New South Wales
Supreme Court

CITATION :	**Attorney General for the State of New South Wales v Bar-Mordecai [2009] NSWSC 558**
HEARING DATE(S) :	23 April 2009, 7 May 2009
JUDGMENT DATE :	19 June 2009
JUDGMENT OF :	Schmidt AJ
DECISION :	1. Application for leave refused. 2. Costs in favour of the plaintiff.
CATCHWORDS :	PROCEDURE - judgments and orders - amending, varying and setting aside - leave sought to file a notice of appeal to set aside Medical Tribunal judgment - vexatious litigant - whether these proceedings are vexatious - allegations of bias - no prima facie grounds in relation to allegations of bias - application for leave refused - costs
LEGISLATION CITED :	Medical Practice Act 1992 Supreme Court Act 1970 Vexatious Proceedings Act 2008 Vexatious Proceedings Restriction Act 2002 (WA)
CATEGORY :	Principal judgment
CASES CITED :	Attorney-General in and for the State of New South Wales v Bar-Mordecai [2005] NSWSC 142 Attorney General for State of New South Wales v Bar-Mordecai [2009] NSWSC 218 Attorney General of New South Wales v Klewer [2003] NSWCA 295 Bar-Mordecai v Health Care Complaints Commission [2002] NSWCA 192 Bar-Mordecai v Hillston [2004] NSWCA 65 Bar-Mordecai v Rotman [2005] NSWCA 71 Barton v Walker [1979] 2 NSWLR 740 Blair v Curran, Curran and Perpetual Trustee Co Ltd v Blair (1939) 62 CLR 464 Bromely v Bromely [1965] P 111 Dovade Pty Ltd v Westpac Banking Group (1999) 46 NSWLR 168

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337
Ex parte Armstrong (1976) 136 CLR 248,
Fox v Percy (2003) 214 CLR 118
Gorman v Health Care Complaints Commission [2002] NSWCA 396
Household Financial Services Ltd v Commercial Tribunal of New South Wales (1992) 26 ALD 756
Hunter v Commissioner of Police [2003] WASC 10
In Re Dr Michael Jacob Bar-Mordecai and the Medical Practice Act (Medical Tribunal of New South Wales, 6 September 2000, unreported)
Kumeragamage v Rallis (No 2) [2001] NSWSC 710
Lindsay v Health Care Complaints Commission (No 1) [2009] NSWCA 9
Livesey v New South Wales Bar Association (1983) 151 CLR 288
Minister for Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24
Raybos Australia Pty Ltd v Tetracan Corporation Pty Ltd [No 9] (unreported, 27 November 1990 per Kirby P, Mahoney and Priestley JJA)
Re Mr Bar-Mordecai [2009] NSWMT 1
Re JRL ex parte CJL (1986) 161 CLR 342
Saville v Health Care Complaints Commission & Anor [2006] NSWCA 298
Sirius Shipping Corporation v The Ship Sunrise [2007] NSWSC 766
S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd (1988) 12 NSWLR 358

PARTIES :	Plaintiff - Attorney General for the State of New South Wales Defendant - Michael Bar-Mordecai
FILE NUMBER(S) :	SC 10622/04
COUNSEL :	Plaintiff - Mr M Dalla-Pozza Defendant - Mr Bar-Mordecai (in person)
SOLICITORS :	Plaintiff - Crown Solicitor's Office Defendant - unrepresented

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IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

SCHMIDT AJ

Friday, 19 June 2009

10622/04 ATTORNEY GENERAL FOR THE STATE OF NEW SOUTH WALES v MICHAEL BAR-MORDECAI

JUDGMENT

1 **HER HONOUR**: Mr Bar-Mordecai moves on a further amended notice of motion of 23 April 2009. The original motion was supported by an affidavit sworn by Mr Bar-Mordecai on 24 February 2009, in which he explained that he was declared a vexatious litigant by the Supreme Court on 25 February 2005 (see *Attorney-General in and for the State of New South Wales v Bar-Mordecai* [2005] NSWSC 142).

2 Mr Bar-Mordecai seeks leave to file a notice of appeal pursuant to s 14 of the *Vexatious Proceedings Act* 2008 against judgments of the Medical Tribunal given on 21 January 2009 and 18 March 2009. These judgments flowed from an inquiry conducted by the Tribunal under the *Medical Practice Act* 1992 into Mr Bar-Mordecai's application to seek re-registration as a medical practitioner. Mr Bar-Mordecai had been de-registered in 2000 by order of the Tribunal (see *In Re Dr Michael Jacob Bar-Mordecai and the Medical Practice Act* (Medical Tribunal of New South Wales, 6 September 2000, unreported)). The Tribunal's judgment was the subject of an unsuccessful appeal (see *Bar-Mordecai v Health Care Complaints Commission* [2002] NSWCA 192).

3 The orders which Mr Bar-Mordecai wishes to pursue are:

> 1 That the judgments of the Tribunal dated 21.01.2009 and 18.03.2009 in ***Bar-Mordecai v NSW Medical Board*** matter no. 40015/07 be set aside.
>
> 2 That the Court of Appeal make an order under s. 69 of the ***Supreme Court Act*** 1970 to have the Tribunal to re-determine the issue in accordance with the law; or
>
> 3 That the Court of Appeal in the alternative make a Reinstatement Order without any conditions.
>
> 4 Costs.

4 The January 2009 decision was that of the Chairman of the Tribunal, *Murrell* J, when her Honour refused to disqualify herself from hearing Mr Bar-Mordecai's application, on grounds of apprehended bias. The March judgement was the Tribunal's judgment dismissing Mr Bar-Mordecai's application for registration. (See *Re Mr Bar-Mordecai* [2009] NSWMT 1).

5 The motion which Mr Bar-Mordecai originally filed in February 2009 was only concerned with *Murrell* J's January disqualification judgment. The motion was later amended when the Medical Tribunal gave its substantive decision in March. The question of costs in those proceedings remained outstanding; that application was listed for hearing in May.

6 The draft notice of appeal in respect of which Mr Bar-Mordecai now seeks leave, indicates that the grounds of appeal which Mr Bar-Mordecai wishes to pursue are twofold. Firstly,

apprehended bias exhibited by Judge *Murrell* and the second, bias. Mr Bar-Mordecai explained that the apprehended bias complaint related to both judgments and that the actual bias complaint was directed to the Tribunal's March decision.

The requirements of the *Vexatious Proceedings Act* 2008

7 The application is governed by the *Vexatious Proceedings Act*, which provides in s 14:

> **14 Application for leave to institute proceedings**
>
> (1) This section applies to a person (***the applicant***) who is:
>
> (a) subject to a vexatious proceedings order prohibiting the person from instituting proceedings, or
>
> (b) acting in concert with another person who is subject to an order referred to in paragraph (a).
>
> (2) The applicant may apply to an appropriate authorised court for leave to institute proceedings that the order would otherwise prohibit the person from instituting.
>
> (3) The applicant must file an affidavit with the application that:
>
> (a) lists all occasions on which the applicant has applied for leave:
>
> (i) under this section, or
>
> (ii) before the commencement of this section—as required by an order under section 70 of the *Land and Environment Court Act 1979* or section 84 of the *Supreme Court Act 1970*, and
>
> (b) lists all other proceedings the applicant has instituted in Australia, including proceedings instituted before the commencement of this section, and
>
> (c) discloses all facts material to the application, whether supporting or adverse to the application, that are known to the applicant.
>
> (4) The applicant must not serve a copy of the application or affidavit on any person unless:
>
> (a) an order is made under section 16 (1) (a), and
>
> (b) the copy is served in accordance with the order.
>
> (5) An appropriate authorised court may dispose of the application by:
>
> (a) dismissing the application under section 15, or
>
> (b) granting the application under section 16.

(6) Despite any other Act or law, the applicant may not appeal from a decision disposing of the application.

8 Mr Bar-Mordecai's application must be dealt with in accordance with the provisions of s 15 and s 16 of the *Vexatious Proceedings Act*, which provide:

15 Dismissing application for leave

(1) An appropriate authorised court must dismiss an application made under section 14 for leave to institute proceedings if it considers:

(a) the affidavit required by section 14 (3) does not substantially comply with that subsection, or

(b) the proceedings are vexatious proceedings, or

(c) there is no prima facie ground for the proceedings.

(2) The application may be dismissed even if the applicant does not appear at the hearing of the application.

16 Granting application for leave

(1) Before an appropriate authorised court grants an application made under section 14 for leave to institute proceedings, it must:

(a) order that the applicant serve each relevant person with a copy of the application and affidavit and a notice that the person is entitled to appear and be heard on the application, and

(b) give the applicant and each relevant person an opportunity to be heard at the hearing of the application.

(2) At the hearing of the application, the court may receive as evidence any record of evidence given, or affidavit filed, in any proceedings in any Australian court or tribunal in which the applicant is, or at any time was, involved either as a party or as a person acting in concert with a party.

(3) The court may grant leave to institute proceedings subject to the conditions that the court considers appropriate.

(4) However, the court may grant leave only if it is satisfied that:

(a) the proceedings are not vexatious proceedings, and

(b) there are one or more prima facie grounds for the proceedings.

(5) In this section:

relevant person, in relation to the applicant for leave to institute proceedings, means each of the following persons:

(a) the person against or in relation to whom the applicant proposes to institute the proceedings,

(b) the Attorney General,

(c) the Solicitor General,

(d) the appropriate registrar for the authorised court that made the vexatious proceedings order concerned if the registrar applied for the order in relation to the applicant,

(e) any person referred to in section 8 (4) (d) or (e):

(i) who applied for a vexatious proceedings order in relation to the applicant, and

(ii) who the appropriate authorised court dealing with the application considers should be served,

(f) any person:

(i) who made an application in relation to the applicant under section 70 of the Land and *Environment Court Act 1979* or section 84 of the *Supreme Court Act 1970* before the commencement of this section, and

(ii) who the appropriate authorised court dealing with the application considers should be served.

9 This application is at the first stage which these provisions contemplate. In *Attorney General for State of New South Wales v Bar-Mordecai* [2009] NSWSC 218, *Johnson* J observed that:

> 7 It seems clear from s.15(2), that an ex-parte hearing of the application at the first stage will take place in open court. However, given the structure of the provisions in ss.14-16, it might be expected that a brief oral hearing is envisaged, at which the only questions to be determined are whether the application ought be dismissed or, alternatively, whether more detailed argument ought occur following service of the application on affected persons, in the form of a contested hearing in open court under s.16(1) of the Act.

10 When the matter came before *Hall* J in March 2009, however, there was an appearance for the Attorney General, who had been served with Mr Bar-Mordecai's motion. His Honour gave various directions about the service of certain documents and steps to be taken by the parties. At that time there was no transcript available of the proceedings before the Medical Tribunal, when the disqualification application was refused. His Honour took the view that the hearing of Mr Bar-Mordecai's motion should not proceed until the transcript was available, given the requirements of s 15 of the *Vexatious Proceedings Act.*

11 In his Honour's view it was necessary for the Court to understand the basis of the approach taken by *Murrell* J, in refusing the disqualification application. His Honour accepted that if Mr

Bar-Mordecai wished to press his application in the absence of the transcript, he could do so. He suggested, however, that such an approach would not assist Mr Bar-Mordecai, given the requirements of s 15 and also suggested that steps be taken to expedite the production of the transcript of the proceedings before the Tribunal.

12 The parties agreed that the hearing of the application should await the production of the transcript and the hearing was adjourned to 20 March. It was then further adjourned until April, because on 18 March 2009 the Medical Tribunal gave its decision on Mr Bar-Mordecai's application for a review of the de-registration order made by the Medical Tribunal in 2000. The Tribunal refused Mr Bar-Mordecai's application and pursuant to
s 64(3) of the *Medical Practice Act*, ordered that there be no review for three years. There were further delays while various transcripts were obtained. The final transcript relied on was filed on 11 June.

13 Against that background, I turn to consider the matters which the parties argued.

Mr Bar-Mordecai's affidavits – s 14(3) and 15(1)(a) of the *Vexatious Proceedings Act* 2008

14 The original affidavit in support of Mr Bar-Mordecai's application was that of 24 February 2009. It was supplemented by two further affidavits of 28 April and 7 May 2009. Mr Bar-Mordecai outlined the proceedings in which he has been involved, as well as those in which he is currently involved, as s 14(3) required. As to what s 14(3)(c) required of him, he deposed to matters of background to his application, referred to his personal circumstances, what had transpired in the proceedings before the Medical Tribunal and why he sought to pursue his re-registration as a medical practitioner.

15 It is Mr Bar-Mordecai's evidence that he has become destitute as the result of his deregistration and the litigation in which he has been involved in the ensuing years. Beforehand, he was a registered general practitioner in private practice earning a significant income, owning considerable assets. He now resides with his aged parents and his income is a Centrelink Carer's benefit. He owes the plaintiff and others substantial amounts, as the result of costs orders made against him in various proceedings. In the proceedings before the Tribunal, he had sought to be re-registered as a medical practitioner. His application failed and he now faces a further period of three years deregistration, as the result of a judgment which he regards as being wrong and oppressive.

16 Mr Bar-Mordecai explained that he wished to pursue his application to the Court of Appeal, given his view that the Tribunal's conclusions evidenced bias, because they were erroneous; rested on material which was not before the Tribunal; and ignored relevant evidence, as well as the provisions of the Medical Board's policies, in relation to which the review proceedings were being conducted.

17 There was no case advanced by the plaintiff that what Mr Bar-Mordecai advanced was not a sufficient basis to satisfy what s 14(3) required of him. I, too, am satisfied that there is no basis for dismissing his application, for failure to comply with s 14(3) of the *Medical Practice Act*, having considered what has been advanced in the affidavits.

Section 15(1)(b) - are these proceedings vexatious proceedings?

18 The term 'vexatious proceedings' is defined in s 6 of the *Vexatious Proceedings Act* as:

> **6 Meaning of "vexatious proceedings"**
>
> In this Act, vexatious proceedings includes:
>
> (a) proceedings that are an abuse of the process of a court or tribunal, and
>
> (b) proceedings instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose, and
>
> (c) proceedings instituted or pursued without reasonable ground, and
>
> (d) proceedings conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

19 The onus falls on Mr Bar-Mordecai to establish that the proceedings are not vexatious, as s 15(1)(b) contemplates (see the discussion of *Johnson* J in *Attorney General for State of New South Wales v Bar-Mordecai*).

20 It was argued for the Attorney General that the proposed application in this case would amount to an abuse of process. This followed, it was submitted, from the frequency with which Mr Bar-Mordecai has made allegations of bias against judicial officers. Attention was drawn to the observations of *Mason* P in *Bar-Mordecai v Rotman* [2005] NSWCA 71*; Bar-Mordecai v Hillston* [2004] NSWCA 65 at [7] - [12]. Reference was also made to complaints of bias brought against *Patten* J, *Bryson* J, *Einstein* J; *Sheller*, *Giles* and *Stein* JJA, and *Murrell* J and *Rein* J. In his own court documents, Mr Bar-Mordecai referred to having referred twenty one Australian judicial officers to the International Criminal Court.

21 This was argued for the Attorney General to provide a basis for the view that Mr Bar-Mordecai makes allegations of judicial bias on every occasion that he is unsuccessful in proceedings to which he is a party. Mr Bar-Mordecai denied that this was factually correct, referring to other proceedings in which he had been involved before *Cohen* J, *Barr* J, *McCallum* J, *Watts* J, *Windeyer* J, *Patten* J and a host of other judicial officers over the years, where he had not succeeded in the applications he had made, but where he had not made complaints of bias.

22 Reference was also made for the Attorney General to the Medical Tribunal's March judgment, where it dealt with evidence before it of an assault on a judicial officer which Mr Bar-Mordecai had contemplated in the past, as well as a view that litigants should not to be held responsible for such an assault, if it occurs. This view has been developed by Mr Bar-Mordecai into a proposed 'battered litigant syndrome'. Expert evidence had been received about these matters, but the Tribunal's judgment finally did not turn on this issue.

23 In the submissions which Mr Bar-Mordecai advanced, there were, it must be accepted, a dismaying number of arguments addressed to a view of what Mr Bar-Mordecai perceives to be past judicial misconduct, by various judicial officers, not directly relevant to his application in this case.

24 No doubt Mr Bar-Mordecai holds the views which he is presently pursuing in relation to the past conduct of various judicial officers in forums which include the International Criminal Court, for reasons which appear to him to be good ones. Nevertheless, it has to be said that the intemperate language in which Mr Bar-Mordecai advanced certain submissions about matters of no direct relevance to this application, was of no assistance at all to his case.

25 Nevertheless, given what this application is ultimately concerned with, namely Mr Bar-Mordecai's pursuit of an application for re-registration as a medical practitioner, it is not appropriate, in my view, to refrain from giving proper consideration to those arguments which Mr Bar-Mordecai advances in support of his application for leave, which may have some foundation, because he also advances submissions which do not assist him. Proper account must be taken of the fact that while he is not only a frequent litigant and one who has been declared a vexatious litigant, Mr Bar-Mordecai is also an unrepresented litigant. Properly, no different approach was urged for the Attorney General.

26 That is consistent with the approach adopted in *Bar-Mordecai v Rotman*; *Bar-Mordecai v Hillston*. There, *Mason* P referred at [7] to 'a plethora of baseless, often scandalous, allegations of judicial bias', but nevertheless then went on to consider and deal with what Mr Bar-Mordecai had there argued were incompatible conclusions reached by the Court of Appeal in two judgments, one finding that a de facto relationship had existed with A and the other that it had not.

27 It was also here argued, however, that Mr Bar-Mordecai's submissions showed that he was now attempting to re-litigate matters already determined in other proceedings, particularly the correctness and legality of the original decision of the Medical Tribunal in 2000, when he had been deregistered. The Court of Appeal dealt with the appeal of that decision in *Bar-Mordecai v Health Care Complaints Commission*. It was argued for the Attorney General to be an abuse of process for Mr Bar-Mordecai to now seek to raise issues dealt with in those proceedings, afresh in these proceedings. (See *Blair v Curran, Curran and Perpetual Trustee Co Ltd v Blair* (1939) 62 CLR 464.)

28 The difficulty with that argument, it seemed to me, was that the Medical Tribunal's 2000 decision and the basis upon which it was reached, were squarely before the Tribunal in the 2008 proceedings in which Mr Bar-Mordecai sought re-registration. The legislative scheme expressly provided for this in s 94A of the *Medical Practice Act*, which provided:

> **94A Inquiry into review application**
>
> (1) A review under this Division is a review to determine the appropriateness, at the time of the review, of the order concerned.
>
> (2) The review is not to review the decision to make the order, or any findings made in connection with the making of that decision, unless significant fresh evidence is produced that was not previously available for consideration, and the appropriate review body is of the opinion that, in the circumstances of the case, the decision to make the order, or any finding on which the decision was based, should be reconsidered.
>
> (3) In addition to any other matter that the review may take into account, the review must take into account any complaint made or notified to the Board about the person, whether the complaint was made or notified before or after the making of the order that is the subject of the review and whether or not the complaint was referred under Division 3 of Part 4 or any other action was taken on the complaint.

29 Mr Bar-Mordecai sought such a review of the 2000 decision during the course of the hearing before the Tribunal, seeking to rely on a decision of the Court of Appeal in *Bar-Mordecai v Hillston* where, contrary to the view reached by the Medical Tribunal in 2000, the Court of Appeal had concluded that Mr Bar-Mordecai had been in a de facto relationship with the patient

(A), whose sister had made the complaint against him in 1999, which had led to the 2000 Medical Tribunal proceedings and his deregistration.

30 The s 94A application was considered and refused by *Murrell* J, who, it would appear, took the view that it raised a question of law which fell to her Honour to decide, consistently with s 154(1) of the *Medical Practice Act*. The application was refused by her Honour, it was later explained in the Tribunal's March judgment at [16], because:

> ... the Court of Appeal's decision was not 'fresh evidence'. The material before the Court of Appeal was previously available for consideration. Consequently, the Tribunal could not review the decision for findings of the 2000 Tribunal.

31 The Tribunal went on to explain that:

> 17. The 2000 Tribunal's decision did not depend upon whether the relationship between Mr Bar-Mordecai and A was a de facto relationship: p2.9 of the reasons for judgment.
>
> 18. The status of Mr Bar-Mordecai's relationship with A (whether it was a de facto relationship or fell short of that status) is not important to the findings of this Tribunal. Nor is this Tribunal influenced by the propriety or otherwise of financial dealings that occurred more than 15 years ago between Mr Bar-Mordecai and A. The Court of Appeal's findings do not affect this Tribunal's opinion about Mr Bar-Mordecai's past boundary transgressions and do not significantly impact on the critical issue of whether he now has a sufficient appreciation of the boundaries of the doctor/ patient relationship.

32 The Tribunal then turned to consider, under the heading 'Understanding of Doctor/Patient Boundaries', the question of whether Mr Bar-Mordecai had demonstrated that he now had an understanding and acceptance of the rule that it is improper for a doctor to treat his or her de factor partner, at [22] to [36]. That was the consideration upon which the Tribunal's refusal of Mr Bar-Mordecai's application turned.

33 The proceedings taken by Mr Bar-Mordecai before the Medical Tribunal in 2007 involved an application for re-registration which he was entitled to make, given the terms on which he was deregistered by the Medical Tribunal in 2000, which precluded him from seeking re-registration until 2007. What arose for consideration in the review proceedings under
s 94A(1), was the appropriateness of the order made in the 2000 judgment, at the time of the 2008/09 review.

34 It followed from s 94A(2) that Mr Bar-Mordecai was also entitled to ask the Medical Tribunal to review the decision to make the 2000 deregistration order, or any findings made in connection with the making of that decision, if he was able to produce 'significant fresh evidence' not previously available for consideration.

35 That Mr Bar-Mordecai believed that a decision of the Court of Appeal in 2004, which had concluded that he had a de facto relationship with A, which he had been unable to convince the Medical Tribunal in 2000 had existed, was significant, fresh and previously unavailable evidence, does not seem surprising. Whether he was correct in that opinion, is a different matter, but the making of that review application, it seems to me, does not involve any re-litigation of

matters already dealt with, as the Attorney General argued.

36 The Medical Tribunal had never before had occasion to consider the Court of Appeal's 2004 decision, nor the basis upon which it was reached. Section 94A permitted Mr Bar-Mordecai to raise that issue before the Tribunal and once raised, the Tribunal was obliged to determine it.

37 In these proceedings, Mr Bar-Mordecai does not seek to appeal the Tribunal's conclusion, but seeks to rely upon it, to establish the bias about which he wishes to complain. That is also not a matter which has previously been litigated.

38 The Attorney General accepted that while there was no right of appeal from the Tribunal's judgment under the statutory scheme established by the *Medical Practice Act*, a party to such review proceedings was entitled to bring an appeal with respect to a point of law, during the course of an inquiry being conducted by the Tribunal, with leave (see s 89(2)).

39 It must follow, in my view, that the application made by Mr Bar-Mordecai under s 94A in relation to the Medical Tribunal's 2000 decision cannot have been an abuse of process. He was entitled to seek such a review, if he could establish that significant, fresh and previously unavailable evidence not previously considered, existed. He was unable to convince *Murrell* J that it did. Not having been granted leave to appeal that decision during the course of the inquiry, Mr Bar-Mordecai accepted he had no right to appeal either the merit of the decision, nor even the question of law determined by *Murrell* J.

40 Nevertheless, he seeks to establish bias, having regard to this, as well as other aspects of the Tribunal's judgment. I will return to consider this further in the context of s15(1)(c), but, in my view, the mere fact that Mr Bar-Mordecai has the view that there was bias in the Medical Tribunal proceedings cannot, at this stage of these proceedings, lead to the conclusion that this application is an abuse of process.

41 Mr Bar-Mordecai is a pensioner who wishes to resume his former profession as a medical practitioner, having been precluded from doing so since 2000, as the result of the Medical Tribunal's 2000 order. He was unsuccessful in his 2007 application for re-registration, given the conclusions reached by the Tribunal in 2009 that he lacked the necessary good character, for such an order to be made. He is plainly dissatisfied with the Tribunal's decision, for various reasons which he has sought to explain. He accepts that under the statutory scheme, he has no general right to appeal the merits of the Tribunal's decision, but seeks to pursue such rights which do exist, including those granted by s 69 of the *Supreme Court Act* 1970. That section provides:

> **69 Proceedings in lieu of writs**
>
> (1) Where formerly:
>
> (a) the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description, or
>
> (b) in any proceedings in the Court for any relief or remedy any writ might have issued out of the Court for the purpose of the commencement or conduct of the proceedings, or otherwise in relation to the proceedings, whether the writ might have issued pursuant to any rule or order of the Court or of course,

then, after the commencement of this Act:

(c) the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but

(d) shall not issue any such writ, and

(e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and

(f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.

(2) Subject to the rules, this section does not apply to:

(a) the writ of habeas corpus ad subjiciendum,

(b) any writ of execution for the enforcement of a judgment or order of the Court, or

(c) any writ in aid of any such writ of execution.

(3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.

(4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.

(5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision.

42 Dissatisfaction with the Tribunal's decision and a desire to challenge it on available grounds, even in the case of a person such as Mr Bar-Mordecai, who has been declared a vexatious litigant, cannot, it seems to me, of itself be a basis for concluding that this application is an abuse of process.

43 Such a declaration is not intended to deprive a person declared to be a vexatious litigant of all of his or her rights to pursue any and all legal proceedings before a court to which the declaration applies. It rather imposes a leave requirement, it must be accepted, in quite onerous terms, before such rights may be exercised in future. The fact that Mr Bar-Mordecai seeks to pursue what rights he may have in relation to his failure to achieve re-registration as a medical practitioner, cannot of itself be an abuse of process.

44 Leave is sought to appeal to the Court of Appeal in relation to a decision upon which depends Mr Bar-Mordecai's right to resume the practice of a profession which he had engaged in for some 25 years before his deregistration. That is not a decision in respect of which Mr Bar-

Mordecai has ever brought any other proceedings. I can see no general basis upon which it might be concluded that a desire to pursue the right to resume medical practice, involves an abuse of process in any general way, even if his application rests on allegations of bias. Such complaints certainly appear to have been raised by other litigants before the Tribunal (as to which see, for example *Lindsay v Health Care Complaints Commission (No 1)* [2009] NSWCA 97 at [9]).

45 Undoubtedly, it is a fact that Mr Bar-Mordecai has made a significant number of earlier complaints about alleged bias in other proceedings. That does not mean that bias, whether apprehended or actual, could never arise in another case. In my view, in the circumstances here before the Court, the mere fact that Mr Bar-Mordecai has unsuccessfully alleged bias in other proceedings, is not a proper basis for concluding that this application involves an abuse of process.

46 No other of the Attorney General's submissions were directed to the matters dealt with in the definition of 'vexatious proceedings'. On the material, I am satisfied that the proceedings which Mr Bar-Mordecai seeks to bring are not vexatious, as defined, even though this is another occasion upon which Mr Bar-Mordecai seeks to show bias in those determining an application he has made.

Section 15(1)(c) - are there prima facie grounds for the proceedings in relation to the Medical Tribunals' March decision, given the allegations of bias on which the application rests?

Onus

47 The onus imposed on Mr Bar-Mordecai under the *Vexatious Proceedings Act* is a high one. In *Hunter v Commissioner of Police* [2003] WASC 10, *Pullin* J had to consider applications brought under the *Vexatious Proceedings Restriction Act* 2002 (WA), where a similar onus is imposed by s 6(5). At [18], his Honour observed:

> 18 To succeed on this application, s 6(5) of the 2002 Act requires me to dismiss the application if there are no prima facie grounds for the proposed proceedings. The ordinary meaning of the words prima facie is "at first sight; on the face of it; as appears at first sight without investigation": *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 615-616; Macquarie Dictionary. In the present context, the phrase "prima facie grounds" means, in my opinion, that there is a legal basis for the claim and that there is some evidence referred to in the affidavit in support of the application which, if accepted, would be capable of sustaining the proceedings: cf *North Ganalanga* (supra) at 639; *May v O'Sullivan* (1955) 92 CLR 654 at 658.

48 Can it be concluded that this standard has been satisfied by Mr Bar-Mordecai?

49 Mr Bar-Mordecai does not appeal from the merits of the Tribunal's decision, even though he vehemently disagrees with the conclusions reached. This is because, as was common ground, there is no right of appeal from the Medical Tribunal's judgments under s 90 of the *Medical Practice Act*. The proceedings were not concerned with 'a person about whom a complaint is referred to the Tribunal', but with an application for the review of the Tribunal's 2000