SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2010 0028

BRIAN WILLIAM SHAW — Applicant

v

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA — Respondent

JUDGES:	MAXWELL P and BUCHANAN JA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	4 February 2011
DATE OF JUDGMENT:	4 February 2011
MEDIUM NEUTRAL CITATION:	[2011] VSCA 63
JUDGMENT APPEALED FROM:	*Attorney-General for the State of Victoria v Shaw* (Unreported, Supreme Court of Victoria, Beach J, 17 March 2010).

PRACTICE AND PROCEDURE – Vexatious litigant – Application to disqualify judge – No arguable basis for disqualification – Whether leave should be granted to commence proceeding – Whether Court satisfied that proceeding would not be an abuse of process – Contentions unintelligible in law – Applicant does not recognise Court as validly-constituted – Claims not justiciable – Proceeding would be abuse of process – Application for leave to appeal refused – *Supreme Court Act 1986* (Vic) s 21(4).

APPEARANCES:	Counsel	Solicitors

The Applicant in person
No appearance for the Respondent

MAXWELL P:

1 On 17 May 2007, the applicant, Mr Shaw, was declared to be a vexatious litigant, pursuant to s 21 of the *Supreme Court Act 1986* (Vic) ('Supreme Court Act'). Having made that declaration, Hansen J ordered that Mr Shaw be restrained from commencing or continuing any legal proceeding (other than the proceeding of *Shaw & Ors v Frangipani Nominees Pty Ltd*, proceeding number 6890 of 1999) without leave of a judge of the Supreme Court.[1]

2 This is an application for leave to appeal from an order made by Beach J in the Supreme Court on 17 March 2010. On that day, his Honour rejected an application by Mr Shaw for leave to commence a proceeding as a vexatious litigant under s 21(4) of the *Supreme Court Act 1986* (Vic).

3 The relief claimed by Mr Shaw in the proceedings he sought leave to commence included an order 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.

Application to disqualify

4 When the matter was called on for hearing this morning, Mr Shaw made an application that Buchanan JA disqualify himself from sitting. The basis of his application appeared initially to be that his Honour was a member of this Court which, during October 2001, heard and dismissed an application by Mr Shaw[2] to summon a grand jury. It was suggested that this prior involvement could give rise to an apprehension of bias.

5 When, however, Mr Shaw was asked to detail the grounds on which an apprehension of bias, or actual bias, would be sought to be established, he advanced a wide range of propositions about various individuals, different Acts of Parliament,

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1 *Attorney-General for the State of Victoria v Shaw* [2007] VSC 148 (17 May 2007).

2 *Re Shaw* (2001) 4 VR 103

the former Attorney-General, a Master of this court and the former President of this Court. None of the matters raised had any relevance to his application in respect of Buchanan JA.

6 Mr Shaw made a similar application at the commencement of the hearing before Beach J, seeking that his Honour disqualify himself. The application was put on the basis that Beach J's father, as a Judge of the Supreme Court, in 2001 refused to make an order permitting Mr Shaw to file originating process and that this fact gave rise to an apprehension of bias.

7 In rejecting Mr Shaw's application, Beach J noted the following relevant principles:[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.[4] 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 apprehended bias.[5]

8 Those principles are equally relevant to the current application. The fact that Buchanan JA has, as a member of a Court constituted by five judges, joined in a previous decision relating to the kind of proceeding Mr Shaw now seeks leave to commence does not give rise to any arguable basis for asserting apprehended bias.

9 The multifarious other matters referred to have no relevance whatsoever to Buchanan JA. Nothing said on this application disclosed even the remotest suggestion of Buchanan JA having any personal interest in the subject matter of this proceeding. In my opinion, the application for disqualification is wholly without foundation and it is unnecessary to invite Buchanan JA to respond to it.

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3 *Attorney-General for the State of Victoria v Shaw (No 2)* [2010] VSC 73, [3] ('*Shaw (No. 2)*').

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

5 Ibid at 348, [19]. See further *Re J R L; ex parte C J L* (1986) 161 CLR 342, 352.

10 As Mr Shaw doubtless appreciates, if a judge is a friend of a party to a proceeding or has a financial interest in a company which is a participant, that will almost always constitute a disqualifying interest. The judge will step aside in order that there be no perception that he/she might allow the personal interest in the outcome to affect the impartial determination of the case. But, as I have said, there is nothing in anything Mr Shaw said which makes any reference to Buchanan JA, let alone provides a scintilla of a suggestion that he has any personal interest.

11 Accordingly I refuse to entertain the application that his Honour disqualify himself.

The application for leave to appeal

12 Subsection 21(4) of the Supreme Court Act provides:

> (4) Leave must not be given unless the Court, or if the order under subsection (2) so provides, the inferior court or tribunal is satisfied that the proceedings are not or will not be an abuse of the process of the Court, inferior court or tribunal.

13 The Act thus prohibits this Court from allowing a vexatious litigant to commence a new proceeding unless the Court is satisfied that the proposed proceeding is not or will not be an abuse of the process of the Court. It is for the vexatious litigant to persuade the Court that what is proposed will not be an abuse of the process of the Court.

14 One form of abuse of process is commencing a proceeding which has no prospect of success, that is, is hopeless or, as his Honour said, is 'foredoomed to fail'. Where a proceeding has no legal merit whatsoever, it would be a waste of the Court's time to have to deal with it.

15 The reason for that requirement in the Supreme Court Act is obvious enough. A person is declared a vexatious litigant when the Court has been persuaded, on the application of the Attorney-General, that the person has persistently engaged in litigation of a vexatious or hopeless kind. The power to declare a person a vexatious

litigant exists, of course, because the courts must be available to the citizens of the State who have their various legal rights and interests to prosecute and defend. For example, in the case of criminal defendants, they have fair trial rights which they are entitled to assert when they are prosecuted.

16 The courts must be able to place a limit on those who would otherwise take up an unreasonable amount of available Court time. Declaring a person a vexatious litigant is designed to prevent the precious time of the courts of the State being taken up on issues that simply do not justify the time.

17 Beach J concluded, for reasons which his Honour gave, that the proceeding proposed by Mr Shaw was hopeless, that it was without legal merit and was therefore foredoomed to fail. Mr Shaw had failed all together to satisfy him that the proposed proceeding would not be an abuse of process. His Honour came to precisely the opposite conclusion, namely that the proposed proceeding would be an abuse of process and accordingly that he was bound by law to refuse the application.

18 In the course of his application today, Mr Shaw has made lengthy oral submissions as to why there is legal merit in his contentions, such as should have satisfied Beach J, and should satisfy us, that the proposed proceeding will not be an abuse of process.

19 For reasons which follow, none of the matters to which Mr Shaw referred satisfies me, or could have satisfied Beach J, that the proposed proceeding would not be an abuse of process. On the contrary, in my respectful opinion, his Honour was entirely correct, for the reasons which he gave, to conclude that the proposed proceeding would be an abuse of process in the relevant sense.

20 It is important to point out that the characterisation of the proposed proceeding as 'an abuse of process' does not suggest that Mr Shaw is not genuine in his concerns. It is clear enough from the way he presents his argument, both orally and in writing, that he believes passionately in the matters which he argues. Nor does the conclusion imply that Mr Shaw is acting dishonestly or improperly or

deceitfully. The question, quite simply, is whether the proposed proceeding has any legal merit. As I have said, this Court has to focus on those matters which do have merit and not spend time on those that do not.

21 The difficulty (and it is insoluble) is that Mr Shaw and those in court supporting him are very firmly – passionately – of the view that his arguments do have legal merit and, moreover, that this Court should entertain them. That is a problem to which the Supreme Court can provide no solution, as none of the arguments proposed by Mr Shaw has any legal merit at all, and this Court has no jurisdiction to consider the kinds of matters that Mr Shaw wants to ventilate.

22 This is just the latest in a series of rulings by different judges expressing essentially the same view, that the arguments advanced by Mr Shaw are legally unintelligible. His propositions do not engage any of the principles of law which this Court is bound to apply. Applying those rules, Beach J was entirely correct and I would therefore refuse leave to appeal.

23 In his judgment, Beach J referred to the difficulties in Mr Shaw's application, as follows:

> 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".
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> 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. Secondly, on 1 January 2010, the common law procedure of calling a grand jury was abolished. Thirdly, the procedure for challenging the validity of an election is by petition to the Court of Disputed Returns, 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.
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> 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 support of his argument, Mr Shaw relies upon *Byrne v Armstrong* 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.
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> So far as *Byrne v Armstrong* is concerned, a difficulty for Mr Shaw is that that decision was overruled in *Re Shaw & Anor*. 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.
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> 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.[6]

24 In the course of Mr Shaw's submissions this morning, even more fundamental difficulties have emerged which, at least at points in the argument, Mr Shaw himself appeared to acknowledge. Perhaps the most fundamental difficulty is the proposition which underpins all his arguments, that all of the constitutions purportedly in force in Australia – that is, the Commonwealth and State constitutions including the *Constitution Act 1975* (Vic) – are invalid. Indeed, he went so far as to submit that the constitutions are 'shredded on a monthly basis'.

25 If the *Constitution Act 1975* (Vic) is invalid, it follows that this is not a validly–constituted court and, if it is not a valid court, then there is no point in Mr Shaw's being here. That is a fundamental obstacle. The very arguments which Mr Shaw wants to present are arguments which show that the court does not exist, has no valid powers and is comprised of judges who were not validly appointed.

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6 *Shaw (No. 2)*, [9]–[13] (citations omitted).

26 He also said in the course of his submissions something along these lines:

> If you're pooling writs and trading birth certificates, you're not the Supreme Court, you're a branch of the stock exchange.

This statement highlights the inescapable internal contradiction in Mr Shaw's spending time arguing his case before a non-existent court.

27 There are other fundamental difficulties. One of Mr Shaw's arguments concerns legislation in Western Australia, which is said to have affected the way the Crown is recognised in that State. No court in Victoria has any jurisdiction to deal with any matter arising under the Constitution of Western Australia or concerning the status of the Crown in right of Western Australia. Likewise, no Victorian Court has jurisdiction to deal with any matter concerning the validity of election of any person to the Commonwealth Parliament. As pointed out in argument, those are matters for a court of disputed returns.

28 That same point applies, as the judge pointed out, to the Altona by-election in which Mr Shaw was a candidate. He complains that he lost because of fraud. He says, and we have no reason to doubt, that he is $80,000 out-of-pocket because of his participation in that by-election. There is a provision for a court of disputed returns in respect of Victorian parliamentary seats. The difficulty confronting Mr Shaw is that, if he does not accept that the Parliament of Victoria is operating lawfully, then the law which provides for adjudication of disputed returns is itself invalid. These concerns about the validity of the legal framework of the State, and the country, are properly capable of ventilation only in the court of public opinion.

29 Mr Shaw went so far as to say that there was a 'secret government'. Mr Shaw says that the agenda of that secret government is the 'destruction of each State economy and each State government'. He went on to say:

> Something absolutely destructive is happening.

If there was any truth in these assertions, it would be of great concern to citizens. He should be spending his time alerting other members of the community, rather than

two judges who have no power to deal with these matters.

30 A number of other matters were mentioned. The question of freemasonry, which has been a concern of Mr Shaw's for a long time, was mentioned only towards the end of his submissions, in relation to a former officer of this Court. It is of no relevance and certainly gives rise to no matter capable of being litigated in this Court.

31 Mr Shaw concluded with a submission that the only hope for the further prosecution of the concerns he has is before a grand jury. The system of grand juries in Victoria has been abolished, as the primary judge noted. In any event, none of the matters about which Mr Shaw is campaigning – and it is, after all, a campaign – would be proper for a grand jury. These are matters for the court of public opinion. They are not matters that can conceivably be dealt with in any court in Victoria.

BUCHANAN JA:

32 I agree that the application for leave to appeal should be dismissed for the reasons stated by the President.

MAXWELL P:

33 The order of the Court is application refused.

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