, his grounds of appeal did not include any alleged error in the High Court's approach to the admissibility of the judgments relied on by the Attorney-General.[68] However, this Court did not suggest it had any concern with the High Court's approach to the admissibility of the

---

64 At [35].
65 At [35].
66 At [36].
67 At [37].
68 CA Judicature Act order, above n 7.

judgments. It considered that the requirement under s 88B for a respondent to have "instituted vexatious legal proceedings" was to be interpreted broadly as encompassing not only proceedings that were vexatious from their inception, but also those that become vexatious because of the way they are conducted.[69] It went on to review Mr Siemer's conduct in the period following the High Court order, citing relevant appeal and recall judgments, and finding that he had at an appellate level vexatiously conducted another proceeding and refused to accept the finality of decisions that were adverse to him.[70]

[38] The same approach is evident in this Court's decision in *Mahwinney v Auckland Council* which concerned an application for an extended order under the Senior Courts Act jurisdiction.[71] Although the res judicata or issue estoppel exceptions to s 50 were potentially relevant because the parties to the candidate proceedings and to the application for the extended order were the same, s 50 of the Evidence Act was not discussed at all. Instead the focus was on Mr Mahwhinney's submission that the judgments in the three proceedings on which the High Court Judge had relied in making the extended order were wrong.

[39] In responding to this submission the Court set out the correct approach to determining whether the candidate proceedings were totally without merit, making it clear that the Court could carefully review judgments in the candidate proceedings as follows:[72]

> [64] In our view Mr Mawhinney's argument misconceives the nature and rationale of the s 166 jurisdiction. The correctness or otherwise of the judgments which are the culmination of the candidate proceedings is not the issue. The proper focus is whether the proceeding themselves were so lacking in merit that they were bound to fail.
>
> [65] However … a Judge must be confident that the proceeding was truly bound to fail. Such a conclusion may be possible simply from a consideration of a finding in the judgment in a proceeding where, for example, the basis of the finding is issue estoppel. However in other cases attaining such a state of confidence may necessitate careful consideration of the factual and legal bases

---

69 At [35].

70 At [44]–[45]. The Court dismissed Mr Siemer's appeal and allowed the Attorney-General's cross-appeal, replacing the High Court's more limited order with an order requiring the Court's leave before commencing or continuing any proceeding.

71 *Mawhinney v Auckland Council* [2021] NZCA 144, [2021] 3 NZLR 519.

72 Footnote omitted.

> for the proceeding. The extent of the inquiry required to be undertaken will be necessarily case-dependent.
>
> [66] Section 167 makes clear that it is the Judge determining the issue whether an order should be made who is required to "consider" whether the proceedings are totally without merit. Although in all likelihood that Judge will carefully review the reasoning in the judgments given in the relevant proceedings, the question whether in any particular proceeding the threshold is established is for the consideration of the Judge contemplating making the order.

[40] In the present case, Duffy J did not agree with the approach of Ronald Young and Brown JJ in *Attorney-General v Siemer*.[73] The Judge could not see how the judgments were relevant if they were not relied upon for the proof of facts nor how the opinions of the Judge could bind Mr Siemer. The Judge considered she was not bound by it.[74] The Judge distinguished *Mawhinney* from the rule in *Hollington v Hewthorn* codified in s 50 on the basis that the parties in *Mawhinney* in the s 166 application and the candidate proceedings were the same.[75] The Judge also suggested that the judgments in *Mawhinney* may not have been relied on as evidence but rather the Court was treating them as non-binding legal authorities relevant to the s 166 application.[76] As we have discussed, neither of those grounds was the basis on which this Court considered that the reasons in judgments in the candidate proceedings could be carefully reviewed. The Judge instead placed reliance on the decisions of this Court and the Supreme Court in *Simunovich Fisheries Ltd v Television New Zealand Ltd* and *APN New Zealand Ltd v Simunovich Fisheries Ltd* respectively, as well as a decision of the High Court in 1985 in *Auckland District Law Society v Leary*.[77]

[41] *Simunovich* was concerned with the particulars relied on for a defence of truth and honest opinion in relation to a defamation claim. The plaintiffs alleged that the defendants' publications, which concerned the allocation of fishing quota to catch scampi, said that the plaintiffs were corrupt. The defendant wished to rely on findings about the plaintiffs in previous court judgments. While the judgments could be relied

---

73 HC Judicature Act order, above n 7.

74 Judgment under appeal, above n 3, at [92]–[93].

75 At [76] and [82].

76 At [83].

77 At [56]–[59] and [62]–[63], citing *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 [*Simunovich* (CA)]; aff'd *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 [*Simunovich* (SC)]; and *Auckland District Law Society v Leary* HC Auckland M1471/84, 12 November 1985.

on as a necessary part of the narrative, they could not be relied upon in the way the defendants wished in support of their defences. As the Supreme Court said:[78]

> [33] … Mr Gray QC initially argued that [s 50] does no more than make clear that the Act does not extend the application of the principles of res judicata and issue estoppel. He accepted on reflection, however, that the section goes further, and prevents the introduction of a judgment to prove the existence of a fact that was in issue in the proceeding in which the judgment was given. The plain words of s 50 do indeed make that clear. A finding of fact in other litigation over the allocation of quota for catching scampi cannot be relied upon by the defendants to prove the existence of that fact. The making of the finding can be proved, if the fact of its making is relevant in the later proceeding. But that would not assist the defendants in establishing the defence of truth because, as we have already demonstrated, they are required to establish independently the accuracy of the fact which was the subject of the earlier finding. Section 50 simply reinforces that position.

[42] *Simunovich* is therefore an example of where a party to proceedings sought to rely on findings made in judgments in litigation to which it was not a party to prove the facts in issue in its litigation. It does not assist with whether that is the purpose of the documents at issue in this case.

[43] *Leary* concerned an application by the Auckland District Law Society that Mr Leary be struck off the roll of barristers and solicitors.[79] The Law Society proposed to adduce a transcript of the evidence and the judgment in relation to a judge-alone trial on a charge against Mr Leary of theft of money held in his trust account. Mr Leary's defence on that charge was that the money was in part properly applied in payment of fees due to a Ms Townsend. The trial judge had rejected this defence but Mr Leary was found not guilty on other grounds.

[44] No objection was taken to the admissibility of Mr Leary's evidence from that trial but Hardie Boys J held that the evidence of all other witnesses at the trial was inadmissible hearsay.[80] As to the judgment, the Court said:[81]

> The purpose for which the judgment is produced was said to be twofold: first, by way of background information and out of fairness to Mr Leary to show that he was indeed acquitted; secondly in order to found an argument that an estoppel arose against Mr Leary by virtue of the Judge's finding of fact that no moneys were due by Townsend, as Mr Leary had claimed. Mr Crew very

---

78 *Simunovich* (SC), above n 77.
79 *Auckland District Law Society v Leary*, above n 77, at 1.
80 At 9–10.
81 At 10.

> correctly submitted that the fact that there was an acquittal could have been placed before the Court by way or narrative in an appropriate affidavit and that production of the full judgment was quite unnecessary for this purpose. Indeed except so far as the estoppel point may have validity, the judgment is no more than an expression of opinion that is inadmissible for the purposes of the present proceedings.

[45] This case is an example of the application of the rule in *Hollington v Hewthorn* prior to the enactment of s 50 of the Evidence Act. For completeness, we also note that there has been a series of cases since *Leary* applying s 50 in Law Society disciplinary matters.[82]

[46] In *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal*, for example, Brewer J in the High Court referred to s 50 of the Evidence Act and held that the Lawyers and Conveyancers Disciplinary Tribunal was in error in holding that it was bound by findings of fact made by the courts "unless those facts related directly to Mr Dorbu".[83] The Judge went on to say:[84]

> [38] I do not say that the [Tribunal] should have avoided referring to the Courts' judgments altogether. The Tribunal was entitled to refer to the judgments if they would "assist it to deal effectively with the matters before it". But the judgments were not binding on it.

[47] Although this refers to the statutory power in the disciplinary context to receive evidence that would not be admissible in a court of law, it is evident that the Judge did not regard such use of judgments as infringing the principle in s 50.[85]

[48] Similarly, as this Court said in *Deliu v National Standards Committee of the New Zealand Law Society*, whether judgments can be used as evidence in disciplinary

---

82 See also *Lieven v Complaints Assessment Committee 2103* [2023] NZHC 3040 in which the approach in the legal disciplinary cases discussed below was followed in relation to the Real Estate Agents Disciplinary Tribunal.

83 *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal* HC Auckland CIV-2009-404-7381, 11 May 2011 at [29]–[30].

84 Footnote omitted.

85 Lawyers and Conveyancers Act 2006, s 239(1). Compare this approach with the decision in *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, [2015] 2 NZLR 606 at [80] which regarded s 239(1) as governing s 50 of the Evidence Act and enabling the Court's conclusions contained in any judgments to be given the weight appropriate in the relevant context.

proceedings depends on the use the judgments are being put to in the particular case.[86] This Court said it was well-established that the Tribunal was "not entitled to determine that facts in issue are proved by accepting without inquiry the findings of another court or tribunal as to the existence of those facts".[87]

[49] In that case, Mr Deliu was charged with making false allegations against Judges in correspondence with the Judicial Conduct Commissioner and the Chief High Court Judge, and in applications made in the courts. The judgments the Committee of the Law Society wished to adduce in the disciplinary proceedings were judgments in proceedings that were the subject of Mr Deliu's complaints.[88] This Court found the judgments were therefore relevant to the disciplinary charges and admissible.[89]

Australian case law

[50] Australian courts have considered the issue that is before this Court. The various Uniform Evidence Acts (the Code) contain a provision materially similar to s 50(1) of the New Zealand Evidence Act. That provision relevantly provides:[90]

> **91 Exclusion of evidence of judgments and convictions**
>
> (1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.
>
> …

---

86 *Deliu v National Standards Committee of New Zealand Law Society* [2015] NZCA 399 at [34]. The case was an application for leave to appeal a decision of Thomas J, in which the Judge also affirmed the admissibility of judgments as evidence in the circumstances: *Deliu v National Standards Committee* [2014] NZHC 2739 at [88]–[89].

87 *Deliu v National Standards Committee of New Zealand Law Society*, above n 86, at [34].

88 At [7(e)]. The judgments were adduced under the relevant statutory power to assist the Tribunal to deal effectively with the matters before it: at [34], referring to s 239(1) of the Lawyers and Conveyancers Act.

89 At [35].

90 Australian jurisdictions have largely moved towards harmonisation of the laws of evidence by adopting mirror legislation commonly known as the Uniform Evidence Act. The various Acts have some differences, but s 91(1), quoted here, is identical across the applicable jurisdictions, with the exception of s 91(1) of the Evidence Act 2011 (ACT) which differs in one immaterial respect. See generally: Evidence Act 1995 (Cth), s 91(1); Evidence Act 1995 (NSW), s 91(1); Evidence Act 2001 (Tas), s 91(1); Evidence Act 2008 (Vic), s 91(1); Evidence Act 2011 (ACT), s 91(1); Evidence (National Uniform Legislation) Act 2011 (NT), s 91(1); and Heydon *Cross on Evidence*, above n 56, at [1015] and [5225].

[51] In New South Wales there was a divergence of views as to whether this provision precluded the admission of previous court decisions in the context of an application for a vexatious litigant order. In *Attorney-General of New South Wales v Martin*, Simpson J declined to admit decisions in which courts had held that proceedings were an abuse of process instituted without reasonable grounds.[91] The Judge considered, in relation to many of the judgments at issue, that the findings of the courts were the very facts that the Attorney-General sought to prove in order to establish that the proceedings were vexatious.[92] The Judge recommended legislative amendment to address the "clear case for legislative reform" arising from the operation of s 91 of the Evidence Act 1995 (NSW) in vexatious litigant proceedings.[93]

[52] Schmidt J took a different view in *Attorney-General for the State of New South Wales v Mohareb*.[94] The Judge disagreed with Simpson J's conclusion that a decision that proceedings were vexatious and frivolous, an abuse of process, or did not disclose a reasonable cause of action were "findings of fact" that the Attorney-General sought to prove on an application for a vexatious litigant order.[95] The Judge explained his view as follows:

> [26] The term "finding of fact" is not defined in the Evidence Act. While issues which arise for resolution in particular proceedings will very frequently depend on findings of fact made on the evidence, not every finding made, or conclusion reached on matters in issue involves a finding of fact. In some cases they involve the resolution of questions of law and often, the resolution of questions of mixed fact and law.
>
> [27] As discussed in *Collector of Customs v Agfa Gevaert Ltd* … whether "facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law". So, too, I consider, are questions which arise under Rule 13.4 of the [Uniform Civil Procedure Rules 2005 (NSW)], as to whether particular proceedings either generally, or in relation to any particular claim, are "frivolous or vexatious", or disclose "no reasonable cause of action", or involve "an abuse of the process of the court". If not questions of law they are at least mixed questions of law and fact.
>
> [28] The judgment which [Simpson J] refused to admit was one where in issue was the question of whether proceedings brought in the Land and Environment Court were vexatious and frivolous, had no reasonable cause of action and were an abuse of process. The conclusion which the Commissioner came to, rested on facts found, but the decision was not sought to be tendered

---

91 *Attorney-General of New South Wales v Martin* [2015] NSWSC 1372.
92 At [38]–[39], [65]–[66], [102]–[103], [105]–[106], [112] and [119].
93 At [132]–[133].
94 *Attorney-General for the State of New South Wales v Mohareb* [2016] NSWSC 1823.
95 At [31].

> in the vexatious proceedings in order to prove the existence of facts that were in issue in the Land and Environment Court proceedings.
>
> [29] Rather, the decision was tendered to prove that Mr Martin was a party to the proceedings; that they had been dismissed; that this had been the result of the conclusions reached by the Commissioner, that the proceedings would be vexatious and frivolous if they were to proceed further; that there was no reasonable cause of action; and that they involved an abuse of process.
>
> [30] As found in *Teoh*, decisions of that kind are admissible in proceedings brought under the Vexatious Proceedings Act. Views expressed in such decisions are not binding, but they are relevant to what arises to be decided in proceedings under that Act, not because they are tendered in order to prove the existence of a fact that was in issue in the earlier proceedings, but rather, to establish the fact that the earlier proceedings existed, that the defendant was a party to them, how they were resolved and in some cases, the views the presiding judge expressed on matters which also fall within the definition of "vexatious proceedings". That term is defined in s 6 of the Vexatious Proceedings Act …
>
> …
>
> [31] All of those matters also involve questions of law. They must certainly be decided on facts found, but conclusions reached in the earlier proceedings on those questions are not themselves "findings of fact". ...
>
> [32] That does not render such judgments inadmissible under s 91 of the Evidence Act, in later proceedings, including those brought under the Vexatious Proceedings Act, unless the judgment is sought to be tendered to prove the existence of a fact that was in issue in the earlier proceeding. If tendered to establish the existence of the proceedings, who the parties were and how a question of law, or a question of mixed fact and law, was resolved in those proceedings, s 91 does not render the judgment inadmissible.
>
> …
>
> [34] Conclusions reached in earlier proceedings as to matters which fall into the s 6 definition of "vexatious proceedings" are not findings of fact which are impermissible to rely on in later proceedings brought under the Vexatious Proceedings Act, given the provisions of s 91 of the Evidence Act.

[53] These decisions were discussed by the New South Wales Court of Appeal in a different context in *King v Muriniti.*[96] Although the Court did not have to decide the matter, it noted that Schmidt J in *Mohareb* did not discuss the extent to which s 91 was based on the rules against hearsay statements and opinion evidence.[97] The Court instead suggested that s 91 of the Evidence Act 1995 (NSW) could be viewed as having

---

96 *King v Muriniti* [2018] NSWCA 98, (2018) 97 NSWLR 991. The case concerned whether the Court's findings in judgments about the conduct of proceedings were admissible in determining whether costs should be ordered against a lawyer in those proceedings. The Court ultimately found that s 91 of the Evidence Act 1995 (NSW) was not engaged.

97 At [32].

been impliedly repealed by the Vexatious Proceedings Act 2008 (NSW) in the context of proceedings under that Act.[98] By this time, however, the issue had been resolved in respect of such proceedings by a legislative amendment enabling judgments and findings of fact by a court to be considered when deciding whether to make a vexatious litigant order.[99]

[54] In Victoria, both before the enactment of s 91 of the Code and subsequently, the courts have taken the view that judgments that have found proceedings to be vexatious, an abuse of process or as not disclosing a reasonable cause of action are admissible under the Vexatious Proceedings Act 2014 (Vic). As it was put by McDonald J in the Supreme Court of Victoria in *Attorney-General for the State of Victoria v Garrett*:[100]

> [22] I have concluded that the judgments of Ormiston JA in *Kay* and Ashley J in *Attorney-General (Vic) v Horvath*, *Senior*, although preceding the enactment of s 91 of the Evidence Act, correctly state the test for the admissibility of evidence to be relied upon in an application for a general litigation restraint order. A judge hearing a general litigation restraint order application must make an independent determination of whether an individual has commenced and/or conducted vexatious proceedings. In doing so, a judge is entitled to have regard to court orders and reasons for judgment in proceedings which are relied upon by the applicant for the order. Insofar as judgments and court orders record findings as to the nature of proceedings (such as whether the proceedings should be dismissed as an abuse of process), this is a finding of mixed fact and law. Section 91 does not operate to preclude reasons for judgment and orders in respect of such proceedings from being admitted into evidence in support of an application for a general litigation restraint order.

[55] The Judge placed reliance on the fact that under the Vexatious Proceedings Act 2014 (Vic), a court is able to take into account any matter it considered relevant.[101] A similar view was taken by Wheelahan J in the Federal Court of Australia in *Fokas v Mansfield.*[102] The relevant provision in that case was s 37AO of the Federal Court of

---

98 At [31].

99 At [33], referring to s 8(2)(c) of the Vexatious Proceedings Act 2008 (NSW).

100 *Attorney-General for the State of Victoria v Garrett* [2017] VSC 75, (2017) 51 VR 777 (footnote omitted). The same view has been taken in the Northern Territory, although this conclusion was reinforced by s 7(2)(b) of the Vexatious Proceedings Act 2006 (NT) which expressly provided that the Court may have regard to orders made by any court or tribunal: *Registrar of the Supreme Court v Jenkins* [2019] NTSC 51 at [34]–[35].

101 At [24], referring to s 29(2) of the Vexatious Proceedings Act 2014 (Vic). The Judge considered his conclusion was supported by the legislative history of the Vexatious Proceedings Act, as well as the operation of the common law, which it considered was codified in s 91.

102 *Fokas v Mansfield* [2020] FCA 30.

Australia Act 1976 (Cth) which entitles the court to make an order if a person had frequently instituted or conducted vexatious proceedings. Section 37AO(6) enables the court to have regard to other proceedings, orders made in other proceedings, and the conduct of those proceedings.

[56] The Judge commented:

> [62] A related point arises in circumstances such as those of the present case. One emanation of frivolous, vexatious litigation amounting to an abuse of process which is often found is attempted relitigation: … It would be a surprising result if, in the context of an application for a vexatious proceedings order, the respondent to the application could relitigate those proceedings forming the foundation for the application. It would be even more surprising if a respondent to an application for a vexatious proceedings order could relitigate an earlier finding of attempted relitigation.

[57] The Judge said:

> [66] … The position therefore remains that the question whether other proceedings were vexatious is a question for the Court considering an application under s 37AO, but that s 37AO(6) permits that regard may be had to those other proceedings, including any reasons for judgment in those proceedings, largely in the way explained by Ormiston JA in *Kay*, and by Ashley J in *Horvath*. Section 91 of the Evidence Act is not infringed by relying on orders and reasons for judgment in other proceedings for the purposes of considering whether s 37AO(1) of the Federal Court of Australia Act is engaged. That is because the judgments and orders are not relied upon to prove a fact in issue in those proceedings. Rather, as s 37AO(6) expressly authorises, the judgments and orders may be relied upon to show the outcome of the proceedings, and the course they had taken, and to record the person's conduct of those proceedings for the purposes of characterising those proceedings in order to evaluate whether s 37AO(1) is engaged ...

England and Wales

[58] The issue before us does not arise in England and Wales because of the operation of the vexatious litigant regime in that jurisdiction. A judge who dismisses or strikes out an application because it is totally without merit is required under the Civil Procedure Rules 1998 (UK) to record that fact and this record may be relied upon in an application for a civil restraint order.[103]

---

[103] Civil Procedure Rules 1998 (UK), rr 3.3(7), 3.4(6) and 23.12; and *Sartipy v Tigris Industries Inc — Practice Note* [2019] EWCA Civ 225, [2019] 1 WLR 5892 at [37] and [79].

Discussion

[59] Section 166(1) of the Senior Courts Act provides that the court "may" make an order restricting a person from commencing or continuing a civil proceeding. Section 167 relevantly provides:

> **167 Grounds for making section 166 order**
>
> (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.
>
> (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.
>
> …

[60] Section 169 relevantly provides:

> **169 Procedure and appeals relating to section 166 orders**
>
> (1) A party to any proceeding may apply for a limited order or an extended order.
>
> (2) Only the Attorney-General may apply for a general order.
>
> (3) A Judge of the High Court may make a limited order, an extended order, or a general order either on application (under subsection (1) or (2), as applicable) or on his or her own initiative.
>
> …

[61] It can be seen that, in contrast with the Victorian and Federal Courts of Australia jurisdictions, the Senior Courts Act does not expressly state that a court may have regard to previous proceedings or any matter it considers relevant.[104]

---

[104] Vexatious Proceedings Act 2014 (Vic), s 29(2); and Federal Court of Australia Act 1976 (Cth), s 37AO(6).

Nevertheless, we agree that s 50 of the Evidence Act similarly does not apply to the judgments and minutes relied on in support of the s 166 application for the following reasons.

[62] First, it is clear that s 167(1) to (3) requires a judge to consider whether two or more proceedings were totally without merit and, under s 169(3), the judge may do so of his or her own initiative. The judge is required to make that assessment and in order to do so must review previous proceedings that are or may be the candidate proceedings. It is implicit in the ability of a judge to make an order on his or her own initiative that the judge will have reviewed the candidate proceedings. The judgments in those proceedings that are the culmination of the proceedings must be part of that review. They provide an authentic and reliable record of decisions made in those proceedings. Their authenticity qualifies them for admission under s 130 of the Evidence Act, if otherwise admissible under the Act, and their reliability qualifies them under s 128 of the Evidence Act.

[63] Secondly, as it was put in *Mawhinney*, the correctness or otherwise of the judgments that are the culmination of the proceedings is not the issue.[105] The determination of the threshold issue is the task of the judge hearing the s 166 application and so it is "not appropriate in effect to delegate that decision by simply adopting the assessments of the Judges in the candidate proceedings".[106] This means that a judge hearing a s 166 application is not relying on any facts found in a judgment for the truth of those facts in determining the s 166 application. The judge makes his or her own assessment of the proceedings on the basis of an authentic and reliable record of those proceedings and any other relevant evidence adduced.

[64] This also means that the judgments or minutes are not adduced to prove the truth of their contents.[107] Nor is the judge relying on the conclusions contained in the judgment on matters of law or mixed questions of law and fact as a form of opinion evidence, or as Duffy J put it "hearsay opinion evidence" as the basis for determining the application.[108] Rather the judge will likely "carefully review the reasoning in the

---

105 *Mawhinney v Auckland Council*, above n 71, at [64].
106 At [72].
107 Evidence Act, ss 4(1) definition of "hearsay statement" and 17.
108 Sections 23–25. See judgment under appeal, above n 3, at [98] and [115].

judgments given in the relevant [candidate] proceedings" as an authentic and reliable record of the causes of action argued and their outcome (which can be supplemented by a review of the pleadings, affidavits and applications in those proceedings), but the decision remains one for the judge hearing the s 166 application.[109]

[65] Thirdly, this was also the approach taken under the previous jurisdiction in s 88B of the Judicature Act.[110] The decision of the High Court in *Attorney-General v Siemer*, which addressed s 50, was delivered some two years prior to the introduction of the new regime in the Senior Courts Act.[111] Parliament apparently considered no change in approach was necessary when enacting the Senior Courts Act. Had the approach been considered incorrect or had any concerns been raised about it, it could be expected that the approach would have been considered during the process that led to the introduction of the new regime under ss 166 to 169 of the Senior Courts Act.[112] We see no reason to depart from the approach under the Judicature Act to this issue.

[66] Fourthly, we consider that the primary concerns that underlie s 50 (and the rule in *Hollington v Hewthorn*) are not engaged.[113] Mr Siemer is not a stranger to the judgments that relate to proceedings he has commenced. He was responsible for those proceedings and the conduct of them that led to the conclusions that the courts drew on the judgments in those proceedings. His commencement and conduct of them are directly relevant to the s 166 applications against him.

[67] Fifthly, we do not accept the submission made by and on behalf of Mr Siemer that a court should rely only on the pleadings, applications and affidavits made in the candidate proceedings in determining whether those proceedings were "totally without

---

109 *Mawhinney v Auckland Council*, above n 71, at [66].

110 See the discussion of the decisions in HC Judicature Act order, above n 7, and CA Judicature Act order, above n 7, above at [33]–[37].

111 HC Judicature Act order, above n 7. See the discussion above at [32]–[37]. There are also a number of other decisions considering judgments when determining a s 88B application, see: *Attorney-General v Reid* [2012] NZHC 2119, [2012] 3 NZLR 630; *Attorney-General v Slavich* [2013] NZHC 627; and *Attorney-General v Heenan* [2009] NZAR 763 (HC).

112 See Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, 2012); Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012); Judicature Modernisation Bill 2013 (178-1); *Judicature Modernisation Bill: Report of the Ministry of Justice to the Justice and Electoral Committee* (Ministry of Justice, Wellington, April 2014); Judicature Modernisation Bill 2013 (178-2); and Senior Courts Bill 2016 (178-3A).

113 See in particular the discussion above at [26]–[31].

merit" or that the evidence should be adduced by agreed facts. While agreed facts could be one way of adducing evidence, that is not the only admissible form of evidence. Moreover, seeking to agree the facts with a litigant that the applicant claims issues and conducts proceedings that are without merit could well lead to delay. A judgment (or minute in some instances) provides the court with the nature and context of the proceedings that were before the court and, in many cases, its outcome and the reasons for that outcome. The judge is able to review the outcome and the reasons given in deciding whether the proceedings were totally without merit. If Mr Siemer takes issue with the description of the proceedings in any judgment (or minute), he can do so.[114]

[68] Lastly, we do not accept the submission that the relevance of the judgments is low and their probative value is outweighed by their prejudicial effect. If and to the extent the judgments made findings of fact at issue in the s 166 application (an example may be the finding of Downs J that Mr Seimer was behind the proceedings brought by Mrs Siemer), the judge will not be able to rely on that finding for its truth. If and to the extent that the judgments contain irrelevant material, the judge considering the s 166 application will be able to ignore that irrelevant material — a not uncommon task for a judge in any civil proceeding. We do not see any unfair prejudice in this, let alone any unfair prejudice that would outweigh the relevance of the judgments and minutes.

[69] We therefore allow the Attorney-General's appeal on this ground.

Consolidation

[70] As noted earlier, Duffy J consolidated the judicial review proceedings commenced by Mr Siemer against the Register of the Supreme Court and in which the Registrar brought the interlocutory application under s 166 (CIV-2021-485-177) with the originating application proceedings brought under s 166 by the Attorney-General (CIV-2021-404-1955).

---

[114] Mr Siemer provided an example of this in relation to the Minute of Venning J (Tab 8). Mr Siemer explained that Peters J had struck out the proceeding for a particular reason, he then fixed this issue and refiled the proceeding, and Venning J's minute does not acknowledge this background.

[71] The court's power to consolidate proceedings is set out in r 10.12 of the High Court Rules 2016 as follows:

> **10.12 When order may be made**
>
> The court may order that 2 or more proceedings be consolidated on terms it thinks just, or may order them to be tried at the same time or one immediately after another, or may order any of them to be stayed until after the determination of any other of them, if the court is satisfied—
>
> (a) that some common question of law or fact arises in both or all of them; or
>
> (b) that the rights to relief claimed therein are in respect of or arise out of—
>
> (i) the same event; or
>
> (ii) the same transaction; or
>
> (iii) the same event and the same transaction; or
>
> (iv) the same series of events; or
>
> (v) the same series of transactions; or
>
> (vi) the same series of events and the same series of transactions; or
>
> (c) that for some other reason it is desirable to make an order under this rule.

[72] Rule 10.13 provides that r 10.12 applies even though "the relief claimed in the proceedings is not the same" or one or more of the proceedings is pending in the exercise of the court's admiralty jurisdiction or is brought under the provisions of an Act conferring special jurisdiction on the court.

[73] The Judge consolidated the proceedings in response to Mr Siemer's application seeking to strike out the Attorney-General's application as duplicative of the Registrar's interlocutory application.[115] The Judge recorded that, while Mr Siemer's preference remained for a strike out, he had "responsibly acknowledged that the abusive duplication of process that he complains about can be cured by consolidation of the proceedings".[116]

---

115 Judgment under appeal, above n 3, at [5]–[9].
116 At [8].

[74] The Judge acknowledged that it might not be possible to consolidate an originating application with an interlocutory application in a separate proceeding. But the Judge saw no reason why the two proceedings could not be consolidated so that the originating application could be heard at the same time as the interlocutory application.[117] The Judge noted that procedurally there was little practical difference between the way the two applications would be heard.[118] The Judge accepted Mr Siemer's submission that there were multiple substantial similarities between the two applications.[119] Further, both applicants were public officers who derived their funding for their applications from the same source.[120] The Judge considered there would be efficiencies in the use of court and judicial time and resources as well as the time and resources of Mr Siemer and the Crown Law Office and conversely it would be oppressive if Mr Siemer was required to attend two hearings.[121]

[75] The Judge considered that, if the two hearings were heard together, it might well be that the Registrar's application would be subsumed with the Attorney-General's application. This was because the fact that Mr Siemer had brought multiple judicial review proceedings against the Registrar was one of the planks in the Attorney-General's application.[122] The Attorney-General had not identified any oppression or prejudice to her from consolidation. The Attorney-General's proposal that her application be stayed pending the Registrar's application being heard and determined would still leave open the possibility of two separate applications going to hearing.[123] It could not be assumed that both applications would result in like outcomes.[124]

[76] The Judge concluded:

> [24] It follows that I find the conditions of r 10.12(a) are engaged. In the alternative, I consider the circumstances here fall within r 10.12(c). I see no reason why consolidation rather than ordering the two applications to be tried at the same time cannot be ordered. Once consolidated the Attorney-General's application will be heard together with the Registrar's application. If both are

---

117 At [15].
118 At [16].
119 At [18].
120 At [19].
121 At [20].
122 At [20].
123 At [22].
124 At [23].

> successful, that will bring an end to the judicial review Mr Siemer has filed. If only the Attorney-General's application is successful, that will also bring an end to the judicial review, and if only the Registrar's application is successful that too will bring an end to the judicial review. It is only if both applications are unsuccessful that the judicial review will remain live. These potential outcomes show how the judicial review has essentially been overtaken if not trumped by the interlocutory application the Registrar now brings. They are further reasons why it is best for the two proceedings to be joined and for the Registrar's interlocutory application to be heard with the Attorney-General's application. No harm can come from them being heard together, whereas the problems that can arise if they proceed independently, even with the stay of the Attorney-General's application are as outlined above.

[77] The Attorney-General submits that the consolidation was made so that the interlocutory application could be heard with the originating application but the correct focus should have been on the originating application and Mr Siemer's judicial review proceeding.[125] They were the two "proceedings" for the purpose of r 10.12 and with that focus the Attorney-General says it would have been apparent that there were no common questions of law and/or fact between them. Further, the Attorney-General submits that the Judge failed to take into account that the Registrar's interlocutory application and Mr Siemer's judicial review were both ready to be heard and a hearing of them was scheduled to occur two weeks after the consolidation order was made. The effect of the consolidation order was effectively to prevent the Registrar from pursuing the s 166 application pending resolution of this appeal and the Attorney-General's originating application.

[78] We agree with the submissions of assisting counsel that there is nothing in r 10.12 that limits the broad power in that rule to similarities in the pleaded substantive causes of action.[126] Here there are common questions of law or fact in both proceedings because the judicial review proceedings include the s 166 interlocutory application and both the Attorney-General's application and the Registrar's interlocutory application are capable of determining Mr Siemer's judicial review proceeding. We also agree that there is nothing in r 10.12 that requires an interlocutory

---

125 The Attorney-General accepts that orders under r 10.12 of the High Court Rules 2016 are exercises of discretion to which the approach in *May v May* (1982) 1 NZFLR 165 (CA) at 170 applies. It says the consolidation order was based on errors of law, failed to take into account relevant considerations, and was plainly wrong.

126 As it was said in *Regan v Gill* [2011] NZCA 607 at [10]: "It is difficult to conceive of a wider procedural distinction."

application on one proceeding to be determined before consolidation is jurisdictionally available.[127]

[79] Finally, we also agree that the Judge did consider that the interlocutory application was ready for hearing but the Attorney-General's application was not. The transcript of the hearing shows this was clearly conveyed to the Judge as a reason for not consolidating the proceedings but the Judge was unpersuaded by this point, which led to the Attorney-General proposing that her application be stayed pending the determination of the Registrar's interlocutory application. The Judge rejected the stay proposal because it would still leave open the possibility of two separate applications proceeding to hearing before different judges in different registries and the potential for inconsistent judgments.[128]

[80] We conclude it was open to the Judge to order consolidation. There was an overlap of issues between the two s 166 applications and it was possible that they could bring an end to the judicial review proceeding. It was open to the Judge to give more weight to the efficiencies to the court and the parties from a single hearing than the fact that one of the proceedings was ready for hearing. Moreover, hearing them together would ensure that the common legal and evidential issues were dealt with consistently. We therefore dismiss this ground of appeal.

Result

[81] The appeal is allowed in part:

(a) The ruling that the documents at [15] above are inadmissible is set aside. The documents are admissible.

(b) The appeal against the High Court's decision consolidating the proceeding in CIV-2021-485-177 with the proceeding in CIV-2021-404-1955 is dismissed.

---

127 Compare with *East Quip Ltd (in liq) v Galvanising (HB) Ltd* [2013] NZHC 1503 at [30] which might be read as suggesting otherwise.

128 Judgment under appeal, above n 3, at [23].

[82] We make no order for costs given that both parties had a measure of success and the admissibility of the documents at issue has relevance for other s 166 applications.

[83] Mr Siemer sought reimbursement of his travel expenses on the basis that the appeal has significance for other cases. We decline to order such reimbursement. Mr Siemer appeared on his own behalf. Counsel to assist the Court was appointed because of the wider significance.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Appellants