SUPREME COURT OF QUEENSLAND

CITATION:	*Crown Solicitor v Bird* [2019] QSC 147
PARTIES:	**CROWN SOLICITOR** (Applicant) **v** **GEOFFREY JAMES BIRD** (Respondent)
FILE NO/S:	BS No 4585 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	12 December 2018
JUDGE:	Brown J
ORDER:	**1. It is declared that, pursuant to s 10(1)(a) of the *Vexatious Proceedings Act 2005* (Qld) (the 2005 Act), the respondent was prohibited from commencing the originating application filed 1 May 2018 (BS4585/18), pursuant to s 7 of the 2005 Act, seeking to set aside the vexatious proceedings order made against him on 27 February 2004 (Originating Application), without leave of the Court under s 13(3) of the 2005 Act.** **2. It is declared that, unless leave is granted in respect of the Originating Application, the proceeding is stayed pursuant to s 10(2) of the 2005 Act; and** **3. No order as to costs.**
CATCHWORDS:	PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – VEXATIOUS LITIGANTS AND PROCEEDINGS – where the respondent has been declared a vexatious litigant under the *Vexatious Litigants Act 1981* (Qld) – where order continues in force under the *Vexatious Proceedings Act 2005* (Qld) – where in March 2018 the respondent filed an originating application for leave to bring an application pursuant to s 7 of the 2005 Act – where the Court determined in March 2018 that the respondent did not require leave to serve the application pursuant to s 7 on

the Crown Solicitor – where the respondent then served the application pursuant to s 7 and a supporting affidavit on the Crown Solicitor – where the Crown Solicitor then applied to state a case for consideration by the Court of Appeal as to whether a person subject to a vexatious proceedings order requires leave to bring an application pursuant to s 7 –where the Court then refused the application by the Crown Solicitor and determined that the more appropriate course was for the Crown Solicitor to apply for a declaration that such leave is necessary under r 16 of the *Uniform Civil Procedure Rules 1999* (Qld) – where the Crown Solicitor now applies for a declaration that the respondent was prohibited from commencing the originating application to set aside the vexatious proceedings order against him pursuant to s 7 by s 10 of the 2005 Act – whether an application under s 7 to vary or set aside a vexatious proceedings order is a "proceeding" for which the person the subject of the order requires leave to institute

Acts Interpretation Act 1954 (Qld), s 14A, s 32A

Supreme Court Act 1986 (Vic), s 21

Vexatious Litigants Act 1981 (Qld) s 2, s 5

Vexatious Proceedings Act 2005 (Qld), s 4, s 5, s 6, s 7, s 8, s 10, s 11, s 12, s 13, s 16

Vexatious Proceedings Act 2008 (NSW), s 8, s 9

Attorney General in and for the State of New South Wales v Potier (No 2) [2015] NSWSC 238, considered

Attorney-General v Kay [2005] VSC 426, cited

Attorney-General v Vernazza [1960] AC 965, cited

Balog v Independent Commission Against Corruption (1990) 169 CLR 625, cited

Bhamjee v Forsdick (No 2) [2004] 1 WLR 88, cited

Carr v Western Australia (2007) 232 CLR 138, applied

Conde v Gilfoyle & Anor [2010] QCA 109, considered

Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (1981) 147 CLR 297, cited

COUNSEL:	SA McLeod with MA Eade for the applicant Respondent appeared in person
SOLICITORS:	Crown Solicitor for the applicant Respondent appeared in person

[1] Mr Bird was declared a vexatious litigant by this Court on 27 February 2004.[1] He seeks to have the order declaring him a vexatious litigant rescinded. The question for this Court is whether he needs to seek leave before he is able to apply for the decision to be rescinded or whether he can make such an application without such leave. In the event that leave is required, he seeks a determination of that question.[2] The history of how this matter has come before the Court today is of some relevance and I set out a summary below.

Background

[2] In January 2018, Mr Bird made an application pursuant to s 7 of the *Vexatious Proceedings Act 2005* (Qld) ("the 2005 Act") to set aside the vexatious proceedings order against him. On 6 March 2018, Mr Bird filed an originating application for leave to bring an application under s 7 to set aside the vexatious proceedings order. On 15 March 2018, the Court determined that Mr Bird did not require leave to serve the application on the Crown Solicitor.[3]

[3] Following Mr Bird serving an originating application to set aside the vexatious proceedings order and supporting affidavit on the Crown Solicitor, the Crown Solicitor applied to state a case for consideration by the Court of Appeal as to whether a person subject to a vexatious proceedings order requires leave to apply for the variation or setting aside of the order under s 7 of the 2005 Act. On 29 May 2018, this Court made an order that the Crown Solicitor prepare and file an application to the Court to state a case for the opinion of the Court of Appeal under r 483(2) of the *Uniform Civil Procedure Rules 1999* (Qld) ("the UCPR"), with respect to the aforementioned question. Following the hearing of that application, this Court refused the application on 18 September 2018. The Court determined that if the Crown Solicitor wished to argue leave is necessary, the more appropriate course was for the Crown Solicitor to apply for a declaration to that effect in the proceeding pursuant to r 16 of the UCPR, on the basis that leave was required before the commencement of the proceeding.[4] The Crown Solicitor now applies for a declaration that:

> "…pursuant to s 10(1)(a) of the *Vexatious Proceedings Act 2005* (Qld) (the 2005 Act), the applicant was prohibited from commencing the originating application filed 1 May 2018 (BS4585/18), pursuant to s 7 of the 2005 Act, seeking to set aside the vexatious proceedings order made against him on 27 February 2004

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1 *Lohe v Bird* [2004] QSC 23. The declaration was made pursuant to s 3 of the *Vexatious Litigants Act 1981* (Qld). The order continues in force under the *Vexatious Proceedings Act 2005* (Qld), s 16.

2 See *Re Application by Geoffrey James Bird* [2019] QSC 148.

3 Reasons of Burns J, 15 March 2018.

4 Reasons of Boddice J, 18 September 2018.

(Originating Application), without the leave of the Court under s 13(3) of the 2005 Act…"

[4] Mr Bird submits that he did not consider that he could make an application without leave and does not contend that the Crown is wrong in their construction of s 7 of the 2005 Act, under which leave is required to make an application to rescind an order declaring somebody to be a vexatious litigant. However, the Court having made an order that leave was not required, he contends that order should remain unless overturned by appeal.

Legislation

[5] Section 7 of the 2005 Act provides for the Court to set aside or vary a vexatious proceedings order. Section 7 of the 2005 Act provides as follows:

"(1) The Court may, by order, vary or set aside a vexatious proceedings order.

(2) The Court may make the order on its own initiative or on the application of—

(a) the person subject to the vexatious proceedings order; or

(b) a person mentioned in section 5(1)."

[6] Section 10 of the 2005 Act provides that:

"**10 Vexatious proceedings order prohibiting institution of proceedings**

(1) If the Court makes a vexatious proceedings order prohibiting a person from instituting proceedings, or proceedings of a particular type, in Queensland—

(a) the person may not institute proceedings, or proceedings of the particular type, in Queensland without the leave of the Court under section 13; and

(b) another person may not, acting in concert with the person, institute proceedings, or proceedings of the particular type, in Queensland without the leave of the Court under section 13.

(2) If a proceeding is instituted in contravention of subsection (1), the proceeding is permanently stayed.

(3) Without limiting subsection (2), the Court, or the court or tribunal in which the proceeding is instituted, may make—

(a) an order declaring that a proceeding is a proceeding to which subsection (2) applies; and

(b) any other order in relation to the stayed proceeding it considers appropriate, including an order for costs.

(4) The Court, or the court or tribunal in which the proceeding is instituted, may make an order under subsection (3) on its own initiative or on the application of a person mentioned in section 5(1)."

[7] Section 11 provides for an application for leave to be made and provides for an affidavit to be filed with that application and prescribes its content. The application may be dismissed under s 12 or granted under s 13 of the 2005 Act. Prior to granting the application under s 13, the Court must order the applicant serve each relevant person with the application and affidavit and give them an opportunity to be heard.[5]

[8] The principal question is whether the definition of "institute" and "proceeding" apply to an application under s 7 of the 2005 Act. The 2005 Act defines "institute" and "proceeding" in the following terms:[6]

> "***institute***, in relation to proceedings, includes—
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> (a) for civil proceedings—the taking of a step or the making of an application that may be necessary before proceedings can be started against a party; and
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> (b) for proceedings before a tribunal—the taking of a step or the making of an application that may be necessary before proceedings can be started before the tribunal; and
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> (c) for criminal proceedings—the making of a complaint or the obtaining of a warrant for the arrest of an alleged offender; and
>
> (c) for civil or criminal proceedings or proceedings before a tribunal—the taking of a step or the making of an application that may be necessary to start an appeal in relation to the proceedings or to a decision made in the course of the proceedings.
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> …
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> ***proceeding*** includes—
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> (a) any cause, matter, action, suit, proceeding, trial, complaint or inquiry of any kind within the jurisdiction of any court or tribunal; and
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> (b) any proceeding, including any interlocutory proceeding, taken in connection with or incidental to a proceeding pending before a court or tribunal; and
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> (c) any calling into question of a decision, whether or not a final decision, of a court or tribunal, and whether by appeal, challenge, review or in another way."

[9] The 2005 Act repealed the *Vexatious Litigants Act 1981* (Qld) ("the 1981 Act"). Mr Bird was declared to be a vexatious litigant under the 1981 Act.[7] Section 2(2)(b)(i)-(iii) of that Act excluded certain applications from the definition of "legal proceedings", including applications

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5 *Vexatious Proceedings Act 2005* (Qld), s 13(1)(a)-(b).

6 Schedule to the *Vexatious Proceedings Act 2005* (Qld), Dictionary.

7 *Lohe v Bird* [2004] QSC 23.

to vary or revoke an order declaring a person a vexatious litigant. Therefore, under the 1981 Act, Mr Bird would not have required the Court's leave to apply for revocation of his vexatious litigant declaration.[8]

Contentions by the Crown Solicitor

[10] The Crown Solicitor contends that the preferred construction of sections 7 and 10 of the 2005 Act is that an application pursuant to s 7 of the Act by a person subject to a vexatious proceedings order is a "proceeding" and thus prohibited by s 10, unless the Court has given leave pursuant to s 13.

[11] As I have stated above, Mr Bird does not argue against that construction but relies on the determination by this Court on 15 March 2018 that leave was not required. However, it is for the Crown Solicitor to satisfy me that theirs is the correct construction of the 2005 Act.

[12] In determining that Mr Bird did not require leave the Court stated that:[9]

> "…I have come to the view that leave is not required…
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> As Fraser JA stated in *Conde v Gilfoyle* with reference to the question in that case as to whether the general right of appeal is excluded, if that was the position, one would expect the legislation to make that unmistakably clear. The same observation may be made in relation to the question before me. If it had been the intention of the legislature, to require persons who had been declared vexatious litigants to apply for leave before bringing an application to vary or rescind that order, then it could have – it would be expected, that the legislature would have made that unmistakably clear."

[13] His Honour dismissed the application. His Honour did not have the benefit of submissions from the Crown Solicitor at the hearing of the application, which was heard *ex parte*.

Construction of Legislation

[14] As the Crown Solicitor has identified, two competing constructions are open in interpreting the relevant provisions of the 2005 Act:

(a) Firstly, that an application pursuant to s 7 of the 2005 Act by a person subject to a vexatious proceedings order is a "proceeding" within the meaning of s 10 and requires the Court to first give leave to institute a proceeding pursuant to s 13 of the 2005 Act; and

(b) Secondly, that leave is not required as the definition of "proceeding" and the terms of s 10 do not apply to applications commenced under s 7.

[15] The rules in relation to construction of a statutory provision are uncontroversial. In construing a statutory provision, the Court must prefer the interpretation that would best achieve the

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[8] Cf *Lohe v Mansukhani* [2007] QSC 69.

[9] Reasons of Burns J, 15 March 2018.

purpose of the Act.[10] The Court may have regard to legitimate aids in statutory construction and rules of statutory interpretation.

Purpose

[16] The Crown Solicitor contends that the purpose of the 2005 Act is to restrict vexatious proceedings and thereby:

(a) Protect the Court's processes;

(b) Avoid the unnecessary wastage of the Court's time and resources; and

(c) Protect the community (including any possible defendants or respondents to litigation) from repeated institution of baseless proceedings.

[17] While the Act does not expressly state its purpose, the purpose identified by the Crown Solicitor is supported by the Explanatory Notes to the *Vexatious Proceedings Bill 2005* (Qld) and second reading speech.[11] It is further supported by broad power to make orders under s 6 of the 2005 Act if a party is determined to be conducting vexatious proceedings. The purposes of the Act as outlined above are also supported by:

(a) The requirement for leave to institute proceedings the subject of the vexatious proceedings order under s 10 of the 2005 Act;

(b) The provision in s 10(2) that proceedings instituted without leave are permanently stayed;

(c) The mandatory requirements for matters to be included in affidavit material to accompany an application for leave under s 11; and

(d) Provision being made for relevant parties to be give notice and given an opportunity to be heard before the Court grants leave under s 13.

[18] I find that the above matters identified by the Crown Solicitor do constitute the purpose of the 2005 Act but would add that an additional purpose is to provide safeguards for the rights of a vexatious litigant to access the courts, by providing that he or she may still bring proceedings if he or she meets certain preconditions under the Act and by providing for the setting aside or variation of the vexatious proceedings order.

Matters supporting first proposed construction

[19] The Crown Solicitor identifies a number of matters that support the first construction, under which leave is required, as follows.

[20] First, the definition of "proceeding" in the 2005 Act is broad and encompasses an application commenced pursuant to s 7 by a person the subject of a vexatious proceedings order. Given

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[10] *Acts Interpretation Act 1954* (Qld), s 14A.

[11] In particular see: Explanatory Notes, *Vexatious Proceedings Bill 2005*, p 3.

the width of the definition of "proceeding", that proposition may be regarded as uncontroversial, if the definition applies to s 7.

[21] Secondly, the Crown Solicitor points to the fact that where a term is defined within an Act, it will apply, except so far as the context or subject matter otherwise indicates or requires.[12] The Crown Solicitor contends that the fact an application is caught within the broad definition of a "proceeding" is a powerful factor in favour of a construction that leave is required, which should only be displaced if perceived to be unintended. The Crown Solicitor contends that adopting this interpretation is consistent with the purpose of the Act, which is to protect the Court and the community from groundless proceedings and limit the unnecessary wastage of court time and resources.[13] Given the nature of the legislation and the high threshold that must be met before a vexatious proceedings order is made, the Crown Solicitor contends that the broad interpretation is not unreasonable, arbitrary or capricious. Those factors must, however, be balanced against the fact that the legislation inhibits the freedom of access to the courts by citizens, which has been regarded as a fundamental right, as will be discussed below.

[22] The Crown Solicitor argues that if leave was not required, the purpose of the Act would be frustrated, as the operation of s 10 could be circumvented by a vexatious litigant re-applying to set aside or vary an order and seeking to agitate the same or similar issues that were the subject of earlier vexatious proceedings, or by making such an application as a means of pursuing proceedings for which they would otherwise have to seek leave. The latter course may, however, result in the application not being found to be an application under s 7 of the 2005 Act.[14]

[23] Thirdly, the Crown Solicitor contends that the Explanatory Notes for the *Vexatious Proceedings Bill 2005* (Qld) support an intention that the Act create a broad regime, recognising that the constraint on the right to commence proceedings was justified to prevent actions that "clog the Court system, waste public resources and force defendants to respond and incur expense".[15] The same rationale underlies the Act's prohibition of any right of appeal from a decision refusing leave to institute proceedings because "vexatious litigants, by their nature, take action in any way possible to question the Court's decision regardless of the merits of their position".[16]

[24] Fourthly, the 2005 Act must be "construed on the prima facie basis that its provisions are intended to give effect to harmonious goals".[17] The requirement to obtain leave does not belie the right to make an application to vary or set aside the vexatious proceedings order. The Crown Solicitor contends that s 10 is properly able to limit the effect of s 7 and that if the Court

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[12] *Acts Interpretation Act 1954* (Qld), s 32A.

[13] Explanatory Notes, *Vexatious Proceedings Bill 2005*, p 1.

[14] See, for example: *Re Skyring* [2013] QSC 197 at [9].

[15] Explanatory Notes, *Vexatious Proceedings Bill 2005* (Qld), p 3.

[16] Explanatory Notes, *Vexatious Proceedings Bill 2005* (Qld), p 4

[17] *Project Blue Sky Inc v Australian Broadcasting Commission* (1998) 194 CLR 355 at [70], per McHugh, Gummow, Kirby and Hayne JJ.

had to determine which provision was the more dominant, it should be s 10, which partially delimits the rights of one class of applicants under s 7.

[25] Fifthly, the requirement for leave does not impermissibly curtail a fundamental right, as s 7 specifically recognises that there is a right to seek to set aside or vary the order declaring a person a vexatious litigant and, if there is a proper basis for doing so, leave ought to be given.[18] Thus, the litigant is not deprived of a substantive right. That said, the litigant is subject to a more onerous procedure to prosecute that right.[19]

[26] Sixthly, the Crown Solicitor relies on the fact that the terms of the 2005 Act depart from the 1981 Act, which expressly excluded an application to vary or set aside an order declaring a person to be a vexatious litigant from the definition of "legal proceedings", with the effect that leave was not first required to bring such an application.[20] That change in the 2005 Act is said by the Crown Solicitor to militate in favour of a construction that "proceeding" was intended to encompass a section 7 application made by an individual subject to a vexatious proceedings order.

[27] Finally, the Crown Solicitor contends that while there is no decision directly on point, there are a number of authorities which favour the construction contended for by the Crown Solicitor. In *Hambleton & Anor v Labaj*,[21] White JA (with whom McMurdo P and Cullinane J agreed) commented that "[t]he wide-ranging nature of the Act's reach can be seen from the definitions in the Dictionary". In that regard, her Honour specifically referred to the definitions of "proceeding" and "institute". Further, although *obiter*, her Honour stated that:

> "As is plain, the consequences for a person against whom a vexatious proceedings order is made are serious and onerous. The application for leave casts a significant burden upon such a person seeking to set aside that order."[22]

[28] The words "such a person", in the context of that paragraph, can only be referring to the person who was subject to the vexatious proceedings order. Her Honour's comments suggest that her Honour's view was that leave is required before an application can be pursued under s 7 to set aside the vexatious proceedings order. Although the comment is *obiter*, it of course carries some weight, emanating as it does from the Court of Appeal.[23]

[29] Although the case of *Conde v Gilfoyle & Anor*[24] held that an appeal from a vexatious proceedings order under the 2005 Act was not a "proceeding" within the meaning of the Act, it

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[18] *Attorney-General v Vernazza* [1960] AC 965 at 977, per Lord Denning; see also *Lohe v Mansukhani* [2007] QSC 69 at [50], per Mackenzie J.

[19] *Attorney-General v Vernazza* [1960] AC 965 at 975, per Viscount Simonds.

[20] *Vexatious Litigants Act 1981* (Qld), s 2(2)

[21] [2011] QCA 17 at [21].

[22] [2011] QCA 17 at [21].

[23] McMurdo P and Cullinane J agreeing with her Honour's comments.

[24] [2010] QCA 109.

was due to other considerations identified by Fraser JA that the definition did not apply. Fraser JA commented that, on its face, an appeal was within the plain meaning of the broad definition of "proceeding". However, given the presence of a specific appeal right pursuant to s 69 of the *Supreme Court Act 1991* (Qld) and the fact that an appeal challenges whether an order should be made at all, the Court determined that the 2005 Act did otherwise indicate that the definition of "proceeding" did not apply to such an appeal.

Matters supporting alternative construction

[30] Given Mr Bird was self-represented, the Crown Solicitor identified the matters favouring the construction that leave is not required for an application under s 7 of the 2005 Act.

[31] Firstly, it was not expressly stated that a specific purpose of the 2005 Act was to limit the right of a person who is subject to a vexatious proceedings order from being able to apply to set aside or vary that order without leave being required. Thus, while a requirement for leave may fall within the general purpose of the legislation, that does not necessarily equate to the legislature pursuing the purpose to the fullest extent.[25]

[32] Secondly, while "proceeding" is defined broadly, s 7 is a specific provision without any express procedural limitations. The Explanatory Notes state that the *Vexatious Proceedings Bill 2005* provides balance to the loss or limitation of the right to bring legal actions and in that regard explicitly refer to the Bill providing a person with a vexatious proceedings order against them with the opportunity to apply to the Court to vary or set aside the order.

[33] In that regard, I note that the following passage in the Explanatory Notes is consistent with the definition of "proceeding" and therefore the constraints of leave applying to proceedings against a third party. It states that:

> "The Bill ensures that a person, who is the subject of a vexatious proceedings order, can bring a legitimate legal action, for example, a personal injuries claim. Under the Bill, that person can apply to the Supreme Court for leave to proceed before commencing the action. The Supreme Court will allow such a legal action to proceed if it is not vexatious..."[26]

[34] Thirdly, the right to commence court proceedings has been expressed as a fundamental right protected by the rule of law,[27] which should not be construed as being interfered with by legislation unless made clear. This was a matter referred to by Fraser JA in *Conde v Gilfoyle & Anor*[28] and referred to by Burns J in considering Mr Bird's initial application.[29] Gleeson CJ

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[25] *Carr v Western Australia* (2007) 232 CLR 138 at 142-4.

[26] Explanatory Notes, *Vexatious Proceedings Bill 2005* (Qld), p 3.

[27] See, for example: *Re Attorney-General (Commonwealth) & Anor; Ex parte Skyring* (1996) 135 ALR 29 at 31-32, per Kirby J; *Ramsey v Skyring* (1999) 164 ALR 378 at 389 at [51], per Sackville J.

[28] [2010] QCA 109 at [25].

[29] Reasons of Burns J, 15 March 2018.

confirmed in *Plaintiff S157/2002 v Commonwealth*[30] that the courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless that intention has been clearly manifested by unmistakable and unambiguous language. In that regard, his Honour noted that general words will generally not be sufficient for that purpose. In that respect, where there are two alternative constructions open, one of which interferes with a common law right to a lesser extent than the other, the former is to be preferred.[31]

[35] In the context of the *Vexatious Actions Act 1896* (UK), Scrutton J in *Re Boaler*[32] stated that the language of vexatious litigant legislation must be jealously watched by the courts and should not be extended beyond its least onerous meaning unless justified by clear words.

[36] Fourthly, s 7 is a specific provision in relation to a particular type of application, namely one to set aside or vary a vexatious proceedings order, whereas s 10 is a general provision governing all types of proceeding. Therefore, to the extent s 7 is more specific, it should prevail over the more general provision.

[37] Fifthly, sections 7 and 10 of the 2005 Act bear some similarity to s 21(3) of the *Supreme Court Act 1986* (Vic), under which a vexatious proceedings order may require the vexatious litigant to obtain leave to commence "legal proceedings", and s 21(5) of that Act, under which a Court may vary, set aside or revoke such an order. In the context of that legislation, the approach of the Victorian Supreme Court appears to have been that leave was not required for a vexatious litigant to seek to have that declaration set aside.[33]

Consideration

[38] Only one decision of this Court has touched upon the matter in question, other than the reference in *Hambleton* referred to above. In the case of *Re Skyring,*[34] Mullins J considered an originating application which sought to set aside an order declaring that Mr Skyring was a vexatious litigant. Mr Skyring had sought, in the alternative to that application, leave to issue proceedings. While her Honour considered it was arguable that a person subject to a vexatious proceedings order is not required to bring an application for leave to make an application under s 7 of the 2005 Act in respect of that order,[35] her Honour did not need to decide the matter. Her Honour found that when properly characterised, the application in that case was not an application to vary, set aside or revoke the vexatious proceedings order.

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[30] (2003) 211 CLR 476 at 492 [30].

[31] *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-636, per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; *Federal Commissioner of Taxation & Ors v Smorgon* (1977) 16 ALR 721 at 729, per Stephen J.

[32] [1915] 1 KB 21 at 36.

[33] See for example: *Kay v Attorney-General of Victoria & Anor* [2009] VSC 71 at [5]-[6], per Smith J; *Attorney-General v Kay* [2005] VSC 426 at [5], per Hansen J.

[34] [2013] QSC 197.

[35] At [9], referring to *Conde v Gilfoyle* [2010] QCA 109 at [25].

[39] Fraser JA (with whom McMurdo P and Peter Lyons J agreed) delivered the reasons of the Court in *Conde v Gilfoyle & Anor.*[36] In that case, the Court of Appeal determined that leave was not required before an appeal could be instituted from orders made under s 6(2)(b) of the 2005 Act. The issue in that case was different from the present. It dealt with an appeal from, amongst other orders, orders under s 6(2)(a) of the 2005 Act which stayed six different proceedings and orders under s 6(2)(b) of the 2005 Act which prohibited the appellant from instituting any proceeding without the prior leave of the Court.[37] One of the issues that the Court of Appeal had to consider was whether the appeal was incompetent because Mr Conde had not sought leave from a Judge of the Supreme Court prior to instituting the appeal. In that case it was contended that the breadth of the definitions of "proceeding" and "institute, in relation to proceedings" included an appeal against a section 6(2)(b) order and therefore leave was required under s 13, with the appeal proceedings otherwise permanently stayed.[38]

[40] Fraser JA considered s 32A of the *Acts Interpretation Act 1954* (Qld), noting that it evinces an intention for a more flexible approach to be taken in the application of a statutory definition when interpreting Queensland legislation than would be required under some other interpretation provisions.[39] His Honour therefore considered whether the context and subject matter of ss 6(2) and 10 indicate or require that the definition of the term "proceeding" does not apply to those provisions so as to prohibit an appeal from an order under s 6(2)(b) of the 2005 Act.

[41] In the course of his reasoning, Fraser JA noted that "[t]he freedom of access to the courts by citizens has been regarded as a fundamental right".[40] His Honour considered that an order under s 6(2)(b) erodes that right even though the erosion is limited by the provisions which empower the court to vary or set aside a vexatious proceedings order under s 7, and by the right of the person affected by a vexatious proceedings order to apply for leave to institute a particular proceeding under s 11(2) of the 2005 Act.[41] In his Honour's view, the 2005 Act, which was based on model legislation approved by the Standing Committee of Attorneys-General, "was plainly designed to expand the court's powers to control vexatious litigants".[42] His Honour noted that the considerations which informed such legislation were discussed in *Bhamjee v Forsdick (No 2)*,[43] in which the Master of Rolls noted that the courts' overriding objective of dealing with cases justly can be thwarted by hopeless applications, which are an abuse of process, and further noted that such applications may be oppressive to opponents of

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[36] [2010] QCA 109.

[37] At [5].

[38] At [19]

[39] At [20].

[40] At [25].

[41] At [25].

[42] At [25].

[43] [2004] 1 WLR 88 at 93, per Lord Phillips MR.

the litigation.[44] His Honour considered those considerations could arguably form the rationale for legislation excluding appeals against vexatious proceedings, which finds some support in the breadth of the definitions of "proceedings" and "institute, in relation to proceedings".[45] However, his Honour considered that the context of s 6(2)(b) of the 2005 Act militates against acceptance of the argument.

[42] In particular, his Honour considered that given the general right of appeal under s 69 of the *Supreme Court of Queensland Act 1991* (Qld) from fundamentally important orders such as those made under s 6(2)(b) of the Act, one would expect the legislation to make that unmistakably clear.[46] His Honour further found that the marked contrast between the general words in the 2005 Act and the plain terms used in s 11(6) to exclude a right of appeal where leave is not granted strongly suggests that s 6(2)(b) does not empower orders which are immunised against appeal and subject to a requirement of leave.

[43] Fraser JA agreed with the comments of Mackenzie J in *Lohe v Mansukhani,*[47] including the observation that there is no injustice "if a person who has frequently engaged in litigation which has the characteristics of vexatious proceedings is required to establish, on any subsequent occasion he wishes to litigate, that the proposed litigation is not just more of the same".[48] Fraser JA commented, however, that the question of whether someone had frequently started vexatious litigation is the very issue that a person whose right of free access to the courts was qualified by a vexatious proceedings order would ordinarily wish to challenge on appeal.[49]

[44] His Honour concluded that the context and subject matter of ss 6(2) and 10 indicate that the definition of the term "proceeding" does not apply in such a way that s 10(1) should be construed as prohibiting an appeal against an order made under s 6(2)(b) without leave.[50]

[45] The context and subject matter of s 7 differ from that considered by the Court of Appeal in *Conde v Gilfoyle & Anor* insofar as a vexatious proceedings order has already been made under s 6(2) and the vexatious litigant has had an opportunity to appeal from that order. Thus, there is no scope for challenging whether the order should have been made at all. Seeking to set aside an order under s 7 is not in the nature of an appeal. Insofar as provision is made in s 7 for varying or setting aside a vexatious proceedings order, the purpose of the section is to make it clear that a vexatious proceedings order is interlocutory in character and not a final

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44 At [25]-[26].

45 At [25]-[27].

46 At [27].

47 [2007] QSC 69 at [50]-[51].

48 At [29]-[30].

49 At [30].

50 At [28].

order which can only be interfered with upon appeal.[51] The fact that there is no reference to the person subject to a vexatious proceedings order obtaining leave is consistent with the fact that such an application falls within the definition of "proceeding", making such a reference unnecessary. It is further consistent with the fact that the 2005 Act provides for a broader range of persons who may seek such a variation or setting aside of the order than those mentioned in s 5(1).

[46] Other than the breadth of the definitions of "proceeding" and "institute", the fact that the 2005 Act departs from the *Vexatious Litigants Act 1981* (Qld), in that it does not exclude an application to vary or set aside a vexatious proceedings order from the definition of a "proceeding",[52] strongly favours the application of the definitions to an application under s 7 of the 2005 Act.

[47] In this regard there are some similarities to the amended[53] legislation considered in *R v Bradley (No 1)*.[54] In that case Asche J stated that:

> "When an amending Act alters the language of the principal Statute the alteration must be taken to have been made deliberately: see *D R Fraser & Co Ltd v Minister for National Revenue* [1949] AC 24 at 33. In *R v Price* (1871) 6 LR QB 411 at 416, Cockburn CJ said: 'When the legislature in legislation *in pari materie* and substituting certain provisions in that Act for those which existed in the earlier statute, has entirely changed the language of the enactment, it must be taken to have done so with some intention and motive.'"

[48] In that case, the use of the word "Court" in the amendment of a provision which had previously provided for a jury to determine whether an accused was capable of understanding the proceeding at trial, was found to manifest an intention that the matter was not to be determined by a trial. As with the present case, which deals with the restriction of the fundamental common law right to access the courts, the Court approached the construction with a strong presumption that "a statute or code does not erode the right to trial by jury unless that intention is manifested in the most express and unambiguous terms".[55]

[49] Section 8 of the 2005 Act provides a safeguard if a person who has had a vexatious proceedings order made against them set aside is found within five years of that order being set aside to have instituted or conducted a vexatious proceeding. It authorises the Court in such circumstances to order that the vexatious proceedings order be reinstated. That suggests

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[51] *GRC Crown Law v Mathews*; *Mathews v Corp of the Synod of the Diocese of Brisbane & Ors* [2017] QSC 64 at [10], per Jackson J.

[52] Cf *Vexatious Litigants Act 1981* (Qld), s 2(2)(b).

[53] Notwithstanding that the 1981 Act was repealed as opposed to amended, the Courts will have regard to the history of the legislative scheme in order to work out what the legislation was intended to achieve. See, for example: *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at [12]-[21] per McHugh, Gummow, Hayne and Heydon JJ.

[54] (1986) 40 NTR 6 at 11.

[55] At 13.

leave to apply to set aside or vary is not required, given the provision acts as a safeguard against vexatious proceedings. However, little significance can be attached to that provision, given that an equivalent provision was contained in the 1981 Act and under that Act leave to apply to vary or revoke the order was expressly not required.[56]

[50] If leave is not required to vary or set aside a vexatious proceedings order, the Act does not include any limitation upon such an application being sought by a person otherwise the subject of a vexatious proceedings order.[57] Such a construction would potentially defeat the purpose of the legislation by allowing a vexatious litigant to make an application under s 7 of the 2005 Act within months of the order being made against them, which would at least involve the Crown Solicitor but also potentially some of the persons referred to in s 5(1). While the inherent jurisdiction of the Court to restrict vexatious proceedings has been specifically preserved by s 4 of the 2005 Act, it is of a more limited scope, dealing specifically with proceedings already instituted in the Court.[58]

[51] Reference was made to s 21 of the *Supreme Court Act 1986* (Vic) and decisions in which the Victorian Supreme Court took the approach that leave was not required to bring an application to vary or set aside a vexatious proceedings order, although the Court did not squarely consider the issue.[59] That position has since altered with the introduction of s 65 of the *Vexatious Proceedings Act 2014* (Vic).[60] Section 21(3) of the *Supreme Court Act 1986* (Vic) provides that a vexatious litigant must not, without leave of the Court, continue any legal proceedings in the Supreme Court or inferior courts or tribunals, or commence any legal proceedings in the Supreme Court of Victoria or other specified inferior courts or tribunals. Section 21(5) in contrast authorises the Court to "at any time set aside or revoke an order made under subsection (2) if it considers it appropriate to do so". There is no definition of "legal proceedings" in the *Supreme Court Act 1986* (Vic). The reference to "leave" in s 21(3) and its absence in s 21(5) support a construction that leave is not required in the latter case. Those decisions provide little guidance in the present case given the differences in the legislation and the fact it is a matter which was accepted without discussion in the decisions of the Victorian Supreme Court.[61]

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[56] Section 5.

[57] This is in contrast to the New South Wales legislation discussed below.

[58] *Hambleton & Anor v Labaj* [2011] QCA 17 at [54]-[57], per White JA.

[59] See, for example: *Kay v Attorney-General of Victoria & Anor* [2009] VSC 71 at [5]-[6], per Smith J; *Attorney-General v Kay* [2005] VSC 426 at [5], per Hansen J.

[60] See *Karam v Palmone Shoes Pty Ltd* [2018] VSC 206 at [19], where Ginnane J stated that the introduction of the requirement for leave meant that an applicant must demonstrate reasons why leave should be granted before their application to vary or revoke the order will be fully considered. "Presumably, this higher threshold of having to apply for leave in the first instance is intended to preserve judicial resources that would be otherwise be spent on considering applications to vary or revoke restraint orders, which may involve reconsideration of the applicant's entire litigation history."

[61] See, for example: *Kay v Attorney-General of Victoria & Anor* [2009] VSC 71 at [5]-[6], per Smith J; *Attorney-General v Kay* [2005] VSC 426 at [5], per Hansen J.

[52] McCallum J in *Attorney General in and for the State of New South Wales v Potier (No 2)*[62] determined that an application to vary vexatious proceedings orders by the person the subject of the orders did not require leave under the relevant legislation. Section 9 of the *Vexatious Proceedings Act 2008* (NSW) provides:

> "(1) An authorised court may, by order, vary or set aside a vexatious proceedings order that the court has made.
>
> (2) An authorised court may make the order of its own motion or on the application of:
>
> (a) a person subject to the vexatious proceedings order; or
>
> (b) a person referred to in section 8 (4).
>
> (3) An application may be made by a person referred to in section 8 (4) (e) only with the leave of the authorised court."

[53] The person requiring leave under section 9(3) of the *Vexatious Proceedings Act 2008* (NSW) is a "person who, in the opinion of the court, has a sufficient interest in the matter".[63] Her Honour found that by necessary implication, the imposition of a requirement for leave in such a case should be understood to mean that there is no requirement for leave in the case of an application to vary made by the person against whom the vexatious proceedings order was made. This was conceded on behalf of the Attorney-General.[64]

[54] The fact leave is not required under the New South Wales Act is further supported by the provision in s 9(4) of the *Vexatious Proceedings Act 2008* (NSW) that:

> "An authorised court may decline to consider an application to vary or set aside a vexatious proceedings order made by the person subject to the order if the court is not satisfied that the application is materially different from an earlier application to vary or set aside the same order that was not successful."

[55] That constraint does not exist in the Queensland 2005 Act. The lack of any qualification in the 2005 Act arguably supports "proceeding" and "institute" applying to s 7 such that leave is required to institute such a proceeding and s 11 and s 13 must be complied with if such an order is made.

[56] Like the Queensland Court of Appeal, the New South Wales Court of Appeal has otherwise considered that the breadth of the definitions of "proceeding" and "institute" permits the inference that there has been a conscious attempt by the legislature to be comprehensive as to the proceedings for which leave is required.[65]

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[62] [2015] NSWSC 238.

[63] *Vexatious Proceedings Act 2008* (NSW), s 8(4)(e).

[64] At [9].

[65] See *Potier v State of New South Wales* [2014] NSWCA 359 at [19], per Leeming JA, referring to *Patsalis v State of New South Wales* [2012] NSWCA 307, per Basten JA. The decisions refer to ss 4 and 5 of the

Conclusion

[57] I have considered all of the arguments both for and against each construction identified by the Crown Solicitor. I consider the proper construction is that the definitions of "proceeding" and "institute" apply to an application under s 7 and leave is required under s 13 of the 2005 Act, for the following reasons.

[58] First, the definition of "proceeding" in the 2005 Act is a comprehensive one which would on its literal construction apply to an application under s 7 of the 2005 Act, such that s 10 would prohibit instituting such proceedings without first obtaining leave. The literal construction is consistent with the remedial purpose of the legislation[66] and consistent with providing access to the Courts through legal proceedings if the application is such that the Court is satisfied leave should be granted.

[59] Secondly, while the purpose of the legislation has not been explicitly said to be the removal of a right to seek a variation or the setting aside of the order without first seeking leave, the clear words of the provision together with the broad definitions of "institute" and "proceeding" manifest such an intention, which is consistent with the overall purpose of the legislation to prevent the pursuit of vexatious proceedings which cause wastage of public resources and the harassment and annoyance of defendants in litigation that lacks a reasonable basis. An application to set aside or vary a vexatious proceedings order without a leave requirement would at least require the Crown Solicitor to respond to the application and potentially other relevant persons identified in s 5(1) of the Act.

[60] Thirdly, the expanded breadth of the definition of "proceeding" in the 2005 Act compared with the *Vexatious Litigants Act 1981* (Qld), while maintaining a provision for an application to be made by, *inter alia*, a person the subject of a vexatious proceedings order to vary or revoke that order but not removing it from the leave requirement, strongly suggests a legislative intention that an application under s 7 is not excluded from "proceeding" and s 10 of the 2005 Act.

[61] Fourthly, while recognising that requiring leave infringes upon a fundamental common law right as discussed by Fraser JA in *Conde v Gilfoyle & Anor,* the subject matter and context is different. Unlike an appeal from a vexatious proceedings order which seeks to challenge the very basis of the order, with the right to bring such an appeal supported by s 69 of the *Supreme Court of Queensland Act 1981* (Qld), a vexatious proceedings order is already in place and presumably any appeal would have been dealt with in relation to the making of such an order before the application under s 7 would be made. The subject matter and context of a section 7 application does not otherwise indicate that the definition of "proceeding" should not apply.

Vexatious Proceedings Act 2008 (NSW), which define "proceedings" and "institute" in substantively the same terms as Queensland's 2005 Act.

[66] *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297 at 321, per Mason and Wilson JJ; *Witheyman v Simpson* [2011] 1 Qd R 170 at 188 [42], per Muir JA, referring to *Saraswati v The Queen* (1991) 172 CLR 1 at 21.

[62] Fifthly, while the Explanatory Notes for the *Vexatious Proceedings Bill 2005* (Qld) expressly acknowledge that the right of a person to take legal action over a wrong is an essential common law right, the legislation is specifically directed at prohibiting or limiting the right of a person subject to a vexatious proceedings order to take or continue legal action. The construction favouring leave being required does not, however, wholly take away that fundamental right, insofar as the 2005 Act provides safeguards for any person the subject of a vexatious proceedings order. First, it makes clear that such an order can be varied or set aside and is not to be treated as a final order which can only be varied on appeal. Secondly, the right of appeal from the original order made is not subject to any leave requirement. Thirdly, there is provision for leave to be given for a proceeding which is not a vexatious proceeding. As was said by Mackenzie J in *Lohe v Mansukhani*:[67]

> "A person subject to a vexatious proceedings order who could persuade the Court that there is a legitimate cause of action, properly pleaded, would ordinarily obtain the necessary leave."

[63] While there is no doubt that the procedures that a person subject to a vexatious proceedings order must undertake in order to obtain such leave are burdensome, that is the consequence of a determination that a vexatious proceedings order was justified and the plain construction of "proceedings". This is also consistent with the Explanatory Notes for the *Vexatious Proceedings Bill 2005* (Qld), which stated that the 2005 Act was to "enact new provisions to prohibit or limit legal actions brought by vexatious litigants or persons acting in concert with vexatious litigants".[68]

[64] Sixthly, the fact that the definitions of "proceeding" and "institute" extend to an application to set aside or vary the order has at least been acknowledged by the Court of Appeal in *Hambleton*. The question was left open by the Court in *Skyring*.

[65] Seventhly, while s 7 is in Part 2 of the Act, which may suggest it is not subject to the consequences of a vexatious proceedings order that are stipulated in Part 3, its evident purpose is to ensure that the vexatious proceedings order is not regarded as a final order.

[66] Finally, unlike the position in *Re Boaler,* there is no ambiguity in the language of the statute, which is open to a narrower as opposed to a broader meaning.[69]

[67] Given the comprehensiveness of the definitions of "proceeding" and "institute" and the fact that the original order under s 6(2) may be the subject of appeal without leave being sought, I do not find that the subject matter and context of s 7 on its proper construction together with s 10 indicates other than that the definitions of "proceeding" and "institute" apply to an application to vary or set aside the vexatious proceedings order.

[68] I find that Mr Bird did require leave to issue the originating application.

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[67] [2007] QSC 69 at 50; see also *Attorney-General v Vernazza* [1960] AC 965 at 975 and 977.

[68] Explanatory Notes, *Vexatious Proceedings Bill 2005*, p 1.

[69] [1925] 1 KB 21 at 41.

[69] While Mr Bird had obtained a ruling from this Court that leave was not required and, as a consequence of the actions by the Crown Solicitor, has had the determination of his matter delayed, no estoppel arises from his Honour's determination to dismiss the application for leave on the basis that it was not required, given no order was made.

[70] As the leave application is an *ex parte* application, the Crown was excused from the matter, having made its submissions in terms of whether leave was required, and I will consider it separately.

Relief

[71] The Crown Solicitor seeks:

(a) A declaration that, pursuant to s 10(1)(a) of the *Vexatious Proceedings Act* 2005 (Qld) the applicant [Mr Bird] was prohibited from commencing the originating application filed 1 May 2018 (BS4585/18), pursuant to s 7 of the 2005 Act, seeking to set aside the vexatious proceedings order made against him on 27 February 2004, without the leave of the Court under s 13(3) of the 2005 Act; and

(b) An order, pursuant to r 16(e) of the *Uniform Civil Procedure Rules 1999* (Qld), that orders 1 to 3 of the originating application filed 1 May 2018 be set aside.

[72] There is utility in providing the declaratory relief sought, given the history of this matter and the decision of 15 March 2018 of this Court determining leave was not required, which was disputed by the Crown Solicitor. I will make the declaration accordingly.[70]

[73] Given that the originating application was to be treated as an application for leave in the event that this Court determined that leave was required,[71] and the Court has determined leave is so required, the appropriate order is to declare that unless leave is granted proceeding BS4585 of 2018 is permanently stayed by the operation of s 10(2) of the 2005 Act. Given the originating application is to be treated as an application for leave, it is not appropriate to order that orders 1 to 3 of the originating application should be set aside.

[74] No order should be made as to costs. While the Crown Solicitor has been successful, Mr Bird acted consistently with the determination of this Court on 15 March 2018 in filing the originating application and cannot be properly be responsible for the costs of the Crown Solicitor seeking to have the question of whether leave was required for an application under s 7 of the 2005 Act determined.

Orders

[75] I therefore:

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[70] The Order is made on the basis that for this application the Crown Solicitor is the applicant and Mr Bird the respondent.

[71] Reasons of Boddice J, 21 September 2018.

(a) Declare that, pursuant to s 10(1)(a) of the *Vexatious Proceedings Act 2005* (Qld) (the 2005 Act) Mr Bird was prohibited from commencing the originating application filed 1 May 2018 (BS4585/18), pursuant to s 7 of the 2005 Act, seeking to set aside the vexatious proceedings order made against him on 27 February 2004 (Originating Application), without leave of the Court under s 13(3) of the 2005 Act;

(b) Declare that, unless leave is granted in respect of the Originating Application, the proceeding is stayed pursuant to s 10(2) of the 2005 Act; and

(c) Make no order as to costs.