IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA132/2019
[2021] NZCA 144

	BETWEEN	PETER WILLIAM MAWHINNEY Appellant
	AND	AUCKLAND COUNCIL Respondent

Hearing:	30 September 2020
Court:	Brown, Gilbert and Katz JJ
Counsel:	Appellant in person K Anderson, L M Van and B Ford for Respondent
Judgment:	29 April 2021 at 10.30 am

JUDGMENT OF THE COURT

A **The application to adduce further evidence on appeal is declined.**

B **The appeal is allowed to the extent that the five-year order of the High Court is set aside and an order of three years is substituted.**

C **The appeal is otherwise dismissed.**

D **There is no order for costs.**

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REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] A Judge of the High Court may make an order under s 166 of the Senior Courts Act 2016 (the SCA) restricting a person from commencing or continuing civil proceedings where at least two proceedings commenced or continued by that person in any court or tribunal are or were totally without merit.

[2] Having found that the appellant, Mr Mawhinney, had pursued three proceedings against the Waitakere local authority which were totally without merit, Hinton J made an order restraining Mr Mawhinney, in any capacity including as a trustee of any trust, from commencing or continuing any civil proceeding (or matter arising out of a civil proceeding) that relates in any way to specified parcels of land in the Waitakere Ranges for a period of five years.[1]

[3] Mr Mawhinney challenges that judgment on several grounds including the interpretation and mode of application of the "totally without merit" threshold and the Judge's finding that the three proceedings pursued by Mr Mawhinney satisfied that test.

The statutory framework

[4] Orders under s 166 of the SCA[2] restricting a person from commencing or continuing a civil proceeding in a senior court, another court or a tribunal may take three forms that vary in scope of restriction:

(a) a limited order which applies to a particular matter;[3]

(b) an extended order which applies to a particular or related matter;[4] and

(c) a general order which applies to any civil proceeding.[5]

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1 *Auckland Council v Mawhinney* [2019] NZHC 299 [High Court judgment].
2 Defined as a section 166 order: Senior Courts Act 2016, s 169(11).
3 Section 166(2)(a) and (3).
4 Section 166(2)(b) and (4).
5 Section 166(2)(c) and (5).

While a limited order or an extended order may be sought by a party to a proceeding, only the Attorney-General may apply for a general order.[6] However, a Judge of the High Court may also make any of the three orders on his or her own initiative.[7]

[5] Section 167 specifies the grounds for the making various types of orders:

> **167 Grounds for making section 166 order**
>
> (1) A Judge may make a limited order under section 166 if, in civil proceedings about the same matter in any court or tribunal, the Judge considers that at least 2 or more of the proceedings are or were totally without merit.
>
> (2) A Judge may make an extended order under section 166 if, in at least 2 proceedings about any matter in any court or tribunal, the Judge considers that the proceedings are or were totally without merit.
>
> (3) A Judge may make a general order if, in at least 2 proceedings about any matter in any court or tribunal, the Judge considers that the proceedings are or were totally without merit.
>
> (4) In determining whether proceedings are or were totally without merit, the Judge may take into account the nature of any interlocutory applications, appeals, or criminal prosecutions involving the party to be restrained, but is not limited to those considerations.
>
> (5) The proceedings concerned must be proceedings commenced or continued by the party to be restrained, whether against the same person or different persons.
>
> (6) For the purpose of this section and sections 168 and 169, an appeal in a civil proceeding must be treated as part of that proceeding and not as a distinct proceeding.

[6] An order under s 166 may restrain a party from commencing or continuing any proceeding (whether generally or against any particular person or persons) of any type specified in the order without first obtaining leave of the High Court.[8] The order has effect for a period up to three years as specified by the Judge but may be for a longer period not exceeding five years if the Judge is satisfied that there are exceptional circumstances justifying the longer period.[9]

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6 Section 169(1) and (2).
7 Section 169(3).
8 Section 168(1).
9 Section 168(2).

Factual background

[7] Mr Mawhinney (in his personal and trustee capacity) and companies controlled by him held interests in more than 120 hectares of land situated in the foothills of the Waitakere Ranges near Bethells Beach (the Waitakere land). Over a period of several years Mr Mawhinney's endeavours to subdivide the land gave rise to a number of applications to the Waitakere City Council (the Council), the relevant consent authority, for approvals under the Resource Management Act 1991 (the RMA) and ensuing litigation.

[8] Several of those cases involved the application of s 91(1) of the RMA which states:

> **91 Deferral pending application for additional consents**
>
> (1) A consent authority may determine not to proceed with the notification or hearing of an application for a resource consent if it considers on reasonable grounds that—
>
> (a) other resource consents under this Act will also be required in respect of the proposal to which the application relates; and
>
> (b) it is appropriate, for the purpose of better understanding the nature of the proposal, that applications for any 1 or more of those other resource consents be made before proceeding further.
>
> …

[9] The proper approach to the application of s 91 was the subject of a thorough examination by the Environment Court in *Waitakere Forestry Park Ltd v Waitakere City Council*.[10] In that decision, Waitakere Forestry Park Ltd and Kitewaho Bush Reserve Co Ltd (Kitewaho), entities controlled by Mr Mawhinney, applied to the Environment Court under s 91(3) of the RMA for orders revoking s 91 determinations made by the Council. In a comprehensive decision, the Environment Court rejected the application and declined to make any order revoking the Council's determinations.

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[10] *Waitakere Forestry Park Ltd v Waitakere City Council* [1997] NZRMA 231 (EnvC).

[10] Section 91(1) was to the fore again in *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* (the *Kitewaho* judgment).[11] Kitewaho had made a variety of applications to the Council for subdivision consents under the RMA. Some of those applications were deferred by the Council under s 91 on the basis that additional resource consents were required from the Auckland Regional Council in relation to stormwater discharge.

[11] Kitewaho applied to the Environment Court for a series of declarations relating to the proposed subdivisions including whether or not the Council had acted correctly in its determinations under s 91. The Environment Court struck out the applications as an abuse of the process of the Court, with the exception of those relating to the use of s 91.[12] The Court indicated that it was inappropriate for a council to make use of the section where, as here, the applicant disputed the necessity of obtaining another resource consent, and that in this case the Council could have processed the subdivision without deferring it under s 91.[13] The Council appealed against the decision in relation to s 91 and Kitewaho cross-appealed against the decision to strike out for abuse of process.

[12] The High Court allowed the Council's appeal, ruling that s 91 is a specific provision giving a consent authority a discretion to determine not to proceed with the notification or hearing of an application if it considers on reasonable grounds that the provisions of the section are met.[14] In respect of certain subdivision consent applications the High Court accepted that the issue of s 91(1) was res judicata having been previously dealt with in *Waitakere Forestry Park Ltd v Waitakere City Council.*[15]

[13] The High Court also upheld the Environment Court's order striking out the proceeding, stating:[16]

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11 *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208 (HC) [*Kitewaho* judgment].

12 *Kitewaho Bush Reserve Co Ltd v Waitakere City Council* EnvC Wellington A135/01, 10 December 2001 at [7].

13 These comments are contained in the Environment Court's interim decision: *Kitewaho Bush Reserve Co Ltd v Waitakere City Council* EnvC Auckland A106/2001, 18 October 2001 at [68]–[69].

14 *Kitewaho* judgment, above n 11, at [37].

15 At [19]–[20], citing *Waitakere Forestry Park Ltd v Waitakere City Council*, above n 10.

16 At [77].

> In reality, the Court was improperly being asked to give what amounted to advisory opinions on a range of possible subdivision scenarios, some of which might proceed and some of which might not. Effectively, Kitewaho was on a wide-ranging fishing expedition in an attempt to establish the most advantageous basis for its subdivisional aspirations. Armed with those advisory opinions, Kitewaho then intended to structure its proposals in the way best calculated to achieve the desired outcome. There was therefore a very real sense in which the questions being asked were hypothetical as well as substantial doubt as to which if any of the proposals would proceed and, if so, in what form.

[14] In the subsequent decade several proceedings were issued in respect of the parcels of the Waitakere land against the Waitakere City Council (and in due course the Auckland Council)[17] by Mr Mawhinney (either in his personal capacity or as a trustee), or by entities controlled by him such as Kitewaho, Waitakere Forestry Park Ltd or Forest Trustee Ltd. Many of those proceedings are listed in Schedule B to the High Court judgment under appeal.[18]

The Council's application

[15] In November 2017 the Council filed an application for an extended order under s 166 of the SCA against Mr Mawhinney, not only in his personal capacity but also as a trustee of any trust, and any entities controlled by him. Schedule 1 of the application listed the parties sought to be subject to the order as follows:

> **Peter William Mawhinney**
>
> Peter William Mawhinney (in a personal capacity)
>
> Peter William Mawhinney as trustee of any trust
>
> **Trusts**
>
> Any of the following trusts through their trustees:
>
> - Waitakere Forest Land Trust
> - Forest Trust
> - Sixty-six Auckland Trust
> - Boulder Trust
> - Any trust re-settled from any of the above trusts

[17] This judgment uses the shorthand "the Council" to refer to both, depending on the relevant time.
[18] See High Court judgment, above n 1.

Companies

Any of the following entities

Zebra Crossings Trading Limited

Sixty-six Auckland Limited

Waitakere Forest Trust Limited

[16] The order sought related to the commencement or continuation of proceedings against the Council in any court or tribunal without leave of the High Court in relation to:

(a) the parcels of land contained in the identifiers set out in Schedule 2 to the application; and

(b) resource consent applications, subdivision consents, certificates of compliance, existing use rights and any matters already determined by the courts related to the land identified in Schedule 2 including the exercise of Council's powers in relation to those matters and any associated appeals.

However the application did not specify the duration of the order sought, nor did it make any reference to exceptional circumstances.

[17] In reliance on s 167(5) of the SCA, which states that the proceedings relied upon must be commenced or continued "by the party to be restrained", Mr Mawhinney contended that several instances of litigation relied upon by the Council were not qualifying proceedings, because they were brought either by corporate entities or by Mr Mawhinney in his capacity as a trustee of various trusts.

[18] In response the Council elected to refine its application. As the Judge explained in her discussion of the terms of the order towards the end of the judgment:[19]

> [152] The Council originally proposed that I make an order restraining Mr Mawhinney and several named companies from commencing civil proceedings. But they subsequently withdrew the application in that form

[19] High Court judgment, above n 1.

> after Mr Mawhinney objected that this Court could not make an order against companies that were not named as parties to this proceeding, citing s 168 of the Act, which in turn would mean that a case would need to be proven against them. That appeared to me to be correct.
>
> [153] The Council now seeks an order in the following terms:
>
> > Mr Mawhinney is restricted, in any capacity, including but not limited to as a trustee of any trust, from commencing or continuing any civil proceeding (or matter arising out of a civil proceeding), which relates in any way to the parcels of land contained in the identifiers set out in Schedule A for a period of five years.
>
> [154] That order may possibly prevent Mr Mawhinney bringing proceedings in the name of corporate entities in any event, but as I understand it, the Council is unconcerned for the moment. It takes the view that in this case the combined effect of the bankruptcy and the s 166 order will be enough to stop Mr Mawhinney bringing or continuing further proceedings in any capacity. The Council says his being an undischarged bankrupt will prevent him from being a director of a company for some time, or for that matter from litigating in person. The Council's particular concern is to stop Mr Mawhinney from litigating as a trustee, which it says might require the s 166 order.

The High Court judgment

[19] Hinton J rejected Mr Mawhinney's proposition that proceedings in which he sued as a trustee could not be properly considered for the purposes of s 167.[20] However the Judge proceeded on the footing that proceedings commenced by corporate entities where Mr Mawhinney was not a named party were not eligible proceedings. This had the consequence of excluding from consideration as qualifying proceedings much of the litigation relied on by the Council.[21] We touch on this issue further below.[22]

[20] The Judge identified only three potential candidates as proceedings commenced or continued by Mr Mawhinney which were totally without merit:

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20 At [63].

21 At [68]–[69], although the Judge noted that those proceedings could still be relevant to the exercise of the discretion under s 167.

22 See [74] below.

(a) *Mawhinney v Waitakere District Council* (while referred to by the Judge as "the Sheppard Proceeding", we will adopt the description "the boundary adjustment litigation");[23]

(b) *Mawhinney v Waitakere City Council* (referred to by the Judge as "the Fogarty Proceeding" but referred to in this judgment as "the subdivision consent litigation");[24] and

(c) *Perceptus Ltd v Waitakere City Council* (referred to by the Judge as "the Heath Proceeding" but referred to in this judgment as "the compliance certificate litigation"),[25] which was a qualifying proceeding because in the High Court Mr Mawhinney was substituted as the appellant.[26]

[21] After discussing aspects of ss 166 and 167, noting that the phrase "totally without merit" is not defined and referring to the discussion in the report of the Ministry of Justice on the Judicature Modernisation Bill previously referred to by the High Court,[27] the Judge stated:[28]

> [52] Under s 88B of the Judicature Act 1908, the predecessor to s 166, the proceedings complained of were required to be vexatious. While no longer an explicit requirement, the test for vexatiousness is still relevant as to whether an order is necessary. A Full Bench of this Court in *Attorney-General v Heenan* identified features that will indicate a claim is vexatious:
>
> (a) a pattern of complex, prolix, and sometimes incomprehensible pleadings;
>
> (b) the proceedings showing the respondent to be an almost compulsive litigant against a widening circle of defendants;
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> (c) extravagant claims or scandalous allegations which the litigant has no prospect of substantiating or justifying;
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> (d) the frequency with which part or all of the respondent's statements of claim have been struck out; and

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23 *Mawhinney v Waitakere District Council* EnvC Auckland A199/05, 7 December 2005. As explained below at [92] the ultimate determination of this litigation was by the High Court.

24 *Mawhinney v Waitakere District Council* [2007] NZRMA 173 (HC).

25 *Perceptus Ltd v Waitakere City Council* EnvC Auckland A40/2008, 4 April 2008.

26 See *Mawhinney v Waitakere City Council* [2009] NZRMA 230 (HC) at [14].

27 *Judicature Modernisation Bill: Report of the Ministry of Justice to the Justice and Electoral Committee* (April 2014) [Ministry of Justice Report] at [292]–[293]. See also *Genge v Visiting Justice Christchurch Men's Prison* [2018] NZHC 1457 at [29].

28 High Court judgment, above n 1 (footnotes omitted).

(e) the extent to which the respondent allows their proceedings to lie dormant.

> [53] A proceeding may be vexatious even if it contains the germ of a legitimate grievance, or may disclose a cause of action or a ground for institution. The conduct and outcome of such a proceeding when viewed in the overall light of the institution, conduct, and outcome of other proceedings may well demonstrate its own particular vexatiousness and unreasonableness. I consider these statements are equally applicable to whether a proceeding is "totally without merit" under s 166.

[22] The Judge explained her approach to the task of deciding whether a proceeding was totally without merit in the following way:[29]

> I note at the outset that I do not intend to do as Mr Mawhinney invites and conduct a "full rehearing" of the proceedings to which I will refer. I will focus on whether the proceedings, on the presiding Judge's view, had a hope of succeeding, and the manner in which Mr Mawhinney conducted himself in those proceedings.

[23] The Judge proceeded to review each of the three potentially qualifying proceedings from that perspective, concluding in this way:

> [116] I consider that all three of the proceedings I have discussed were totally without merit. All three proceedings were struck out in their entirety, and, in the latter two, the decision to strike out was affirmed on appeal (in the case of the Heath Proceeding, the decision was affirmed twice).
>
> [117] The proceedings have exposed the Council to disproportionate levels of inconvenience and expense, chiefly because of Mr Mawhinney's tendency to raise overly technical points and to attempt to re-argue points already determined in previous decisions. This was demonstrated in comments by Judges in all three proceedings, and by the Judges applying reasonably significant uplifts to the costs awarded against Mr Mawhinney.
>
> [118] In both the Sheppard and Heath Proceedings, the proceeding was found to be an abuse of process. In the Heath Proceeding, the Court of Appeal also commented that Mr Mawhinney was improperly using the appellate process.
>
> [119] For these reasons, I am satisfied that the proceedings were totally without merit. They have been characterised by Mr Mawhinney's continuing to argue effectively the same point that was determined finally by Randerson J in *Kitewaho* in 2005, by unnecessarily complex and ultimately fruitless arguments, and all of them ultimately could never have succeeded.

[24] The threshold of at least two totally without merit proceedings having been met, the Judge turned to whether an order was appropriate. She considered numerous

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[29] At [70].

factors which she observed would have been hallmarks of a vexatious claim under the former regime.[30] While she considered that the three proceedings were sufficient by themselves to justify a s 166 order,[31] the Judge viewed the other litigation (which had not been taken into account on the threshold issue) as relevant, though not necessary, to deciding whether to exercise the discretion under s 167.[32]

[25] Having concluded that an extended order was appropriate,[33] the Judge proceeded to find exceptional circumstances existed justifying an order longer than three years,[34] noting the length of time Mr Mawhinney had been litigating with the Council and the timespan of the three qualifying proceedings. The Judge remarked that a five-year restriction was minor by comparison, and made such an order accordingly.[35]

Issues on appeal

[26] While there was a substantial measure of agreement on the issues for determination, the parties were unable to settle a list. We perceive that the arguments advanced raise the following issues:

(a) The meaning and application of the "totally without merit" test.

(b) Did the Judge err in interpreting and applying the test?

(c) Were any of the three candidate proceedings totally without merit?

(d) Did the Judge err in granting a restraining order?

(e) Were there exceptional circumstances warranting an order of five years duration?

(f) Were the terms of the order deficient?

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30 At [124].
31 At [126].
32 At [128].
33 At [133].
34 See Senior Courts Act, s 168(2).
35 High Court judgment, above n 1, at [159]–[160].

[27] Issue (a) subsumes the issue identified by Mr Mawhinney concerning the status of case law under the former legislation.[36] Issue (f) addresses a further issue raised by Mr Mawhinney about the utility of the order in light of his criticism of the manner in which the properties were described in Schedule A of the judgment.

Application to adduce new evidence

[28] Mr Mawhinney sought to adduce on appeal a considerable volume of documentary evidence comprising district plan provisions, applications for resource consent, requests for certificates of compliance, consent authority's determinations, applications for declarations under s 310 of the RMA and enforcement orders under s 314 of the RMA, expert evidence, and court determinations (primarily the Environment Court).

[29] Although extensive, the material was said to be limited to the subdivision consent applications and requests for certificates of compliance that were the genesis of the three proceedings considered by the Judge. Mr Mawhinney explained:

> There were other applications that led to other proceedings, but material as regards those other applications is not included in the subject application under rule 45, because Hinton J wrote at paragraph [22] of her Judgment that she did not review the other proceedings or study the other cases closely.

[30] The application was opposed by the respondent on the grounds that the proposed evidence was neither fresh nor cogent. Rejecting, as discussed below,[37] Mr Mawhinney's contention that the exercise of the s 166 jurisdiction involved in effect appeals of the relevant proceedings, the respondent also contended that the material was not relevant to the appeal.

[31] We accept that the proposed additional material does not satisfy the fresh and cogent criteria. However in any event, given the detailed reasons in the judgments in the candidate proceedings, it has not proved necessary to have resort to the additional material. For both reasons the application is declined.

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36 Judicature Act 1908, s 88B.
37 At [62] below.

The meaning and application of the "totally without merit" test

The parties' positions

[32] The contest between the parties was less about the interpretation of the threshold expression and more about its mode of application in the context of the Court's consideration of issuing a s 166 order. Consequently we discuss those two issues together.

[33] It was Mr Mawhinney's contention that in adopting the expression totally without merit the legislature deliberately set a very high test, namely that a proceeding must be completely devoid of merit. Hence a proceeding which was only partly without merit would not qualify for the purposes of s 167. However in the course of argument he expressed agreement with the reference in the Council's submissions to the "bound to fail" threshold, which is satisfied where there is no rational basis on which a claim can succeed.

[34] Having reviewed the legislative history, Ms Anderson for the Council drew attention to the acceptance by the English Court of Appeal in *R (Wasif) v Secretary of State for the Home Department* that the phrase totally without merit means no more and no less than bound to fail.[38] She also noted the distinction drawn in *Wasif* between cases which were bound to fail and others where a claimant has a rational argument in support of its claim but where the Judge is nevertheless confident that the argument is wrong.[39] However Ms Anderson did not firmly nail the Council's colours to the mast for, in supporting the Judge's conclusion on the three proceedings, she invoked several grounds additional to the bound to fail test.[40]

[35] A cause of particular concern for the Council was its apprehension that Mr Mawhinney's construction of s 167 would require a Judge to undertake a de novo assessment of the merits of the underlying proceedings. That was an understandable reaction to Mr Mawhinney's contention that not only did the three proceedings not

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38 *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82, [2016] 1 WLR 2793 at [11], quoting *R (Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091, [2014] 1 WLR 3432 at [13].

39 At [15].

40 See [57] below.

meet the totally without merit threshold but also that the three judgments, while res judicata, were erroneous. He argued that Hinton J erred in relying on proceedings that were determined by wrong decisions.

[36] Before explaining our conclusion on those contentions, we first review the earlier legislation, the law reform and legislative processes, as well as the recent English case law considering the equivalent English jurisdiction.

The previous legislation

[37] Prior to the SCA the statutory power of the High Court to restrain the activities of vexatious litigants was provided in s 88B of the Judicature Act 1908 which stated:

> **88B Restriction on institution of vexatious actions**
>
> (1) If, on an application made by the Attorney-General under this section, the High Court is satisfied that any person has persistently and without any reasonable ground instituted vexatious legal proceedings, whether in the High Court or in any inferior court, and whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no civil proceeding or no civil proceeding against any particular person or persons shall without the leave of the High Court or a Judge thereof be instituted by him in any court and that any civil proceeding instituted by him in any court before the making of the order shall not be continued by him without such leave.
>
> …

[38] In *Brogden v Attorney-General* this Court explained the nature of the task when considering an application for an order under s 88B:[41]

> [22] What is required is an appropriate assessment of the whole course of the respondent's conduct of the litigation in question, including the manner in which and apparent purpose for which each proceeding has been conducted, including resort to the appeal process where that has been done without any realistic prospect of success. We note the adoption by the High Court in this case of the observation made in *Attorney-General v Hill* (1993) 7 PRNZ 20, 22 that the concern is not with whether the proceeding was instituted vexatiously but whether it is properly described as a vexatious proceeding. Of course, if the litigant is found to have had an improper purpose in commencing proceedings, a finding that the litigation was vexatious is more likely. The test is, however, whether, overall, the various proceedings have been conducted by the litigant in a manner which properly attracts that epithet.

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41 *Brogden v Attorney-General* [2001] NZAR 809 (CA).

Law reform

[39] Various problems with s 88B were identified by the Law Commission through its review of the Judicature Act, including that only the Attorney-General could apply for an order, the remedy was one of last resort with a high threshold, the jurisdiction did not take into account interlocutory applications and the status of appeals was unclear.[42] These topics were discussed by the Commission in Issues Paper 29, which also reviewed the criteria for obtaining an order, expressing the provisional view that the requirement that the proceeding be instituted "without any reasonable ground" should be removed because it did not appear to add anything to the term "vexatious".[43]

[40] The Commission's final report recommended a system of graduated orders for dealing with persons who bring vexatious proceedings which would be available additionally to parties to the proceedings or to the courts on their own motion.[44] It proposed that interlocutory applications, appeals and criminal prosecutions brought by litigants would also be able to be taken into account.[45] The report recommended the current three tier system and introduced, without specific discussion, the "totally without merit" test which in due course appeared in cl 163 of the Judicature Modernisation Bill 2013 (178–1).[46] The Bill implemented the Government's response to the Law Commission's report and eventually led to the enactment of the SCA.

[41] A Ministry of Justice report to the Justice and Electoral Committee reviewing submissions received on the Bill noted the New Zealand Bar Association's reservations that the totally without merit test might not be sufficiently wide. The Association considered that the term "vexatious proceeding" had a well understood meaning which better captured elements of harassment or abuse and it proposed that the provision should contain a non-exhaustive list of considerations for determining vexatious proceedings.[47]

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42 Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) [Law Commission Report] at [16.3]. Section 88B also related only to the institution of proceedings rather than the continuation of proceedings.

43 Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, 2012) at [16.65].

44 Law Commission Report, above n 42, at 162: recommendations 83 and 84:

45 At 163: recommendation 85:

46 At [16.27]–[16.32].

47 Ministry of Justice Report, above n 27, at [280]–[281].

[42] However the Ministry of Justice Report did not adopt either of those suggestions, explaining:

> 288. Advisers note the view that "vexatious" is better defined than "totally without merit" and that a proceeding might be regarded as vexatious but still have merit.
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> 289. The term vexatious has never been clearly defined in New Zealand legislation, so understanding has relied on common law. In *Attorney-General v Hill*, the following factors were identified as leading to a determination of vexatious as used in section 88B of the Judicature Act:
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> - a pattern of complex, prolix, and sometimes incomprehensible pleadings;
> - proceedings showing almost compulsive litigation against a widening circle of defendants;
> - extravagant claims and unfounded attacks;
> - the frequency with which claims were struck out; and
> - the extent to which proceedings have been allowed to lie dormant.
>
> 290. Other cases have since added to the definition so, while the term is reasonably well understood, it is possibly not quite as well defined as the Bar Association indicates. …
>
> (Footnote omitted.)

[43] The Ministry of Justice Report then focussed on the evolution of the vexatious litigant jurisdiction in England:

> 291. In England, the Civil Procedure Rules Part 3C (the Rules), brought into force in 2004, have largely superseded the use of their Senior Courts Act 1981. That latter Act provides for an order similar to that of our Judicature Act because both acts had their origins in the Vexatious Actions Act 1896 (UK). The Rules provide for a scheme similar to that in the Bill, including the use of a totally without merit test.
>
> 292. The term "totally without merit" is not defined in the Rules. Its meaning is reliant on case law just as the definition of vexatious is in this country. A survey of English cases indicates the following factors have been considered as relevant in deciding whether a proceeding is totally without merit:
>
> - that there are no prospects whatever for success;

- exposure of defendants to inconvenience, harassment and expense out of all proportion to the gain a plaintiff is likely to receive;

- actions are brought at the drop of a hat despite the lack of merit; and

- no regard is paid to merit, proportionality or cost by a litigant.

293. We also note that the English system closely links struck out proceedings to the making of orders restricting civil litigation. Judges are expected to note on a struck out proceeding if it would be considered totally without merit. As a result, the grounds for strike out in the Civil Procedure Rules are also relevant. These are:

- that the statement of case discloses no reasonable grounds for bringing or defending the claim;

- that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

- that there has been a failure to comply with a rule, practice direction or court order.

[44] The Ministry of Justice Report concluded:

294. It can be seen that legislative definitions and the courts themselves tend to centre on common considerations, regardless of the term or country involved.

295. This observation could support the inclusion of a common set of criteria to underpin the core test, similar to Australian legislation. Advisers have considered this approach, as put forward by the Bar Association, but still favour not specifying criteria. We take this view because a) there is already a range of accepted criteria that the court is likely to draw on from New Zealand and overseas jurisdictions, and b) proving a set of criteria in a case may still miss the reason why proceedings are necessary. For example, intention to harass and annoy is a common criterion, yet vexatious litigants often do not intend this at all – they just want to be proven right.

296. By not including criteria, each case can be argued on its merits and drawing on the most relevant reasons in the circumstances. …

The legislative history

[45] In the original Judicature Modernisation Bill the grounds for each order utilised the phrase "in more than 1 proceeding" as can be seen in cl 163(1):

163 Ground for making section 162 order

(1) A Judge may make a limited order if, in more than 1 proceeding about the same matter in any court or tribunal, the Judge considers that 2 or more of the proceedings are or were totally without merit.

…

[46] Several changes were introduced by the Justice and Electoral Committee in the second iteration of the Bill drawing on recommendations made in the Ministry of Justice Report. To facilitate comprehension, we set out the revised version with the amendments revealed:[48]

163 Ground for making section 162 order

(1) A Judge may make a limited order if, in ~~more than 1 proceeding~~ at least 2 proceedings about the same matter in any court or tribunal, the Judge considers that ~~2 or more of~~ the proceedings are or were totally without merit.

(2) A Judge may make an extended order if, in ~~more than 1 proceeding~~ at least 2 proceedings about any matter in any court or tribunal, the Judge considers that ~~2 or more of~~ the proceedings are or were totally without merit.

(3) A Judge may make a general order if, in ~~more than 1 proceeding~~ at least 2 proceedings about any matter in any court or tribunal, the Judge considers that ~~2 or more of~~ the proceedings are or were totally without merit.

…

[47] Further changes, described as minor and to improve drafting, were made by a Supplementary Order Paper (SOP).[49] Only the grounds for a limited order were materially changed:

163 Grounds for making section 162 order

(1) A Judge may make a limited order under **section 162** if, in ~~at least 2~~ civil proceedings about the same matter in any court or tribunal, the Judge considers that at least 2 or more of the proceedings are or were totally without merit.

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48 Judicature Modernisation Bill 2014 (178–2).

49 Supplementary Order Paper 2016 (197) Judicature Modernisation Bill 2014 (178–2) (explanatory note) at 3.

[48] The SOP made no comment on those changes which were not debated in the House. However they serve to indicate how (but do not explain why) the structure of the grounds for a limited order differs from the other two orders and adopts the unusual phrase "at least 2 or more of the proceedings".

[49] The grounds for each of the three forms of s 166 order simply employed the totally without merit test. They did not adopt the calibration reflected in the grounds for the equivalent orders in the United Kingdom's Practice Direction 3C – Civil Restraint Orders shown in the comparative table below:

Order	**SCA, s 167**	**Practice Direction 3C – Civil Restraint Order (CROs)**
Limited	The Judge considers that at least two or more of the proceedings are or were totally without merit.	Where a party has made two or more applications which are totally without merit.
Extended	In at least two proceedings about any matter the Judge considers that the proceedings are or were totally without merit.	Where a party has persistently issued claims or made applications which are totally without merit.
General	In at least two proceedings about any matter the Judge considers that the proceedings are or were totally without merit.	Where the party against whom the CRO is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended CRO would not be sufficient or appropriate.

The English jurisprudence

[50] A convenient point of departure is the succinct concurrence of Lord Dyson in *R (Grace) v Secretary of State for the Home Department*:[50]

> **19** The phrase "totally without merit" is now firmly embedded in our Civil Procedure Rules. It is perhaps unfortunate that the word "merit" is included in the phrase. We are familiar with the notion of a claim being meritorious or having merit, connoting the idea that the claim is just or "is in accordance with the merits", but the word "merit" in the phrase "totally

[50] *R (Grace) v Secretary of State for the Home Department*, above n 38.

> without merit" does not have this meaning. Although the court always seeks to do justice, the purpose of "totally without merit" is to enable the court to root out claims which are bound to fail, and, for the reasons given by Maurice Kay LJ, I would construe that phrase as meaning "bound to fail".

[51] Delivering the primary judgment Maurice Kay LJ explained that the phrase first entered the lexicon of civil procedure in the context of civil restraint orders:

> **8** … It was first taken up soon after that in amendments to the [Civil Procedure Rules], where it now appears in a number of places. Its origin within the jurisprudence of civil restraint orders is acknowledged by paragraph 2.1 of the Practice Direction 3C supplementing [Civil Procedure Rules] r 3.11, which provides: "A limited civil restraint order may be made by a judge of any court where a party has made two or more applications which are totally without merit."
>
> **9** There the mischief sought to be addressed is that of the litigant who commences a plurality of hopeless cases. Its concern is to prevent further abusive or vexatious claims by placing a restriction in the form of a civil restraint order in relation to future litigation. It does not prevent the bringing of subsequent meritorious cases, for which permission can be sought and obtained.
>
> **10** At the same time there was an amendment to the [Civil Procedure Rules] empowering a judge of the Court of Appeal to certify an application for permission to appeal to this court as totally without merit, but its sole purpose at that time was to provide material for the making of a civil restraint order on that or a future occasion. It did not then prevent the applicant from renewing his application to an oral hearing. …

[52] The issue in *Grace* concerned not a civil restraint order but a further provision[51] which extended the limitation on requests for permission to apply for judicial review to a claimant with no previous history of abusive or vexatious claims, removing the entitlement to an oral hearing of the application for permission. It was argued that a finding of totally without merit should not be made unless the claim was so hopeless or misconceived that a civil restraint order would be justified if such applications were persistently made.

[53] Rejecting that submission Maurice Kay LJ said:

> **13** I return to the purpose of [Civil Procedure Rules] r 54.12(7). It is not simply the prevention of repetitive applications or the control of abusive or vexatious litigants. It is to confront the fact, for such it is, that the exponential growth in judicial review applications in recent years has given rise to a significant number of hopeless applications which cause trouble to public

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51 Civil Procedure Rules 1998 (UK), r 54.12(7).

> authorities, who have to acknowledge service and file written grounds of resistance prior to the first judicial consideration of the application, and place an unjustified burden on the resources of the Administrative Court and the Upper Tribunal. Hopeless cases are not always, or even usually, the playthings of the serially vexatious. In my judgment, it would defeat the purpose of [Civil Procedure Rules] r 54.12(7) if totally without merit were to be given the limited reach for which Mr Malik contends. It would not produce the benefits to public authorities, the Administrative Court or its other users which it was intended to produce. I have no doubt that in this context totally without merit means no more and no less than "bound to fail". …

Addressing the issue of safeguards, Maurice Kay LJ observed that no judge would certify an application as totally without merit unless confident, after careful consideration, that the case was truly bound to fail.[52]

[54] As Ms Anderson noted, the meaning of the phrase was revisited in *Wasif*, where the Court of Appeal, with the Master of the Rolls again presiding, sought to reconcile the different thresholds of "not arguable" and "totally without merit". As Underhill LJ explained:[53]

> **13** … [I]t is now generally accepted that the touchstone is whether the application [for permission to apply for judicial review] is "arguable" or has "a realistic prospect of success": the cases are legion, but the locus classicus is the judgment of Lord Bingham of Cornhill and Lord Walker of Gestingthorpe in *Sharma v Brown-Antoine* … As a matter simply of language it could be strongly argued that there is no real difference between that criterion and the criterion for [totally without merit] certification as established by the *Grace* case … if a case is unarguable is it not bound to fail? But if that were so the result would be that whenever a judge refused permission to apply for judicial review the application should also be certified as [totally without merit]. It was common ground before us, and is plainly correct, that that cannot be the intention behind the relevant Rules. The rule-maker evidently intended that applications certified as [totally without merit] should represent a sub-set of applications in which permission was refused: there must, therefore, be a difference between "not arguable" and "bound to fail", despite the conceptual awkwardness. The problem is how to define the difference.

[55] His Lordship concluded:

> **15** In our view the key to the conundrum is to recognise that the conventional criterion for the grant of permission does not always in practice set quite as low a threshold as the language of "arguability" or "realistic prospect of success" might suggest. There are indeed cases in which the judge considering an application for permission to apply for judicial review can see no rational basis on which the claim could succeed: these are in our view the

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52 *R (Grace) v Secretary of State for the Home Department*, above n 38, at [15].

53 *R (Wasif) v Secretary of State for the Home Department*, above n 38.

> cases referred to in the *Grace* case as "bound to fail" (or "hopeless"). In such cases permission is of course refused. But there are also cases in which the claimant or applicant … has identified a rational argument in support of his claim but where the judge is confident that, even taking the case at its highest, it is wrong. In such a case also it is in our view right to refuse permission; and in our experience this is the approach that most judges take. On this approach, even though the claim might be said to be "arguable" in one sense of the word, it ceases to be so, and the prospect of it succeeding ceases to be "realistic", if the judge feels able confidently to reject the claimant's arguments. The distinction between such cases and those which are "bound to fail" is not black-and-white, but we believe that it is nevertheless real; and it avoids the apparent anomaly identified at para 13 above.

The meaning of the phrase

[56] On the face of it at least, the parties were in accord on the interpretation of the threshold requirement. The Council's submission stated that the three proceedings were totally without merit "because they were bound to fail, and/or had no prospect of success". As earlier noted, Mr Mawhinney endorsed that approach.[54]

[57] However in its analysis of the candidate proceedings the Council addressed both the threshold and other factors concurrently:

> 6.10 The Council submits that the Three Proceedings:
>
> (a) Had no prospects of success, whatsoever, and were bound to fail.
>
> (b) Demonstrate Mr Mawhinney's propensity to issue proceedings at the drop of a hat.
>
> (c) Resulted in significant and unnecessary cost and inconvenience to the Council.
>
> (d) Could very well be classified as being designed to inconvenience Council.
>
> (e) Demonstrate Mr Mawhinney's lack of regard to the merit, proportionality, or costs in bringing or continuing proceedings against the Council.
>
> (f) Make clear that Mr Mawhinney regularly fails to comply with rules, practice directions and court orders.

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[54] See [33] above.

[58] Items (b) to (f) draw from the factors the Ministry of Justice Report identified as relevant to the totally without merit test,[55] factors which have previously been adopted by the High Court.[56] However, we agree with English jurisprudence and the parties in this case that a proceeding is totally without merit if it is bound to fail. In our view a proceeding is either bound to fail or it is not. If a proceeding is bound to fail, then the absence of factors described in (b) to (f) would not provide a basis to redeem it. However, similarly, if a Judge concludes that a proceeding is not bound to fail, we do not consider that the presence of factors (b) to (f) can be called in aid to assist it across the threshold. As the English Court of Appeal observed in *R (Kumar) v Secretary of State for Constitutional Affairs*:[57]

> **69** Under the new rule-based regime, however, it is sufficient that the previous claims or applications were totally without merit, and that the litigant persisted in making them. The requirement for "vexatiousness", or its modern equivalent, has gone.

[59] However to that conclusion we would sound this caveat. As Lord Dyson observed, the adoption of the word "merit" was perhaps unfortunate.[58] The potential breadth of its meaning in the context of the s 167 test was not explored in the submissions in this case. Hence our judgment does not engage with the proposition that might be advanced in another case that some proceedings are so manifestly vexatious that they would satisfy the s 167 test notwithstanding that the Court identified some legal or factual basis on which they might nevertheless succeed.

[60] In their submissions both parties employed synonyms for the word "totally", the Council referring to no prospects of success "whatsoever" and Mr Mawhinney referring to "completely devoid" of merit. We consider that the word "totally" is apt to convey both a qualitative and a quantitative dimension. As the present appeal demonstrates, a proceeding may combine multiple causes of action. Even if only one cause of action has merit, it cannot be said that the proceeding is totally without merit.

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55 Ministry of Justice Report, above n 27, at [292]–[293]. See [43] above.

56 *Genge v Visiting Justice Christchurch Men's Prison*, above n 27, at [29]; and High Court judgment, above n 1, at [50].

57 *R (Kumar) v Secretary of State for Constitutional Affairs* [2006] EWCA Civ 990, [2007] 1 WLR 536.

58 *R (Grace) v Secretary of State for the Home Department*, above n 38, at [19]. See [50] above.

Hence in order for a proceeding to satisfy the s 167 threshold, it will be necessary that all the causes of action pleaded should have been bound to fail.

Applying the test

[61] Mr Mawhinney's 90-page second amended notice of appeal and his application for leave to adduce extensive additional evidence served to underscore his conviction that, in considering the s 166 jurisdiction, a Judge should in effect entertain appeals against the judgments in the relevant proceedings.

[62] The Council responded that such an approach would result in two absurd outcomes:

> (a) The presiding Judge on an application under section 166 would have to undertake the work of not less than two first-instance Judges, in determining whether two or more proceedings were totally without merit, by reference to the pleadings, evidence, and submissions in those proceedings.
>
> (b) A respondent to an application under section 166 would effectively have a 'second bite at the cherry'. The respondent would be able to re-litigate the merits of its position at the first-instance hearing, which would run wholly contrary to the doctrine of *res judicata.*

[63] But Mr Mawhinney perceived that res judicata was no obstacle, submitting:

> [W]hilst the Judgments in the 3 proceedings relied upon by Hinton J are now *res judicata*, they were erroneous, and Hinton J erred by relying on proceedings that were determined by incorrect decisions. One of the grounds for the appeal is that erroneous decisions cannot qualify the proceedings in which they arose as totally without merit for the purposes of s 167 Senior Courts Act [2016].

[64] In our view Mr Mawhinney's argument misconceives the nature and rationale of the s 166 jurisdiction. The correctness or otherwise of the judgments which are the culmination of the candidate proceedings is not the issue. The proper focus is whether the proceedings themselves were so lacking in merit that they were bound to fail.

[65] However as Maurice Kay LJ observed in *Grace,* a Judge must be confident that the proceeding was truly bound to fail.[59] Such a conclusion may be possible

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[59] *R (Grace) v Secretary of State for the Home Department*, above n 38, at [15]. See [53] above.

simply from a consideration of a finding in the judgment in a proceeding where, for example, the basis of the finding is issue estoppel. However in other cases attaining such a state of confidence may necessitate careful consideration of the factual and legal bases for the proceeding. The extent of the inquiry required to be undertaken will be necessarily case-dependent.

[66] Section 167 makes clear that it is the Judge determining the issue whether an order should be made who is required to "consider" whether the proceedings are totally without merit. Although in all likelihood that Judge will carefully review the reasoning in the judgments given in the relevant proceedings, the question whether in any particular proceeding the threshold is established is for the consideration of the Judge contemplating making the order.

Did the Judge err in interpreting and applying the test?

[67] No issue was taken with the Judge's two step approach:[60]

> [115] In deciding an application under s 166, I consider there are two steps. Firstly, I must decide whether there are at least two proceedings that are or were totally without merit. If that is so, secondly, I make a discretionary judgment on whether an order is appropriate. In so doing, I may consider how those proceedings were conducted, and any wider circumstances that weigh for, or against, an order being made.

[68] However Mr Mawhinney submitted that [52]–[53] of the High Court judgment[61] disclosed an incorrect interpretation of the threshold test and revealed that at the jurisdictional stage Hinton J erroneously took into account considerations which were previously relevant under the repealed s 88B. While the observations at [52] read as confined to the decision whether, once the threshold is established, a s 166 order should be made, we agree that at [53] the Judge appears to contemplate that vexatious considerations have application to the s 167 threshold itself.

[69] Indeed that approach is explicit at [70] which discloses that the Judge's focus is not only on whether the proceeding had a hope of succeeding but also on the manner in which Mr Mawhinney conducted himself in the proceedings.[62] Similarly at [117],

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60 High Court judgment, above n 1.
61 At [21] above.
62 At [22] above.

in the course of addressing whether the threshold requirement was met, the Judge referred to the proceedings having exposed the Council to disproportionate levels of inconvenience and expense.[63]

[70] While such considerations will be relevant to the decision whether an order should be granted (addressed in the judgment at [115] and following), in our view they are not informative on the question whether the proceedings were bound to fail. Consequently we consider that the Judge erred in her interpretation of the statutory provisions to the extent that previously relevant vexatious considerations were imported into the threshold analysis rather than being reserved for the second step in the exercise.

[71] A further issue arises in the context of [70], the relevant part of which we restate:

> I will focus on whether the proceedings, on the presiding Judge's view, had a hope of succeeding, and the manner in which Mr Mawhinney conducted himself in those proceedings.

[72] As noted above, the determination of whether the threshold test is satisfied is the task of the Judge hearing the s 166 application.[64] It is not appropriate in effect to delegate that decision by simply adopting the assessments of the Judges in the candidate proceedings. To the extent that the passage in [70] suggests otherwise, in its reference to the views of the Judges in the candidate proceedings, we do not endorse it.

[73] As earlier noted,[65] the Council refined its application by excluding from its ambit proceedings commenced by corporate entities to which Mr Mawhinney was not a party. While not expressing a definite conclusion, the Judge nevertheless discussed the implications of s 167(5) in this way:[66]

> [64] I am uncertain if the same [that proceedings where Mr Mawhinney is acting as a trustee can be considered for purposes of s 167] applies to proceedings brought by the incorporated companies associated with and

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63 At [23] above.
64 At [66] above.
65 At [18] above.
66 High Court judgment, above n 1 (footnote omitted).

> represented by Mr Mawhinney. Section 167(5) is in terms: "the proceedings concerned must be proceedings commenced or continued *by the party to be restrained*". Proceedings commenced by a party other than Mr Mawhinney would appear not to count as a qualifying proceeding under s 167(2), even if Mr Mawhinney represented that party.
>
> …
>
> [67] I would be somewhat sympathetic to an argument that the legislature did not intend to preclude a proceeding from qualifying only because the litigant acted through companies, rather than in a personal capacity, especially where he was effectively the only shareholder and director. A proceeding "commenced" in the name of a company would still in those circumstances be a proceeding commenced by Mr Mawhinney.
>
> [68] But, as this may amount to effectively lifting the corporate veil, such an argument would require thorough submissions, and possibly evidence. Because I have not heard argument on it, I do not take the point further. I proceed on the basis that proceedings commenced by corporate entities where Mr Mawhinney was not a named party do not qualify as being a "proceeding" under s 167.

[74] This issue was not addressed on the appeal. Consequently this judgment does not engage with the proposition which has found favour in England that a party who has issued claims or applications refers not only to the named party but also to someone who is not a named party but is nevertheless the "real" party who has issued a claim or made an application.[67]

Was the subdivision consent litigation totally without merit?

The proceeding

[75] The context to this proceeding was described by Fogarty J in this way:[68]

> [78] The subject-matter of these proceedings is the subdivision of land into smaller parcels with the intended consequence that residential dwellings would be built. The roofs of the buildings and the sealed vehicular and pedestrian access ways interfere with what would otherwise be the natural absorption/flows of stormwater. They collect artificially the water, which then flows in increasing volume and velocity to the lowest point, from which it escapes. This potentially adverse effect has always been one of the principal reasons for the control of subdivisions in New Zealand.
>
> [79] Stormwater run-off appears to be at the heart of the impasse between the plaintiff and his predecessors and the council. Mr Mawhinney fears that

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67 See *CFC 26 Ltd v Brown Shipley & Co Ltd* [2017] EWHC 1594 (Ch), [2017] 1 WLR 4589 at [20]; and *Sartipy v Tigris Industries Inc* [2019] EWCA Civ 225, [2019] 1 WLR 5892 at [32].

68 *Mawhinney v Waitakere City Council*, above n 24.

> if he makes applications to the [Auckland Regional Council] he will be drawn into an extremely expensive exercise designed to address disposal of stormwater over a much larger catchment. However, this is a fact of life in New Zealand that developers confront and deal with every day. It does seem to me that Mr Mawhinney has been constantly looking for ways of enjoying a property right, misconceived as being nearly absolute, without being entangled in the lengthy and costly processes of local government. However, like death and taxes, they are inevitable.

[76] In 1999 as trustee of various family trusts Mr Mawhinney commenced a civil proceeding against the Council alleging breach of statutory duty, negligence and misfeasance in public office. Four distinct subdivision applications concerning parts of the Waitakere land were addressed in the proceeding, namely:

(a) the Consent order subdivision;

(b) the Minor Household Unit (MHU) subdivision;

(c) the Unit Title subdivision; and

(d) the Lydiard subdivision.

In respect of the last three Mr Mawhinney claimed that the Council had not processed subdivision consent applications for any good reason. Principally this was a challenge to the Council's invocation of s 91 of the RMA as the reason for not processing the MHU and Unit Title subdivisions, the Council being of the view that it was necessary for resource consents to be first obtained from the Auckland Regional Council.

[77] The remedies pursued comprised judicial review (orders were sought in the nature of mandamus and certiorari) and damages. An order for mandamus was sought in relation to grants of rights of way. The Court was requested to review the Council's dealings in relation to the MHU, Unit Title and Lydiard subdivisions. Damages were sought for extra costs and loss of profits totalling $6,695,656.71 together with interest of $2,307,631.24.

[78] The Council applied to strike out the proceeding on the grounds the claims were untenable or otherwise oppressive and an abuse of process. It contended that there was no common law liability for damages for breach of statutory duty (breach

being denied) and on the facts no common law duty of care could arise (negligence being denied). It submitted that it was an abuse of process for Mr Mawhinney to continue to advance the interpretation of s 91 previously rejected in the *Kitewaho* judgment.[69] There was no basis for any claim for misfeasance in public office when the Council's reliance on s 91 had been upheld by the High Court.

The High Court judgment

[79] Fogarty J observed that Mr Mawhinney, who was appearing for himself, plainly did not grasp the principle of estoppel underpinning abuse of process,[70] commenting:

> [18] It was difficult to move Mr Mawhinney out of the detail of his factual contentions, and to confront the findings of the Environment Court and the High Court in respect of these contentions. I mention this difficulty because I do not consider it relevant to get into a lot of the factual detail. In the course of the hearing it became apparent several times that I was hearing an argument previously argued before another Judge and decided against Mr Mawhinney. He was giving that and other similar arguments another run to see whether another Judge would find sympathy with them.

[80] The Judge stated that having heard two days of argument he was satisfied that Mr Mawhinney was seeking to re-argue the interpretation of s 91 rejected in the *Kitewaho* judgment. In our view that conclusion, that this aspect of the proceeding was an attempt to relitigate Mr Mawhinney's s 91 thesis, was plainly correct.

[81] Clothing the contention with an allegation of malice by the Council could not overcome its abusive nature. As the Judge said:

> [33] Essentially, this argument is new only in its formulation. Mr Mawhinney has been of the view, for some time, that the Council has been giving him the runaround. He thinks this is because the Council takes the view that it had an understanding with him that the consent order granting the fee simple title subdivision back in 1995 was to be the only subdivision, pending further development of the council's proposed plan. It was within Mr Mawhinney's ability to develop the malice argument that he is running now-back when he was challenging the use of s 91.

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69 See *Kitewaho* judgment, above n 11.

70 *Mawhinney v Waitakere City Council*, above n 24, at [16].

[82] Similarly, for the reasons given in the judgment,[71] the Judge's conclusion that there was no tenable argument for judicial review in the nature of mandamus or certiorari was plainly correct. However by their nature the causes of action for breach of statutory duty and in negligence have at least the potential to fall into the grey area identified by Underhill LJ between not arguable and totally without merit.[72]

[83] Speaking of the former, in *Gorringe v Calderdale Metropolitan Borough Council* Lord Steyn said that the central question is whether from the provisions and structure of the statute an intention can be gathered to create a private law remedy.[73]

[84] However we are satisfied that there was no tenable argument available to Mr Mawhinney for breach of a private right conferred by the RMA for the reasons stated by Fogarty J, namely: [74]

(a) The comprehensive character of the processes and remedies within the RMA precludes the need for an additional remedy by way of common law damages.

(b) There was no policy vacuum supporting such a need.

(c) The duties which the RMA casts on territorial authorities are coupled with discretions. While the duties are not easily breached, the normal remedy for a failure to exercise them is the statutory enforcement order.

[85] In regards to the negligence issue, this Court found in the case of *Morrison v Upper Hutt City Council* that there were three policy reasons for denying a private law duty of care in the context of the Town and Country Planning Act 1977: first, questions of interpretation are not susceptible to the application of the negligence standard; second, the plaintiff had a right of appeal; and third, recognising a duty of care here could create a floodgates problem.[75] The Judge's conclusion that Mr Mawhinney's

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71 At [44].
72 *R (Wasif) v Secretary of State for the Home Department*, above n 38, at [15]. See [55] above.
73 *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057 at [3].
74 *Mawhinney v Waitakere City Council*, above n 24, at [46]–[49].
75 *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331 (CA) at 337–338.

claim in negligence fell squarely within that policy framework was plainly correct, justifying his conclusion that there was no prospect of a duty of care being recognised.[76]

Our assessment

[86] Because the Judge was exercising the strike-out jurisdiction he understandably and appropriately applied the well-established test in *Attorney-General v Prince and Gardner* of whether the causes of action were so clearly untenable that they could not possibly succeed.[77] His judgment concluded in this way:

> [81] I am quite satisfied that there was no prospect of the plaintiff succeeding in any of the causes of action. On analysis, none of his arguments are tenable.

[87] While we doubt that there is any difference in practice between the *Prince* test and the s 167 threshold, we are satisfied that all the causes of action in the subdivision consent litigation were bound to fail. Consequently the proceeding in its entirety was totally without merit.

Was the boundary adjustment litigation totally without merit?

The proceeding

[88] On 21 June 2005 the Council declined Mr Mawhinney's request for a certificate of compliance for a number of proposed boundary adjustments in relation to several titles for the Waitakere land. The object was to increase the width of vehicle access to the land.

[89] On the appeal by Mr Mawhinney and Glorit Subdivision Ltd to the Environment Court the Council contended that, as it had no jurisdiction to issue a certificate of compliance, the appeal was frivolous or vexatious and should be struck out. The Council also contended that it would be an abuse of process to allow the appeal to proceed because Mr Mawhinney was relying on an argument that had previously been rejected by the Environment Court, the High Court and this Court.

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[76] *Mawhinney v Waitakere City Council*, above n 24, at [56].
[77] *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

[90] Judge Sheppard struck out the appeal stating:[78]

> [131] There are two grounds of the appeal. Of the first, the common area/complete site ground, I have found that it is so clearly untenable that it discloses no reasonable case and cannot possibly succeed. Of the second ground, the series of boundary changes ground, I have found that it would be an abuse of the process of the Court to allow that ground to be taken further.

[91] Mr Mawhinney and Glorit Subdivision Ltd applied for a rehearing under s 294 of the RMA. That section permits a rehearing if new and important evidence has become available or if there has been a change of circumstances that might have affected the decision. Judge Sheppard ruled there were no grounds for a rehearing.[79]

[92] Mr Mawhinney and Glorit Subdivision Ltd appealed both the strike-out and rehearing decisions to the High Court on questions of law under s 299 of the RMA. The appeals were dismissed in the judgment of Venning J in *Mawhinney v Waitakere City Council* delivered on 19 December 2007.[80] Because Hinton J was under the impression that the appeal to the High Court had been abandoned, the judgment under appeal assessed the merits of the boundary adjustment litigation solely by reference to the Environment Court decision and did not address the judgment of Venning J. However it is the Venning J's judgment which is our focus.

The High Court judgment

[93] The application for the certificate of compliance was made on the basis that the proposed boundary adjustments complied with r 2.1(a) of the Council's partly operative proposed plan. Under this rule subdivisions comprising boundary adjustments where no existing site was adjusted in site area by more than 10 per cent were permitted activities. As the Judge explained at an early point in the judgment, that argument was not sustainable by reference to the individual sites:

> [11] The short answer to this appeal is that at least some of the boundary adjustments that Mr Mawhinney applied for exceeded 10 percent and required a resource consent so that the Council had no authority to grant a certificate of compliance for the particular proposal. In the circumstances the Council was right to decline the application for a certificate of compliance and the

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78 *Mawhinney v Waitakere District Council*, above n 23.
79 *Mawhinney v Waitakere City Council* EnvC Auckland A020/2006, 23 February 2006.
80 *Mawhinney v Waitakere City Council* HC Auckland CIV-2006-485-627, 19 December 2007.

> Environment Court was justified in striking out the appeal as disclosing no reasonable cause of action and as an abuse of process. …

[94] Indeed the fact that some individual sites exceeded the 10 per cent limit was acknowledged by Mr Mawhinney:

> [12] Mr Mawhinney stated in the application for the certificate of compliance that the proposal met the requirement that no existing site was adjusted in site area by more than 10 percent. However, on Mr Mawhinney's own case on this appeal there are two lots, 323 and 324, which are adjusted in size by more than 10 percent. Mr Mawhinney calculated the changes in size as an 18.36% increase in the case of lot 323 and a 29.9% decrease for lot 324. Mr Mawhinney conceded in his written submissions in support of this appeal, after setting out the adjustments to lots 323 and 324:
>
> > It is accepted that as the variation in these lots exceeds 10% reliance cannot be placed on Rule 2.1(a) unless the complete site argument is to prevail.
>
> On the face of Mr Mawhinney's own documentation and submissions the proposal does not comply with rule 2.1(a) (subject to his "complete site" argument, to which I will shortly refer).

[95] However Mr Mawhinney further argued that, because the various parcels of land comprised a single allotment and thereby a single site, the boundary adjustments resulted in an adjustment in the site area of only 7.5 per cent, and hence within the 10 per cent permitted by r 2.1(a).

[96] Mr Mawhinney's argument was constructed as follows:

(a) The definition of "site" for the purposes of r 2.1(a) includes an allotment.

(b) Section 218(2) of the RMA provides that an allotment is a "continuous area" of a parcel of land.

(c) Section 218(3) provides an extension to that term by stating that an allotment shall be deemed to be a continuous area of land notwithstanding that part of it is physically separated from any other part by a road or in any other manner whatsoever.

(d) The reference to "in any other manner whatsoever" extended to include a separation of two parcels of land by a cadastral boundary.

[97] The Environment Court rejected Mr Mawhinney's contention as untenable, ruling the phrase "in any other manner whatsoever" is confined to a physical separation of the kind that occurs with a separation by a road. Venning J shared that view, stating:

> [37] It is a matter of interpretation of the relevant provisions of the plan and the Act. I agree with Judge Sheppard's interpretation of the provisions. The section must be interpreted in its context. In my view the reference to "in any other manner" is plainly a reference to a physical separation because it follows the earlier reference in the section to the land being "physically separated" from any other part by a road. The focus is on a physical separation, not separation by a cadastral boundary. The separation by "any other manner" is by way of physical separation.

[98] He concluded:

> [39] The appellant's contention is simply untenable. The rural residential parcel and undivided share in a common parcel do not, together make an allotment. As they are not an allotment they cannot together constitute a site for the purposes of the plan and particularly rule 2.1(a).

[99] Having dismissed the appeal the Judge made a timetable for written submissions on costs. Mr Mawhinney failed to provided costs submissions. In a judgment dated 5 March 2008 Venning J awarded costs to the Council on a 2B basis with an uplift of 50 per cent on scale costs for the reason that Mr Mawhinney had contributed unnecessarily to the time and expense of the proceedings by pursuing arguments that lacked merit, stating:[81]

> [5] The appellant Mr Mawhinney is no stranger to the processes in the Environment Court nor to appeals to this Court. In the present case he sought to appeal the substantive decision of the Environment Court and also the Environment Court's decision declining an application for rehearing. As noted in the judgment there was a short answer to Mr Mawhinney's appeal. As the Court concluded on the facts conceded by Mr Mawhinney the appeal simply could not succeed. Despite Mr Mawhinney's attempt to reformulate questions of law the application for rehearing was a waste of the Court's time and the respondent's costs. I also note that during the course of the appeal the Court observed that Mr Mawhinney's position on certain issues was untenable.

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81 *Mawhinney v Waitakere City Council* HC Auckland CIV-2006-485-627, 5 March 2008.

Our assessment

[100] We have recorded the detail of Mr Mawhinney's argument and the bases for its rejection by Venning J for several reasons. First, the High Court judgment was not considered by Hinton J and it is appropriate therefore that we assess its significance.

[101] Secondly, Mr Mawhinney's alternative argument involved an issue of statutory interpretation. One might not unreasonably expect that where the contest involves the interpretation of a statute in most cases the point would be at least arguable. However from our analysis of the argument we are satisfied that Mr Mawhinney's alternative single site contention was not arguable.

[102] Thirdly in the costs judgment Venning J made reference to his observations during the hearing to the effect that Mr Mawhinney's position "on certain issues" was untenable. We do not read that comment as suggesting that either of Mr Mawhinney's primary arguments were tenable. It simply records the fact that such interventions were made in the course of argument.

[103] In our view both the arguments Mr Mawhinney advanced before Venning J were bound to fail. Hence that proceeding satisfied the s 167(2) criterion.

Was the compliance certificate litigation totally without merit?

The proceeding

[104] In February 2006 Mr Mawhinney together with a number of his companies[82] lodged with the Council an application for a certificate of compliance (under s 139 of the RMA) and subdivision consents (under s 88) in respect of the Waitakere land. The certificate of compliance was sought in relation to boundary adjustments shown on one plan and the construction of 77 sheds shown on a different plan. The subdivision consents related to a proposed cross-lease of the 77 proposed sheds and a specified house on the basis that the proposed cross-lease was either a controlled

[82] Glorit Subdivisions Ltd, London and Greenwich Trading Co Ltd, Perceptus Ltd and Swanson Heights Ltd.

activity under r 2.1(a) of the General Subdivision Rules or a restricted discretionary activity under r 7.2(c) of the Foothills Subdivision Rules.

[105] The Council rejected the application, primarily on the grounds that it was incomplete. In its letter of 28 February 2006 the Council said:

> 3.1 The status of the resource consent application is non complying and a full assessment of all relevant effects is required, including relevant land use effects arising as a result of the proposed lease subdivisions. This includes the additional Human Environment and subdivision rules that are triggered under the partially operative Waitakere City District Plan, together with relevant resource consents that are required from the Auckland Regional Council under s 15 of the Act: for further information we refer you to the decision of Randerson J in *Waitakere City Council v Kitewaho Bush Reserve Co Ltd & Ors* [[2005] 1 NZLR 208].
>
> 3.2 The applicant is not entitled to limit its application to general subdivision rule 2.2 or Foothills subdivision rule 7.2(c). This is confirmed by the *obiter* comments of Randerson J in *Waitakere City Council v Kitewaho Bush Reserve Co Ltd & Ors*.

[106] The applicants' objection was dismissed by a hearings committee which held the applications for subdivision consent were deficient because they did not provide an adequate assessment of environmental effects. In particular the committee found that the application could not be limited to r 2.2 of the General Subdivision Rules or r 7.2(c) of the Foothills Environment Subdivision Rules. The committee relied on the *Kitewaho* judgment in coming to its conclusions.[83]

[107] On the application of the Council the applicants' appeal to the Environment Court was struck out on the grounds of abuse of process.[84] Other appeals by Mr Mawhinney were struck out at the same time. With reference to those various appeals Heath J explained:[85]

> [13] The common theme underlying the Environment Court's decisions to strike out the appeals is that a single application, seeking both certificates of compliance and resource consents, was a "contrivance" to avoid the need to comply with the subdivision provisions of the Act. The Court considered that, in cases where the certificates and consents are sought for the ultimate purpose of a subdivision, they ought to be assessed for compliance "holistically", rather than in isolation from each other.

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83 *Kitewaho* judgment, above n 11.
84 *Perceptus Ltd v Waitakere City Council*, above n 25.
85 *Mawhinney v Waitakere City Council*, above n 26.

The High Court judgment

[108] Mr Mawhinney, who was substituted for the corporate applicants as appellant, appealed to the High Court under s 299 raising 12 grounds of appeal said to involve questions of law. Heath J did not engage with all those questions, explaining:

> [16] It is unnecessary for me to address all 12 proposed grounds because, in my view, the critical issue is whether the Environment Court was right to strike out the appeals for abuse of process. The answer to that question turns on whether the methodology employed by Mr Mawhinney to obtain authority to subdivide the land was a device designed to subvert the subdivision requirements of the Act and the relevant operative district plan.
>
> [17] Early in the appeal hearing, I raised with Mr Mawhinney whether, if he were to lose on that point, the appeal would inevitably be dismissed. I indicated that I agreed with and endorsed Randerson J's reasoning in *Waitakere City Council v Kitewaho Bush Reserve Co Ltd.*
>
> [18] Although Mr Mawhinney submitted that application of the *Kitewaho* principle was not fatal to his appeal, I remained of the view that it was. During the course of the appeal, without formally doing so, I indicated that I proposed to rule against Mr Mawhinney on this issue and to dismiss the appeal. I now explain my reasons for reaching that view.

[109] The Judge proceeded to address the relevant provisions of the RMA concerning subdivision consent and recited several paragraphs from the *Kitewaho* judgment before stating:

> [31] As is apparent, the human mind behind the *Kitewaho* appeal was Mr Mawhinney. Points similar to the one in issue have also been raised by him and dismissed in other cases …
>
> [32] While Mr Mawhinney is open in saying that he has endeavoured to modify his applications to take account of what has been said in earlier judgments, the evolution of the various applications is no more than a variation on a single theme. The new applications do not address a fundamental flaw in the procedure that Mr Mawhinney has adopted. That flaw arises from his need to obtain resource consents to carry out the whole of the proposed subdivision and to comply with all relevant rules in the relevant operative plan in doing so.

[110] Because the application had attempted to subvert the subdivision requirements of the RMA and the relevant operative district plan, Heath J had no doubt that the Environment Court Judge was right to hold that the appeals amounted to an abuse of

process. Hence the appeal was dismissed without further inquiry into the various points raised by Mr Mawhinney.[86]

The leave judgments

[111] Mr Mawhinney then made an oral application for leave to appeal to this Court. While Heath J provisionally favoured a grant of leave on the basis that it might have been desirable to resolve finally the fundamental issue to which Randerson J referred in *Kitewaho*, ultimately the Judge concluded that "the answer to the question raised is so clear that leave is probably undesirable".[87] Nevertheless the Judge convened a further hearing to afford Mr Mawhinney an opportunity to make additional submissions in support of leave.

[112] Following a hearing on 19 February 2009 Heath J delivered a further judgment dismissing Mr Mawhinney's application for leave to appeal.[88] He also awarded costs in favour of the Council on a 2B basis and incorporated a 50 per cent uplift, stating:

> [26] I am persuaded that the Council has been put to unnecessary costs, not only by arguments which have been raised and determined earlier, but also by the prolix and non-focussed way in which submissions were made in advance of the appeal. That caused the Council to instruct its lawyers to prepare thoroughly on the basis of a number of issues raised which had no prospect of success.

[113] Mr Mawhinney then applied to this Court for special leave to appeal. In its judgment declining the application the Court stated that the answers to Mr Mawhinney's contentions were plain, did not warrant further argument and sought only to expand upon his own idiosyncratic interpretation of the requirements of the RMA.[89] The Court endorsed comments in the High Court judgment in *Kitewaho* as a correct statement of the subdivision regime under the RMA.[90] It confirmed that consent applications are not amenable to compartmentalisation but that the RMA is

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86 At [39]–[40].
87 At [44].
88 *Mawhinney v Waitakere City Council* HC Auckland CIV-2008-486-1119, 19 February 2009.
89 *Mawhinney v Waitakere City Council* [2009] NZCA 335 at [23].
90 At [24]–[25].

directed at the management of natural resources in a comprehensive and holistic way.[91] The Court concluded:

> [30] The shared interpretation of the relevant provisions of the RMA favoured by the Judges in the High Court is sound and in accordance with the Act's scheme and purpose. Mr Mawhinney has not demonstrated that there is any general or public importance in his appeal. His application does not raise arguable points of law. He is using the appellate procedure as a means of furthering his own interests, and as a "backdoor means of expanding [his] argument into a wider challenge": see *Downer Construction (NZ) Ltd v Silverfield Developments Ltd* [2007] NZCA 355 at [39].

Our assessment

[114] In our view the essence of the compliance certificate litigation was an attempt to re-run the propositions rejected in *Kitewaho* and also by Fogarty J in the subdivision consent litigation. Hence it was inevitable that it could not succeed. We consider that the compliance certificate litigation was also totally without merit.

Did the Judge err in granting a restraining order?

[115] As earlier noted,[92] no challenge is made to the Judge's two step approach, nor to the view that the discretion whether to make a s 166 order may include consideration of how the qualifying proceedings were conducted and any wider circumstances that weigh for, or against, an order being made. In that connection we note the observation in *Sartipy v Tigris Industries Inc* that a proceeding need not be abusive, made in bad faith, or supported by false evidence or documents in order to be totally without merit, but if it is, that will reinforce the case for a civil restraint order.[93]

[116] Mr Mawhinney took issue with a number of the factors to which the Judge referred in considering whether to make a s 166 order. He focused first on the following observations:[94]

> [122] In spite of the number of his proceedings that have been struck out, and the numerous costs awards made against him, Mr Mawhinney pays no mind to forcing the Council to incur further costs. He has largely failed to pay any costs orders and has been rendered bankrupt twice as a consequence.

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91 At [25], citing *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA); and *King v Auckland City Council* [2000] NZRMA 145 (HC).

92 At [67] above.

93 *Sartipy v Tigris Industries Inc*, above n 67, at [27].

94 High Court judgment, above n 1.

[117] Mr Mawhinney sought to lay the blame for costs at the respondent's door, submitting that much of the litigation would not have been instigated if the consent authority had observed the RMA processes within the statutory timeframes. He attributed his failure to pay costs orders to the fact that the funds to do so would have derived from the sale of land which could not occur without the subdivision consents he had sought. On the issue of his bankruptcy he observed that the respondent was the only petitioning creditor.

[118] Mr Mawhinney also took issue with the Judge's observations that:

> [123] He continually brings proceedings about largely the same matters. He resorts to litigation "at the drop of a hat". He pays little respect to prior decisions and continues to make the same arguments over and over, presumably in the hope of finding a Judge who is receptive to them.

[119] Mr Mawhinney responded that applications he had filed were not at the drop of a hat but were an attempt to get matters processed by the consent authority in accordance with the procedures and time periods specified in the RMA. He pointed out that it has been his practice to lodge an objection rather than an appeal if that course is available, which he characterised as being the opposite of rushing to litigation at the drop of a hat. He contended that litigation, of which complaint had been made, had been used sparingly and only after extended omissions by the respondent.

[120] With reference to the criticism that he brought proceedings largely about the same matters, he contended that is a function of the RMA, praying in aid to the observation of Heath J that Mr Mawhinney and associated parties had modified and evolved applications and requests to take account of what had been said in prior judgments.[95]

[121] In conclusion he submitted that the respondent's omission to process applications was not a single isolated incident but a pattern of multiple omissions. If the respondent had complied with the processes and time periods specified in the RMA, the remedies sought through litigation would not have been required.

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[95] *Mawhinney v Waitakere City Council*, above n 26, at [32]. See [109] above.

Mr Mawhinney submitted that Hinton J had erred by not taking those considerations into account in the decision to grant an order.

[122] While sincere in his convictions, it is apparent that Mr Mawhinney is unable to recognise the vexatious nature of his pursuit of litigation with the respondent. We agree with the Judge's observations that Mr Mawhinney conducts his proceedings with many of the hallmarks of what would have been considered a vexatious claim under the old regime.[96] The Judge was amply justified in concluding that a s 166 order was appropriate.

Were there exceptional circumstances warranting an order of five years duration?

[123] As earlier noted, the Council's original application was silent on the duration of the order sought.[97] Nor did the application make reference to matters said to constitute exceptional circumstances. The issue as to duration was clarified by the terms of the amended application.[98] However it is not apparent that the Council set out the reasons why an order of five years duration was claimed to be justified. Indeed, as the judgment records, the Council did not even address the Judge on whether there were exceptional circumstances which justified the making of an order of that duration.[99]

[124] Nevertheless the Judge proceeded to consider whether an order in excess of three years was justified. We set out her reasons in full:

> [158] In the Report of the Ministry of Justice to the Justice and Electoral Committee, referred to above, the Ministry noted submissions that a Judge should be able to impose an order of a length they saw fit. However, the Ministry's advice was that s 168(2) was intentionally drafted so as not to give Judges a "blank cheque", as it were. The normal limit of up to three years was set, being sensitive to the important right to access justice contained in the New Zealand Bill of Rights Act.
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> [159] Mindful of that, I have decided there are exceptional circumstances here. Mr Mawhinney has been litigating with the Council over this one issue for 25 years. Even in terms of the "qualifying proceedings", these go back

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96 High Court judgment above n 1, at [124].
97 At [16] above.
98 At [18] above.
99 High Court judgment, above n 1, at [157].

> 13 years now. Coupled with all of the other factors, these are exceptional circumstances. A five-year restriction is minor by comparison.
>
> (Footnotes omitted.)

[125] We have concerns about this conclusion on two fronts. First, from a process perspective, a question plainly arises as to fairness vis à vis Mr Mawhinney. If, as appears to be the case, the matters said to constitute exceptional circumstances were never specified, and given that the Council presented no submissions on the issue, how was Mr Mawhinney to know the matters to which he needed to respond? Perhaps unsurprisingly in the circumstances there was no mention by the Judge of any submissions from Mr Mawhinney on the issue.

[126] Secondly the Judge did not descend to any particularity with reference to the matters which constituted exceptional circumstances. In addition to the three qualifying proceedings, she referred to litigation extending back for 25 years. However as she explained at an early part of the judgment:

> [22] The Council has provided me with a schedule of proceedings involving Mr Mawhinney and the various entities, which I annex to this judgment as Schedule B. I have not reviewed all of the proceedings listed, and the table does not form a part of my reasons. I annex it to provide a broad overview of the history of this dispute. I do not, however, adopt the descriptions of the proceedings, given I have not studied all of the cases closely. I will discuss some of these proceedings in more detail below.

Those cases which were discussed in more detail were the three candidate proceedings.

[127] However it seems obvious from the penultimate sentence in [159] that those three proceedings on their own were not considered sufficient to amount to exceptional circumstances, but only when "coupled with all of the other factors". In our view it was necessary for the matters relied on as constituting exceptional circumstances warranting the maximum period of restraint to have been identified with greater particularity than by the compendious description in [159].

[128] For these two reasons, we consider the five-year order should be set aside and an order of three years substituted.

Were the terms of the order deficient?

[129] The order made by Hinton J was in the following terms:

> Peter William Mawhinney, in any capacity, including but not limited to as a trustee of any trust, is restrained from commencing or continuing any civil proceeding (or matter arising out of a civil proceeding) that relates in any way to the parcels of land contained in the identifiers set out in Schedule A to this judgment, for a period of five years.

[130] Schedule A comprised three columns recording the legal description of the parcels of land, the addresses of the land and the area in hectares. The parcels of land were described by reference to the lot number on a deposited plan.

[131] Mr Mawhinney contended that the judgment was defective and, in his words, lacking in "utility" because the legal descriptions of the parcels of land were not "identifiers" within the meaning of the Land Transfer Act 2017. He drew attention to the definition in the Act of "unique identifier" as meaning a combination of letters or numbers or both by which a record of title or an instrument is identified.

[132] Noting that the "identifier" terminology derived from the respondent's application, Mr Mawhinney submitted that the respondent had obtained what it sought in that the sealed order of the Court included the annexure attached to the application. However the legal descriptions were not identifiers and hence the restraining order and the judgment from which it arose should be set aside.

[133] On this issue we accept the respondent's submission that Mr Mawhinney has adopted an overly technical analysis of the meaning of "identifier" in an attempt to constrain the scope of the Court's order. The order is sufficiently clear about the land to which it relates. Nothing turns on whether or not the identification of the parcels of land in the appendix are identifiers within the meaning of the Land Transfer Act.

Result

[134] The application to adduce further evidence on appeal is declined.

[135] The appeal is allowed to the extent that the five-year order of the High Court is set aside and an order of three years is substituted.

[136] The appeal is otherwise dismissed. The remaining terms of the order remain unchanged.

[137] Mr Mawhinney being self-represented, there is no order for costs.

Solicitors:
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