[2006] WASCA 231

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	SHAW -v- JIM McGINTY in his capacity as ATTORNEY GENERAL & ANOR [2006] WASCA 231
CORAM	**:**	STEYTLER P WHEELER JA BUSS JA
HEARD	**:**	6 APRIL 2006
DELIVERED	**:**	6 NOVEMBER 2006
FILE NO/S	**:**	CACV 83 of 2005
BETWEEN	**:**	BRIAN WILLIAM SHAW Appellant AND JIM McGINTY in his capacity as ATTORNEY GENERAL First Respondent DAMIAN BUGG in his capacity as COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS Second Respondent

ON APPEAL FROM:

Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	MCKECHNIE J
Citation	**:**	SHAW -v- ATTORNEY GENERAL FOR THE STATE OF WESTERN AUSTRALIA & ANOR [2005] WASC 149
File No	**:**	CIV 1128 of 2005

Catchwords:

Appeal - Procedure - Vexatious litigant - *Vexatious Proceedings Restriction Act 2002* (WA) - Interlocutory order

Judiciary Act 1903 (Cth) - s 78B notices - *Inter se* issue frivolous - Unarguable constitutional issue

Legislation:

Judiciary Act 1903 (Cth), s 39(2), s 78B
Supreme Court Act 1935 (WA), s 60(1)(f)
Vexatious Proceedings Restriction Act 2002 (WA), s 3, s 4, s 6(1)

Result:

Leave to appeal refused

Category: A

Representation:

Counsel:

Appellant	:	In person
First Respondent	:	Mr R M Mitchell
Second Respondent	:	Mr D W L Renton

Solicitors:

Appellant	:	In person
First Respondent	:	State Solicitor
Second Respondent	:	Commonwealth Director of Public Prosecutions

Case(s) referred to in judgment(s):

Attorney General v Michael [1999] WASCA 181
Attorney General v Shaw [2004] WASC 280
Casella v Bradshaw Judd & Collins Pty Ltd, unreported; SCt of WA; Library No 970717; 22 October 1997
Commonwealth Bank of Australia v Heinrich (No 2) [2003] SASC 436
Crown Solicitor for the State of Western Australia v Michael, unreported; SCt of WA; Library No 980425; 30 July 1998
D'Esterre v Austplat Minerals NL (In liq) (1991) 4 WAR 548
Forge v Australian Securities and Investments Commission [2006] HCA 44
Glennan v Commissioner of Taxation [2003] HCA 31; 77 ALJR 1195
Kay v Attorney-General [2000] VSCA 176; (2000) 2 VR 436
Lamac Developments Pty Ltd v Devaugh Pty Ltd [2002] WASCA 245; (2002) 27 WAR 287
Nikolic v MGICA [1999] FCA 849
R v Lord Chancellor; Ex parte John Witham [1997] EWHC Admin 237; [1998] QB 575
Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue [2001] HCA 49; (2001) 207 CLR 72
SCM v Saipem (1991) 4 WAR 569
Shaw v Attorney General for the State of Western Australia [2005] WASC 149
West Australian Newspapers Pty Ltd v Nationwide News Pty Ltd (1991) 4 WAR 554

Case(s) also cited:

Attorney-General for the State of Victoria (At the relation of Black) v The Commonwealth of Australia (1980) 146 CLR 559
Attorney-General for the State of Western Australia v Marquet [2003] HCA 67; (2003) 217 CLR 545
Australian Securities and Investments Commission v Edensor Nominees Pty Ltd [2001] HCA 1; (2001) 204 CLR 559
Barton v Walker [1979] 2 NSWLR 740
Byrne v Armstrong (1899) 25 VLR 126
Chun Teong Toy v Musgrove (1988) X ALT 60; (1988) 14 VLR 349
Commonwealth Bank of Australia v Ridout [2004] WASC 136
Dey v Victorian Railways Commissioners (1949) 78 CLR 62
Flint v Webb (1907) 4 CLR 1178
Harrison v Schipp [2002] NSWCA 78; (2002) 54 NSWLR 612
Johnson v Johnson [2000] HCA 48; (2000) 201 CLR 488
Julius v Bishop of Oxford (1880) 5 App Cas 214
Livesey v The New South Wales Bar Association (1983) 151 CLR 288
MacLeod v Australian Securities and Investments Commission [2002] HCA 37; (2002) 211 CLR 287
Nelungaloo Pty Ltd v The Commonwealth (1951) 85 CLR 545
Northern Australian Aboriginal Legal Aid Service Inc v Bradley [2004] HCA 31; (2004) 218 CLR 146
Pirrie v McFarlane (1925) 36 CLR 170
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589
R v McInnes, Erskine & Calwell [1940] VLR 416
R v Parker [1977] VR 22
R v Smith (1995) 1 VR 10
R v Watson; Ex parte Armstrong (1976) 136 CLR 248
Re Austin; Ex parte Schofield (1953) 53 SR (NSW) 163
Re Hamilton-Byrne [1995] 1 VR 129
Re The Governor, Goulburn Correctional Centre; Ex parte Eastman [1999] HCA 44; (1999) 200 CLR 322
Ridout Nominees Pty Ltd v Commonwealth Bank of Australia [2003] WASCA 158
Samad v District Court of New South Wales [2000] NSWCA 344; (2000) 50 NSWLR 270
The Commonwealth of Australia v The Hospital Contribution Fund of Australia (1981) 150 CLR 49
The Commonwealth v Bank of New South Wales (1949) 79 CLR 497
The Commonwealth v Kreglinger & Fernau Ltd [1926] VLR 310
Wilson v Metaxas [1989] WAR 285

1 **STEYTLER P**: I agree with Wheeler JA.

WHEELER JA:

The application - history

2 The background to this matter is to be found set out in careful and detailed reasons of Commissioner Braddock SC delivered 23 December 2004 (***Attorney General v Shaw*** [2004] WASC 280). The learned Commissioner in those reasons, in turn referred in [1] to three earlier decisions of this Court which provided some explanation of the way in which the appellant originally came to be involved in legal proceedings in this State. I accept the learned Commissioner's summary of the proceedings to date as accurate, and do not repeat it here.

3 For the reasons which she gave, on 23 December 2004, the Commissioner made orders pursuant to the *Vexatious Proceedings Restriction Act 2002* (WA) ("the Act"), which relevantly provided:

> "2. No legal proceeding shall be instituted by Brian William Shaw or any person acting on behalf of Brian William Shaw in the State of Western Australia in the Supreme Court or in any inferior court or tribunal, unless Brian William Shaw shall first obtain the leave of the Supreme Court, or inferior court or tribunal (as the case may be) pursuant to section 6 of the *Vexatious Proceedings Restriction Act 2002*.
>
> 3. The whole of any proceedings that have been instituted by Brian William Shaw in the Supreme Court, or in any inferior court or tribunal in Western Australia, or that part of any current proceedings in the Supreme Court, or in any inferior court or tribunal in Western Australia in which Brian William Shaw is a party, be stayed."

4 The appellant then applied for leave to appeal the decision of Braddock C. That application was heard by McKechnie J on 28 June 2005 and was refused for reasons which his Honour then gave (***Shaw v Attorney General for the State of Western Australia*** [2005] WASC 149). All parties before his Honour accepted that leave was necessary pursuant to s 3 and s 6(1) of the Act.

5 The appellant then filed a notice of appeal against McKechnie J's decision. The notice of appeal filed by the appellant asserts that leave to

appeal from that decision is needed pursuant to the Act. The appellant made no submissions in relation to the question of leave. However, counsel for the first respondent helpfully brought to our attention authorities in other jurisdictions bearing upon the question of whether leave was required.

Whether leave required

6 The first question is whether leave is required pursuant to the Act. If it is, the next question is, in respect of an appeal, to whom an application for leave should be made.

7 The Act defines "to institute proceedings" as including "the taking of a step or the making of an application which may be necessary to commence an appeal in relation to the proceedings" and defines "proceedings" as including "an appeal from a decision or determination, whether or not a final decision or determination, of a court … ". Section 4 of the Act permits the Court to make an order staying "any proceedings", or prohibiting a person from "instituting proceedings". It can be seen that the orders made by Braddock C are of both kinds; that is, they prohibit the appellant from instituting legal proceedings in the State and they stay proceedings currently instituted.

8 On their face, the definitions of "institute proceedings" and "proceedings" are wide enough to encompass an appeal from the very proceedings in which the order pursuant to s 4 of the Act was made. However, it would be an odd result if a right to appeal were intended to be able to be restricted by the very order a litigant seeks to appeal.

9 Provisions very similar to those in question here were considered by the Court of Appeal in Victoria in ***Kay v Attorney-General*** [2000] VSCA 176; (2000) 2 VR 436. It is relevant to note that that decision was delivered in September 2000, and so predated the passing of the Act in this State. The applicable provisions there were s 21(2) and s 21(3) of the *Supreme Court Act 1986* (Vic) which empowered the Supreme Court to declare a person to be a vexatious litigant, and to order that the vexatious litigant not continue or commence any legal proceedings without leave of the Court. Section 17 of that Act provided for a right of appeal from any determination of the trial division of the Supreme Court constituted by a Judge, unless otherwise expressly provided. Section 17A(4)(b) required that leave be sought to appeal from an order in an interlocutory application. Comparing the Victorian provisions with those in this State, s 21 was similar to s 4 of the Act, while s 17 was somewhat similar in its effect to s 58 and s 60 of the *Supreme Court Act 1935* (WA).

10 One potentially relevant statutory difference is that s 58 of the *Supreme Court Act 1935* (WA) confers jurisdiction on the Court of Appeal "subject as otherwise provided in this Act and to the rules of court", but does not contain the expression "unless otherwise *expressly*" provided (emphasis supplied), which is contained in s 17. The word "expressly" in s 17 may have the effect that not even necessary implication will exclude the jurisdiction of the Court of Appeal of Victoria (see ***Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue*** [2001] HCA 49; (2001) 207 CLR 72, at [11]). However, that expression was not considered to be decisive in ***Kay v Attorney-General***, and I would not regard it as sufficient in this case to distinguish ***Kay***.

11 In ***Kay***, Chernov JA, with whom Ormiston and Batt JJA agreed, expressed his conclusions about the proposition that the effect of an order pursuant to s 21 of the *Supreme Court Act* (Vic) might be to require leave before an appeal against that decision could be instituted, in the following way:

> "The purpose of s 21(3) is to empower the court to make the orders contemplated by it so that practical effect may be given to the declaration made under s 21(2) that the person in question is a vexatious litigant. Thus, the restraining orders that are made under that provision give content to the order made under s 21(2). But the power to make the restraining orders under s 21(3) is predicated upon there being in existence a valid order made under s 21(2) declaring the person to be a vexatious litigant. Put another way, s 21(3) operates on the assumption that the order made under s 21(2) is a valid order.
>
> Consequently, s 21(3) is concerned with restraining orders in respect of proceedings *other* than those which seek to attack the validity or correctness of the orders made under s 21(2), such as proceedings which are extant at the date of the order, including those in respect of which an appeal may be contemplated, as well as proceedings which the vexatious litigant may seek to bring in the future. But, as I have said, the subsection is not concerned with an appeal which challenges the validity or correctness of the s 21(2) order."

12 His Honour also noted that the effect of requiring leave pursuant to s 21(3), coupled with the effect of s 17A, would be that there would be potentially a multiplicity of interlocutory proceedings seeking leave to

appeal in which it was possible that the real issue - the correctness or otherwise of the order restraining further proceedings - might never come before the Court of Appeal. His Honour doubted that the Act was intended to operate in that way.

13 I note that the power to make an order pursuant to s 4 of the Act is not preceded or conditioned by a "declaration" that a litigant is vexatious. To that extent, the Victorian provisions are different. However, it does require that the Court is "satisfied" of one of the matters set out in s 4(1)(a) or (b). That decision must, of course, be made on evidence capable of demonstrating that the statutory criteria are met. In substance, the statutory schemes should not, in my view, be regarded as relevantly different.

14 I accept, as counsel for the first respondent pointed out, that the observation that the power to make a restraining order pursuant to s 21 was predicated on there being a "valid order" is an unusual way of referring to the decision of a superior court, which has jurisdiction to determine its own jurisdiction and the orders of which are valid unless and until set aside. It may be that there was, as the first respondent submits, some straining of the statutory language to reach the conclusion arrived at by Chernov JA. However, the first respondent also fairly and properly conceded that, in the light of the structural and practical matters referred to by Chernov JA, it might well be appropriate to read the broad definition of "proceeding" in s 4 of the Act as implicitly excluding an application for leave to appeal against an order made pursuant to s 4 itself or, put another way, as impliedly referring only to "proceedings" other than the very proceeding in which the s 4 order was made.

15 There is considerable force in the structural and practical matters referred to by Chernov JA in ***Kay***. Further, as a matter of general principle, it is appropriate that a decision of the Court of Appeal of another State should be followed by this Court unless there are substantial reasons for considering that other decision to be erroneous, or distinguishable. The Victorian provisions are not, in my view, so different from the provisions of the Act and of the *Supreme Court Act* as to suggest that ***Kay*** is distinguishable.

16 I note that ***Kay*** has been followed in South Australia in ***Commonwealth Bank of Australia v Heinrich (No 2)*** [2003] SASC 436. That case is, however, of less persuasive significance, since the provisions of s 39 of the *Supreme Court Act 1935* (SA), pursuant to which the order restraining further proceedings was made, were relevantly different from

both the Victorian provisions and the Act. The South Australian provision neither authorised an order prohibiting a person from continuing proceedings, nor defined proceedings so as to include an appeal. Debelle J therefore found in that case that, for the purposes of s 39 of that Act, the institution of an appeal was to be considered as the continuation of legal proceedings, rather than the institution of fresh proceedings.

17 For those reasons, I would conclude that it was not necessary for the appellant to obtain leave pursuant to s 6 of the Act before instituting an appeal.

18 However, s 7 of the Act provides for an order made under s 4 to be rescinded or varied by the court or a Judge of the court in which the order was made. The presence of a provision to a similar effect in each of Victoria and South Australia led the courts in ***Kay*** and ***Heinrich*** respectively to conclude that orders restraining proceedings were to be considered interlocutory (***Kay*** at [32] - [40] and ***Heinrich*** at [14] - [15]). I accept those analyses, and do not repeat them. The result of that analysis is that s 60(1)(f) of the *Supreme Court Act 1935* is applicable. It relevantly provides:

> "(1) No appeal shall lie to the Court of Appeal -
>
> …
>
> (f) without the leave of the judge or master or of the Court of Appeal, from any interlocutory order … made or given by a judge or a master … "

There are three exceptions, none of which is applicable here.

19 The first respondent submitted that if the decision of McKechnie J were treated as a refusal of leave pursuant to s 60(1)(f) of the *Supreme Court Act 1935* (WA), rather than pursuant to s 6 of the Act, that application could be renewed before the Court of Appeal, citing ***Lamac Developments Pty Ltd v Devaugh Pty Ltd*** [2002] WASCA 245; (2002) 27 WAR 287. I am not certain that it was intended in that case to settle the controversy which had previously existed concerning whether all such applications might be renewed, or only those which had been made *ex parte*: see ***D'Esterre v Austplat Minerals NL (In liq)*** (1991) 4 WAR 548, at 552 - 553; ***SCM v Saipem*** (1991) 4 WAR 569, at 572 - 574 (per Rowland J) 581 - 583 (Nicholson & Walsh JJ); ***Casella v Bradshaw Judd & Collins Pty Ltd***, unreported; SCt of WA; Library No 970717; 22 October 1997 (at 10 per Malcolm CJ). That right of renewal arose

from the former O 63 r 8 of the *Rules of the Supreme Court 1971* (WA), and there is no equivalent in the current appeal rules. The application to McKechnie J was not made *ex parte*.

20 I would not determine in this case whether, under the present Appeal Rules, it is possible to "renew" a s 60(1)(f) application before the Court of Appeal (save in the case of "changed circumstances": ***Lamac*** at 317). It is not necessary, in my view, to consider that issue in relation to this matter. That is because s 60(1)(f) refers to the leave of "the" Judge or Master, and not to "a" Judge or Master. Both a reading of the words of the paragraph, naturally understood, and authority, indicate that it requires that the leave be obtained either from the Judge or Master making the interlocutory order the subject of the application, or the Court of Appeal, but not from another Judge of the general division: see ***West Australian Newspapers Pty Ltd v Nationwide News Pty Ltd*** (1991) 4 WAR 554, at 555, per Pidgeon J, 565 per Murray J; *cf* ***SCM v Saipem*** at 574 per Rowland J. If that is correct, then the application for leave to McKechnie J was not competent and - treating the present application as one pursuant to s 60(1)(f) - this is therefore the first competent application made by the appellant.

21 In the end, it is not necessary finally to determine any of these matters. That is because I would not grant the appellant leave to appeal, his proposed grounds being wholly devoid of merit. I now turn to those grounds.

The proposed appeal

22 The appellant initially put forward 63 grounds of appeal. These were different from the grounds of appeal before McKechnie J, although there were similar themes.

23 At the hearing of the appeal before us, the first respondent pointed out that one of the grounds before McKechnie J might have been considered to raise, albeit obliquely, the point raised in ***Forge v Australian Securities and Investments Commission*** [2006] HCA 44 ("***Forge***"), which had at that time been argued in the High Court and in relation to which the decision of the Court was reserved. That is, it could potentially raise an issue about whether a Commissioner or Acting Judge was able to exercise Federal jurisdiction. The Court invited the appellant to consider whether he wished to raise this point. In response to the invitation, he formulated a further 36 proposed grounds of appeal. Only ground 64 related in any way to that subject matter, and the Court granted

leave to amend the notice of appeal so as to include that ground, but not grounds 65 to 99 inclusive.

Vexatious and embarrassing grounds of appeal

24 With four exceptions, all of the proposed grounds are vexatious and embarrassing in the legal sense. They are simply unintelligible. With many vexatious litigants, although the proceedings brought by them do not relate to any discernible legal or equitable cause of action, it is at least possible to work out what the underlying complaint may be. However, in relation to the appellant's proposed grounds, it is not even possible to understand the underlying complaint. The most that can perhaps be said is that a majority of the grounds appear to relate to three principal themes, two of which are mentioned by Braddock C in her reasons.

25 The first of those themes is that the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* (WA) was not validly passed, has somehow had the effect of subverting the State and/or Commonwealth Constitutions, and has had the result that many persons, including Ministers of the Crown and Judges of this Court, have been involved in offences such as treason and attempts to pervert the course of justice. Examples of this theme appear to be proposed grounds 19 and 22, which read as follows:

> "**Ground 19. (Primary Offenders)**
>
> > Justice McKechnie became part of the primary offender relative to the removal of the Monarch and Crown, (s.5 Interpretation Act 1984 (WA)) from various Acts within the State of Western Australia, in particular, the **Supreme Court Act 1935 (WA)** amended by s.130 of the Acts Amendment and Repeal (Courts and Legal Practice) Act 2003 (WA), amounting to Attempting to Pervert the Course of Justice in relation to the Judicial Power of the Commonwealth, s.43.1 & s.43.3, Crimes Act 1918 (Cth) (a question of Law and Fact)[.]
>
> ...

Ground 22. (Inter Se – Conflicting Powers)

> The prior **agreed amendment** of the Supreme Court Act 1935 (WA) incorporated into the Acts Amendment and Repeal (Courts and Legal Practice) Act 2003 (WA) destroyed the Separation of Powers, automatically creating an impartiality problem, relative to separation and impartiality and bring into direct conflict Judicial Powers and Legislative Powers
> (Question of Law – Inter Se)[.]"

26 The *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003*, in the portions of which the appellant appears principally to complain, replaces various references to Her Majesty or the Crown with references to the State or the Governor so that, for example, prosecutions brought by the DPP of Western Australia on indictment are now entitled "the State" against the accused person rather than "the Crown" against the accused person. It is not possible to see how that statute could have had any of the effects for which the appellant appears to contend.

27 Ground 22, in the portion in brackets, raises another of the themes to be discerned in the grounds, which is that of "*inter se*" issues. It is not clear whether this theme emerged before Braddock C. It appears perhaps most clearly from ground 1, which reads as follows:

"**Ground 1. (Inter Se)**

> Neither Commissioner Braddock (5th November 2004), nor Justice McKechnie (28th June 2005), correctly identified any *Inter Se* issue in either hearing. Whenever, Inter Se issues arise the only Court that has any jurisdiction whatsoever is the Original Jurisdiction of the High Court. The Supreme Court has no Jurisdiction whatsoever to hear or determine a cause or matter where an *Inter Se* issue would be uncovered[.]"

28 It is not clear whether the appellant uses the expression "*inter se*" in the sense in which s 74 of the Constitution uses it. That section, of course, limited the right of appeal to the Privy Council from decisions of the High Court involving the "limits *inter se*" of the constitutional powers of the Commonwealth and a State or States on the one hand, or the "limits *inter se*" of the constitutional powers of any two or more States on the

other. The reference to the "Original Jurisdiction" of the High Court in ground 1 rather suggests that the appellant has some constitutional concept in mind, and may be referring to s 76 of the Constitution, which permits the Parliament to confer original jurisdiction on the High Court in matters arising under the Constitution or involving its interpretation.

29 It may be that, in at least some of the grounds, the appellant is endeavouring to assert that this Court lacks jurisdiction to deal with any matter raising *inter se* issues. If so, that assertion is simply wrong, ignoring as it does the conferral of Federal jurisdiction upon the courts of the States, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon the High Court, by s 39(2) of the *Judiciary Act 1903* (Cth).

30 The third theme is that the appellant has a deep concern about what he considers to be the activities of Freemasons, and a conviction that various persons within the State, including Ministers of the Crown and Judges of this Court, are or may be Freemasons, and that their membership of that organisation, as perceived by the appellant, has some bearing upon their performance of their official duties. Some of the grounds may be intended to suggest that membership of that organisation is either of itself, or where the member holds some public office, a criminal offence of some kind. Many of the proposed grounds identify a variety of persons, including persons completely unconnected with the present proceeding, as potentially being Freemasons. None of these propositions appears to have any logical basis.

31 In relation to all of the grounds raising the three themes which I have been able to discern, and indeed all of the other grounds save those which I specifically identify below, the proposed grounds are unintelligible and, to the extent that the meaning of portions of them can be guessed, they are devoid of any legal merit. They would not justify a grant of leave to appeal.

Intelligible, but wrong, propositions

32 I turn now to the four grounds which seem to me to be intelligible, although they are, in my view, also devoid of merit. Ground 11 reads as follows:

> "**Ground 11. (Questions of Law/Fact)**
>
> The appellant could only be legally declared a vexatious litigant if there was no question of

> either Law or Fact able to be discovered for determination in any of the matters that the Appellant has been either directly or indirectly involved in, in the State of Western Australia, specifically, matters … "

33 This is an assertion of legal principle. If correct, it would mean that the appellant could not be declared a vexatious litigant unless there was no question of law or fact able to be discovered for determination in any of the matters in which he had been involved. The ground cannot succeed for two reasons. The first is that it is wrong in law and the second is that, even if it were correct, it was the view of Braddock C, with which I would respectfully agree, that no intelligible question of law or fact is able to be discovered for determination in the proceedings in which the appellant has been involved.

34 So far as the question of law is concerned, the appellant refers to a view which I expressed in ***Crown Solicitor for the State of Western Australia v Michael***, unreported; SCt of WA; Library No 980425; 30 July 1998 at 32. In that case, I said that, under the former *Vexatious Proceedings Restriction Act 1930* (WA):

> "… it is appropriate to look at the number, general character and result of the proceedings … so that even if in some cases there may be underlying causes of action, what is important is whether there is a pattern of vexatious proceedings habitually and persistently instituted."

35 That view was, as I understand it, accepted on appeal by the Full Court, save that the Full Court considered that I had not expressed with sufficient clarity the principle that it was *not* necessary for proceedings to be "utterly hopeless" before they could be regarded as vexatious: see ***Attorney General v Michael*** [1999] WASCA 181, at [124] - [127]. The view I expressed, quoted above, and the view of the Full Court, directly contradict the proposition which the appellant asserts in ground 11.

36 Ground 27 asserts that McKechnie J was in error in stating that no evidence was supplied by the appellant in support of the proposition that the application by the first and second respondents was brought to protect Freemasons, and that the Supreme Court was "the defacto Law Firm of International Freemasonry" and was therefore involved in a variety of

offences. There would be an error, if there had been evidence of these assertions which had been disregarded by McKechnie J.

37 The ground, however, displays two misunderstandings of the concept of "evidence". It appears from the last four lines of ground 27 that the appellant is under the impression that anything placed on the bar table during the hearing somehow becomes evidence, since he refers to a "large bundle of evidence physically place [*sic*] on the bar table during the actual hearing, by the Commonwealth Director of Public Prosecutions". Whatever material may be available in court, however, it does not become evidence until tendered by a party and accepted by the Court as an exhibit. Any material which may have been available, but which was not tendered, was not evidence.

38 The second misunderstanding concerns McKechnie J's use of the word "evidence" in [41] of his Honour's reasons. It may well be that the appellant supplied a very large quantity of material to Braddock C which he regarded as relevant to the activities of Freemasons. The learned Commissioner describes materials of that kind in [29] through to [32] of her reasons. Understanding "evidence" as facts or material which tend to prove or support a proposition, however, there is nothing described in those reasons, and the appellant has not pointed us to anything, which would constitute any evidence for the propositions which he sought to assert before McKechnie J in his grounds 5 and 7. That is, there is no material which could logically tend to support those grounds.

39 Ground 46 raises what the appellant describes as the "Witham" principle, that being a reference to ***R v Lord Chancellor; Ex parte John Witham*** [1997] EWHC Admin 237; [1998] QB 575. That was, as Braddock C noted at [62] of her reasons, a case concerning an application for a declaration that an order amending the rates of fees for the issuing of process was *ultra vires*. The factual circumstances were remote from the present matter, but there was consideration in the case of the manner in which an individual's right to seek redress in court could be curtailed, other than by clear words of a statute. The important point for present purposes is, as Braddock C noted, that there was no doubt cast in that case upon the proposition that Parliament by clear words may affect the right of citizens to litigate.

40 It is asserted that McKechnie J erred in finding that the appellant's ground 22 of his proposed grounds of appeal before McKechnie J, which raised the "Witham principle", was embarrassing. The form in which ground 22 was cast was:

> "Commissioner Braddock erred in Law and Fact by not abiding by the Witham Principle (England) in relation to the action and Judgment, resulting in a tort to the Appellant[.]"

41 Plainly, McKechnie J was right in the view which he briefly expressed, which was to the effect that the failure of the Commissioner to apply a principle could not result in a commission of a tort against the appellant and, even if it did, that the commission of a tort by the Commissioner would not be a ground of appeal. More importantly, looking at the underlying proposition of law, Braddock C correctly understood the decision to which the appellant refers and its limited application in the present case, and did not fail to apply, or wrongly apply, any principle referred to in it.

42 The final set of grounds which are intelligible, but wrong, are grounds 15 and 49. Generously understood, they assert that McKechnie J was in error in proceeding to determine the application before him, when no notices pursuant to s 78B of the *Judiciary Act 1903 (Cth)* had been issued. In summary, that section provides that it is the "duty of the Court" not to proceed in a cause in which a constitutional issue is raised, unless such a notice has been given. However, a constitutional issue does not arise for the purpose of that section merely because a party asserts that it does. If the alleged "constitutional issue" is unarguable or vexatious, then there is in truth no constitutional issue at all; if the entire proceeding is vexatious, it may be that there is no "matter" within the meaning of s 78B in any event: see ***Nikolic v MGICA*** [1999] FCA 849, per French J, ***Glennan v Commissioner of Taxation*** [2003] HCA 31; 77 ALJR 1195, at [14] per Gummow, Hayne and Callinan JJ.

The *Forge* ground

43 This was the ground added subsequent to the hearing. Ground 64 reads as follows:

> "Commissioner Braddock's purported Commission to hear the Vexatious Writ did not extend into Federal Jurisdiction, such Jurisdiction exercised by the co-joining of the Commonwealth Director of Public Prosecutions and the extensive amount of Constitutional issues raised[.]"

44 As the first respondent pointed out, since the Commonwealth Director of Public Prosecutions was a party to the proceedings before Braddock C and McKechnie J then, if it is correct to regard the Commonwealth DPP as relevantly either the Commonwealth or a person suing on its behalf, by reason of s 75(iii) of the Constitution and s 39(2) of the *Judiciary Act 1903* (Cth), the Commissioner would have been exercising Federal jurisdiction.

45 As the first respondent also points out, it is not clear whether the terms of ground 64 are intended to assert that (a) Commissioner Braddock SC's Commission, while valid, did not authorise Commissioner Braddock to exercise federal jurisdiction; or (b) whether Commissioner Braddock SC's "purported" Commission was invalid. The ground does not in its terms challenge the validity of s 49(1) of the *Supreme Court Act 1935* (WA), pursuant to which the Commission was issued. That is consistent with the decision in ***Forge*** which held s 37 of the *Supreme Court Act 1970* (NSW) to be valid. The first respondent seeks leave to file a further affidavit, explaining the circumstances which gave rise to the appointment of Braddock C. It is not necessary to receive it, and I would not grant leave. That is because the appellant's submissions do not raise any sensible argument relating to this ground which it is necessary for the respondents to answer.

46 The appellant's 98 pages of submissions in relation to this ground consist largely of extracts from the transcript of argument, and the reasons in ***Forge***, with occasional annotations and headings supplied by the appellant. There are also extracts from other documents, including extra-curial speeches of members of the High Court and scripture. To the extent that any argument can be extracted from these materials, it appears to be as explained below.

47 The appellant says that ***Forge*** is "invalid" (page 1, submission filed 29 September 2006). That is said to be the case because all Justices of the High Court had "actual and constructive knowledge of the Western Australian Overt Act", the "overt act [of treason]" apparently being the passage of the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* (WA). As noted earlier, the proposition that passage of that Act constituted or gave rise to an offence of any kind, simply makes no sense. The proposition that knowledge by any member of the High Court of some criminal act by some other person would render a judgment "invalid" also makes no sense.

48 As the first respondent formulated it, the "Forge point" could have been framed as an intelligible legal proposition. The appellant has, however, used ground 64 in order to restate his dissatisfaction, for reasons which are unable to be understood, with the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003*. This ground, too, is therefore vexatious.

49 I would refuse leave to appeal.

50 **BUSS JA**: I agree with Wheeler JA.

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	SHAW -v- JIM McGINTY in his capacity as ATTORNEY GENERAL & ANOR [2006] WASCA 231 (S)
CORAM	**:**	STEYTLER P WHEELER JA BUSS JA
HEARD	**:**	6 APRIL 2006
DELIVERED	**:**	6 NOVEMBER 2006
SUPPLEMENTARY DECISION	**:**	23 NOVEMBER 2006
FILE NO/S	**:**	CACV 83 of 2005
BETWEEN	**:**	BRIAN WILLIAM SHAW Appellant AND JIM McGINTY in his capacity as ATTORNEY GENERAL First Respondent DAMIAN BUGG in his capacity as COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS Second Respondent

ON APPEAL FROM:

Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	MCKECHNIE J
Citation	**:**	SHAW -v- ATTORNEY GENERAL FOR THE STATE OF WESTERN AUSTRALIA & ANOR [2005] WASC 149
File No	**:**	CIV 1128 of 2005

Catchwords:

Turns on own facts

Legislation:

Nil

Result:

Appellant to pay respondents' costs

Category: B

Representation:

Counsel:

Appellant	:	In person
First Respondent	:	Mr R M Mitchell
Second Respondent	:	Mr D W L Renton

Solicitors:

Appellant	:	In person
First Respondent	:	State Solicitor
Second Respondent	:	Commonwealth Director of Public Prosecutions

Case(s) referred to in judgment(s):

Nil

Case(s) also cited:

Nil

1 **STEYTLER P**: I agree with Wheeler JA.

2 **WHEELER JA**: At the delivery of judgment in this matter, the first respondent applied for an order that the appellant pay the first respondent's costs of his application to be taxed.

3 The appellant was given leave to file written submissions within seven days if he wished to oppose that application. By letter dated the following day, the second respondent advised the Court that he too sought an order that the appellant pay the second respondent's costs of the application to be taxed, and foreshadowed making oral application to that effect if necessary when the matter was next re-listed. He also wrote a letter to that effect to the appellant, who then filed, within time, submissions addressing both the first and second respondents' application for costs.

4 The appellant puts forward three reasons why he should not be required to pay the costs of either respondent. Taking them in the order in which they appear in his submissions, they are as follows.

5 It appears from pars 38 to 40 inclusive of the submissions that the appellant takes the view that his application is public interest litigation, raising matters of constitutional significance. He therefore submits that costs should not be awarded in such a case. That is simply not correct. The application was one made to further the private interest of the appellant as a litigant, in the sense that it was directed to the removal of a fetter imposed upon him personally. To the extent that the order pursuant to the *Vexatious Proceedings Restriction Act 2002* (WA) restricted the appellant from bringing proceedings, that was not a matter of public interest or of constitutional significance, since the proceedings which he seeks to bring are largely unintelligible and vexatious and are, to the extent that they are intelligible, entirely wrong in law.

6 The appellant suggests in par 44 of his submissions, as I understand it, that no order for costs should be made as the application arose out of a criminal or *quasi* criminal matter. That is not so. No facts have been identified by the appellant either in his application, or in the proceedings before Commissioner Braddock from which he sought to appeal, or in any of the underlying proceedings which prompted the applications to Commissioner Braddock, which give rise to any plausible suggestion that any criminal offence has been committed by any person.

7 Finally, par 87 of the appellant's submissions suggests that it is not open to the Court to make costs orders against the appellant, since "the writers of the Judgment are primary offenders to Treason". No fact is identified which could logically give rise to any such suggestion, and no intelligible submission is made directed to that proposition. It must therefore be disregarded.

8 The orders will therefore be that the appellant pay the first and second respondents' costs of the application to be taxed.

9 **BUSS JA**: I agree with Wheeler JA.