IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. 9997 of 2006

IN THE MATTER OF an Application pursuant to s 21 of the *Supreme Court Act* 1986

THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA	Plaintiff
v	
BRIAN WILLIAM SHAW	Defendant

JUDGE:	BEACH J
WHERE HELD:	Melbourne
DATE OF HEARING:	10 March 2010
DATE OF JUDGMENT:	17 March 2010
CASE MAY BE CITED AS:	Attorney-General for the State of Victoria v Shaw (No. 2)
MEDIUM NEUTRAL CITATION:	[2010] VSC 73

PRACTICE AND PROCEDURE – Vexatious litigant – Application for leave to commence legal proceedings – Application refused – *Supreme Court Act* 1986, s 21(4).

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	No appearance	
For the Defendant	Mr Shaw in person	

HIS HONOUR:

Introduction

1 Mr Brian Shaw was declared a vexatious litigant in May 2007. As a result, Mr Shaw was prohibited from commencing proceedings in any State Court or tribunal without leave of this Court. Mr Shaw now seeks the leave of this Court to pursue a claim against ten proposed defendants. The claim relates to the by-election held on 13 February 2010 for the seat of Altona. Mr Shaw was one of the eight candidates in the by-election. The proposed defendants against whom Mr Shaw wishes to commence proceedings are the Electoral Commission of Victoria, the Victorian Electoral Commission, the Premier of Victoria and the seven other candidates in the by-election.

Bias

2 At the commencement of the hearing of this application, Mr Shaw applied to have me disqualify myself for bias. The application was made on the basis that my father, as a Judge of this Court, in 2001 refused to make an order permitting Mr Shaw to file originating process. This was said to constitute "grade one" bias. I did not understand this to be an allegation of actual bias. However, if that was the intent of the submission, then I would have rejected it as baseless.

3 The general principle relevant to the disqualification of a judge for reasons of apprehended bias is that a judge should not sit and determine a case if a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.[1] The ordinary duty of a judge is to hear and decide cases regularly invoked in his or her jurisdiction and to which he or she has been assigned. An objection to a judge sitting on the basis of an allegation of apprehended bias should not succeed unless there is a "substantial basis" for concluding that the judge is disqualified by reason of

[1] See generally *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6].

apprehended bias.[2]

4 The fact that a different judge made or refused to make an order in a different matter some years in the past does not give rise to any basis for concluding (let alone a substantial basis for concluding) that a subsequent judge is disqualified by reason of apprehended bias. The fact that the judges are father and son does not alter this proposition. For these reasons, I rejected Mr Shaw's application at the commencement of the hearing that I disqualify myself on the grounds of bias.

The application

5 From his proposed writ, it appears that Mr Shaw, if he was given leave, would issue a proceeding claiming the following relief:

> "1) Leave to File the Writ
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> 2) A declaration that the By-election held 13th February 2010 for the vacant State seat of Altona is a void result, because the result was obtained by Fraud
>
> 3) That the Plaintiff be immediately reimbursed all costs incurred during the course of the By-election at the Victorian Electoral Commission rate of $1.46 per dollar expended
>
> 4) That the criminal aspects both revealed and discovered involving Fraud, Treason and Misprision of Treason, but not limited to these offences be immediately transferred into the criminal Jurisdiction of the Full Court of Victoria for grand Jury process
>
> 5) That all legislation created and enacted contrary to the superior Legislation specifically the Constitution of the Commonwealth of Australia is struck down by virtue of section 109 of such Constitution
>
> 6) Damages against all defendants named, to be determined by a Jury
>
> 7) Liberty to Apply
>
> 8) Costs"

6 Section 21(4) of the *Supreme Court Act* 1986 provides that the application must be refused unless the Court is satisfied that the proposed proceeding is not or will not be an abuse of the process of the Court. The onus rests on Mr Shaw to show that his

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2 Ibid at 348 [19]. See further *Re JRL; ex parte CJL* (1986) 161 CLR 342 at 352.

proposed proceeding will not be an abuse of process.[3] Further, the application should be refused if the Court is of the opinion that the proposed proceeding is "foredoomed to fail".[4]

7 Whilst no particulars of the "fraud", "treason" and "misprision of treason" are provided in the proposed writ, these issues are dealt with, in part, in paragraphs 3, 4 and 5 of Mr Shaw's affidavit sworn 9 March 2010. Paragraphs 3, 4 and 5 provide:

> "**3. <u>Fraud</u>**
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> That, since the election result purportedly won by Jill Hennessy the Labor party candidate, I have elected to challenge not only the result, but the whole structure, based on my written accusation that the whole event and purported result was and remains fraud on the elector, both State and Commonwealth
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> **4. <u>Fraud</u>**
>
> In law the basic substance concerning fraud is the non-disclosure of a material fact; it also includes and contains the removal or denial of a legal right
>
> **5. <u>Treason and Misprision of Treason</u>**
>
> In law the established legal definition relating to Treason is "**Breach of Allegiance**" the twin offence of Misprision of Treason occurs when the actual offence of treason is concealed"

8 Underlying the claim which Mr Shaw seeks leave to bring is an allegation that in enacting the *Courts and Tribunals Legislation (Further Amendment) Act* 2000, the Parliament of Victoria committed an act of treason. The argument in support of this proposition was developed in paragraphs 7 and 8 of Mr Shaw's affidavit sworn 9 March 2010, and then further in argument. Additionally, Mr Shaw contends that this act of treason has been "compounded thereafter by every judicial officer and Court within the State of Victoria. Thereby involving each judicial officer inclusive of the Victorian Police Force in the concealment of such offence (misprision of treason) rolling over into non-disclosure of a material fact (fraud), thereby compounding into a number of criminal offences".

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3 *Phillip Morris Limited v Attorney-General (Vic)* (2006) 14 VR 538, [116].

4 *Phillip Morris Limited v Attorney-General (Vic)* (2006) 14 VR 538, [85].

9 Mr Shaw's affidavits filed in support of his application for leave range over a wide variety of topics. The relevance of many of these topics is not easily discernible. The topics include the original decision declaring Mr Shaw to be a vexatious litigant, the appeal in relation to that decision, the conduct of other judges in other applications, charges initiated by Mr Shaw against more than 50 individuals (including a former President of the Court of Appeal, present and former members of the Court of Appeal, former Directors of Public Prosecutions, a former Prime Minister, a former Leader of the Opposition, a former Governor-General, present and former High Court judges, the Deputy Prime Minister and various present and former politicians and judicial officers), an entity named "Business Unit 19" and an entity described as "Freemasonry Victoria".

10 The deficiencies in Mr Shaw's application are manifest. First, insofar as one can discern any potential cause of action from Mr Shaw's material, there is no evidence before the Court capable of indicating an evidentiary foundation for Mr Shaw's claim.[5] Secondly, on 1 January 2010, the common law procedure of calling a grand jury was abolished.[6] Thirdly, the procedure for challenging the validity of an election is by petition to the Court of Disputed Returns,[7] not by writ. Whilst Mr Shaw has made no attempt to seek leave to invoke this procedure, I should say for the sake of completeness that nothing in the material he relies upon in support of this application suggests that the Court of Disputed Returns would declare the by-election void.[8]

11 Central to the case Mr Shaw wishes to commence is the proposition that notwithstanding ss 253 and 422(2)(a) of the *Criminal Procedure Act* 2009, s 354 of the *Crimes Act* 1958 remains in force, entitling him to require grand juries to be summoned in respect of all of those people against whom he has laid charges. In

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5 Cf *Attorney-General for the State of Victoria v Clemens* (unreported, Supreme Court of Victoria, Hansen J, 24 April 2009), [8].

6 See s 253 of the *Criminal Procedure Act* 2009, which provided for the abolition in terms, and s 422(2)(a), which repealed the former s 354 of the *Crimes Act* 1958.

7 See ss 124 and 133 of the *Electoral Act* 2002.

8 See ss 132(3) and 139 of the *Electoral Act* – but cf ss 140, 151 and 152 of the *Electoral Act*.

support of his argument, Mr Shaw relies upon *Byrne v Armstrong*[9] and an argument that insofar as the *Criminal Procedure Act* purports to repeal s 354 of the *Crimes Act* and/or purports to abolish the grand jury procedure, the *Criminal Procedure Act* is invalid.

12 So far as *Byrne v Armstrong* is concerned, a difficulty for Mr Shaw is that that decision was overruled in *Re Shaw & Anor*.[10] However, Mr Shaw counters by saying that the Court is "estopped" from relying on this judgment (*Re Shaw & Anor*). It is not immediately clear on what basis the Court can be "estopped" from relying upon one of its own decisions – let alone a decision of the Court of Appeal in which five judges sat.

13 So far as the repeal of s 354 of the *Crimes Act* and the abolition of the grand jury procedure is concerned, Mr Shaw contends that the *Criminal Procedure Act* is invalid because it was enacted either by a Parliament that had committed an act of treason or at the behest of an Attorney-General who is himself guilty of treason. Mr Shaw's argument was that the purported repeal of the grand jury procedure was the work of an Attorney-General trying himself to avoid being dealt with by a grand jury. Mr Shaw's argument is without merit. Further, countenancing it would involve a breach of Article IX of the Bill of Rights.[11]

14 At the foundation of Mr Shaw's proposed claim is the proposition that any legislative provision of the State of Victoria or decision of this Court which cuts across the argument he wishes to run is invalid because of some fraud and/or treason and/or misprision of treason. Arguments based upon such a foundation are foredoomed to fail. This, of itself, is a sufficient ground for dismissing Mr Shaw's application.

15 However, as I have already said above, there is no evidence before the Court which could indicate an evidentiary foundation for a successful claim by Mr Shaw. There

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9 (1899) 25 VLR 126.

10 (2001) 4 VR 103.

11 Cf *Holding v Jennings* [1979] VR 289.

being no such evidence before the Court, I am not satisfied that the requirements of s 21(4) have been met. In my view, Mr Shaw's proposed proceeding is foredoomed to fail for this additional reason. Further, far from Mr Shaw establishing that his proposed proceeding will not be an abuse of process, in my view, a proceeding of the kind foreshadowed in which serious allegations are made without any evidentiary foundation would be an abuse of process.

16 For these reasons, Mr Shaw's application must be refused.