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ATTORNEY-GENERAL v WENTWORTH

Common Law Division: Roden J

25 July-9 August, 7 October 1988

Practice — Vexatious litigants — Proceedings to restrain — Test for determining whether proceedings "vexatious" — "Habitually and persistently" instituted — Absence of reasonable ground — Other relevant considerations — Supreme Court Act 1970, s 84(1).

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Injunctions — To restrain legal proceedings — Vexatious litigants — Test for determining whether proceedings "vexatious" — "Habitually and persistently" instituted — Absence of reasonable ground — Other relevant considerations — Supreme Court Act 1970, s 84(1).

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The *Supreme Court Act* 1970, s 84(1), provides:

> "Where any person (in the subsection called the vexatious litigant) habitually and persistently and without any reasonable ground institutes vexatious legal proceedings, whether in the Court or in any inferior court, and whether against the same person or against different persons, the Court may, on application by the Attorney-General, order that the vexatious litigant shall not, without leave of the Court, institute any legal proceedings in any court, and that any legal proceedings instituted by the vexatious litigant in any court before the making of the order shall not be continued by him without leave of the Court."

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Held: (1) For the purposes of s 84(1) legal proceedings may properly be regarded as vexatious on either objective or subjective grounds. (491C)

(2) The relevant test for determining whether proceedings are "vexatious" is:

(a) proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought;

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(b) they are vexatious if they are brought for collateral purposes, and not the purpose of having the court adjudicate on the issues to which they give rise;

(c) they are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless;

(d) in order to fall within the terms of s 84:

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(i) proceedings in categories (a) and (b) must also be instituted without reasonable ground (proceedings in category (c) necessarily satisfy that requirement);

(ii) the proceedings must have been "habitually and persistently" instituted by the litigant. (491C-E)

(3) Other relevant considerations on an application under s 84(1) include:

(a) whether, having regard to the substance of the matter and not to its form, the particular matter can properly be regarded as the institution of proceedings as distinguished from the taking of a step in proceedings that are already on foot. (491F-492D)

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Hunters Hill Municipal Council v Pedler [1976] 1 NSWLR 478 at 485-488, adopted and applied.

Commonwealth Trading Bank v Inglis (1974) 131 CLR 311, considered.

(b) whether the proceedings are in fact vexatious — not whether they have been instituted vexatiously. (492D-E)

Re Vernazza [1960] 1 QB 197 at 208, applied.

(c) whether, if proceedings are found to be vexatious, what the litigant has done in instituting, as distinct from pursuing the proceedings, has been done "habitually and persistently". (492E-G, 495G)

(d) whether there is an absence of reasonable ground for the institution of the particular proceedings under consideration; as to which the mere presence of scandalous, embarrassing, irrelevant or objectionable material, need not be relevant. (492G)

Hunters Hill Municipal Council v Pedler [1976] 1 NSWLR 478 and *Re Langton* [1966] 1 WLR 1575; [1966] 3 All ER 576, considered.

(4) The power of the Court to make an order under s 84(1) is an unfettered discretionary one as to which the prima facie right of access to the courts enjoyed by all citizens and the availability of other powers to deal with abuse of process will be relevant considerations. (493C)

(5) In circumstances where, out of a large number of inter-related proceedings including both substantial and incidental matters, three matters only could be regarded as vexatious proceedings instituted without reasonable grounds, it was not appropriate to conclude that the defendant had "habitually and persistently" and without reasonable ground instituted vexatious proceedings and no order should be made under s 84. (505C)

Note:
A Digest — PRACTICE [1]; INJUNCTIONS [51]

CASES CITED

The following cases are cited in the reported judgment:

Attorney-General for New South Wales v Solomon (1987) 8 NSWLR 667.
Birch v Birch [1902] P 130.
Boaler, Re [1915] 1 KB 21.
Cabassi v Vila (1940) 64 CLR 130.
Chaffers, Re; Ex parte Attorney-General (1897) 45 WR 365; (1897) 76 LT 351.
Commonwealth Trading Bank v Inglis (1974) 131 CLR 311.
Cox v Journeaux [No 2] (1935) 52 CLR 713.
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125.
Hunters Hill Municipal Council v Pedler [1976] 1 NSWLR 478.
Langton, Re [1966] 1 WLR 1575; [1966] 3 All ER 576.
Lawrance v Lord Norreys (1888) 39 Ch D 213.
McDonald v McDonald (1965) 113 CLR 529.
McHarg v Woods Radio Pty Ltd [1948] VLR 496.
McHenry v Lewis (1882) 22 Ch D 397.
Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 62 ALJR 389; 79 ALR 9.
R De W Kennedy (Finance) Pty Ltd v Ley (Holland J, 29 March 1978, unreported).
Vernazza, Re [1960] 1 QB 197.
Wentworth v Rogers [1984] 2 NSWLR 422.
Wentworth v Rogers (No 5) (1986) 6 NSWLR 534.
Wentworth v Rogers (No 10) (1987) 8 NSWLR 398.

The following additional cases were cited in argument:

Alexander v Cambridge Credit Corporation Ltd (Receivers Appointed) (1985) 2 NSWLR 685.
Attorney-General v Vernazza [1960] AC 965.
Beaudesert Shire Council v Smith (1966) 120 CLR 145.
Becker, Re [1975] 1 WLR 842; [1975] 2 All ER 587.
Davison v Colonial Treasurer (1930) 47 WN (NSW) 19.
Dey v Victorian Railways Commissioners (1949) 78 CLR 62.
Dresel v Ellis [1905] 1 KB 574.

Gibbs v Spautz (Smart J, 2 October 1987, unreported).
Gordon v Gordon [1904] P 163.
Grepe v Loam (1888) 37 Ch D 168.
Hood Barrs v Cathcart [1894] 3 Ch 376.
Hood Barrs v Heriot [1897] AC 177.
John Robinson & Co v The King [1921] 3 KB 183.
Jones, Re; Re Vexatious Actions Act (1902) 18 TLR 476.
Kinnaird (Lord) v Field [1905] 2 Ch 306.
Lane v Registrar of Supreme Court (NSW) (1981) 148 CLR 245.
Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210.
Millane, Re [1930] VLR 381.
Pacific Acceptance Corporation Ltd v Thompson [1963] NSWR 56.
Pryor v City Offices Co (1883) 10 QBD 504.
Public Prosecutions, Director of v Humphrys [1977] AC 1.
R v Collins [1954] VLR 46.
Spautz v Williams [1983] 2 NSWLR 506.
Waterhouse v Australian Broadcasting Corporation (1986) 6 NSWLR 716.
Wentworth v Rogers (No 7) (1986) 7 NSWLR 204.
Wentworth v Rogers (No 8) (1986) 7 NSWLR 207.
Wentworth v Rogers (No 9) (1987) 8 NSWLR 388.
Wentworth v Rogers (No 12) (1987) 9 NSWLR 400.
Wentworth v Woollahra Municipal Council (1982) 149 CLR 672.
Wilson (I D) (A Bankrupt), Re; Ex parte Bebbington Easton [1973] 1 WLR 314; [1973] 1 All ER 849.

SUMMONS

This was a summons for orders under s 84(1) of the *Supreme Court Act* 1970 that the defendant should not, without leave of the Court, institute any legal proceedings or continue any legal proceedings already instituted by her.

M F Gray QC, *M L D Einfeld* and *P G Mahony*, for the plaintiff.

R V Gyles QC and *R M Goot*, for the defendant.

Cur adv vult

7 October 1988

RODEN J. The Attorney-General as plaintiff seeks against the defendant Katherine Wentworth Wentworth, orders under the *Supreme Court Act* 1970, s 84(1), that, without leave of the Court, she not institute any legal proceedings or continue any legal proceedings already instituted by her.

Section 84(1) provides as follows:

> "(1) Where any person (in this subsection called the vexatious litigant) habitually and persistently and without any reasonable ground institutes vexatious legal proceedings, whether in the Court or in any inferior court, and whether against the same person or against different persons, the Court may, on application by the Attorney General, order that the vexatious litigant shall not, without leave of the Court, institute any legal proceedings in any court and that any legal proceedings instituted by the vexatious litigant in any court before the making of the order shall not be continued by him without leave of the Court."

There are various means by which the Court can control proceedings before it, and protect its process from abuse. It enjoys inherent powers, but these do not extend to the making of orders which would prevent a potential litigant from instituting proceedings without leave. The relationship between the inherent powers and the statutory provision, and the history of the development of the latter, were considered and explained in *Commonwealth Trading Bank v Inglis* (1974) 131 CLR 311.

In their joint judgment in *Inglis*, Barwick CJ and McTiernan J said (at 319):

> "… the making of unwarranted and vexatious applications in an action which is pending in the court is, in our opinion, a matter over which there is an inherent power in the court to exercise control. There is an essential difference, in our opinion, between regulating the conduct of such an action so as to prevent the court's process from being abused, on the one hand, and impeding a particular person in the exercise of a right of access to the court, on the other hand."

The extreme nature of the remedy provided by s 84 (and by corresponding provisions elsewhere) has been the subject of much judicial comment. In *Re Boaler* [1915] 1 KB 21, Kennedy LJ said (at 34) of the *Vexatious Actions Act* 1896 (UK), that it: "seriously abridges the right of the subject to … redress in the Courts of Law". More recently, and closer to home, in *R De W Kennedy (Finance) Pty Ltd Ley* (Holland J, 29 March 1978, unreported), Holland J, referring to the powers of the court to control litigation and litigants, said:

> "… The most drastic is the power on an application by the Attorney-General … to forbid a vexatious litigant from starting any legal proceedings in any Court, … without first obtaining the leave of the Court. This denies to such a litigant a right that all other citizens have, namely, to call upon the Court to adjudicate a claim simply by making it in Court in the prescribed manner."

In order to determine whether, in any case, such order should be made, it is necessary first to decide whether the requirements of the section have been met, and in the event of a finding favourable to the plaintiff, then to consider whether, in all the circumstances, the order should be made in the exercise of the Court's discretion. If that stage were reached, regard would be had both to the serious implications of so interfering with the litigant's right of access to the courts, and to the other powers available to the Court to regulate and control proceedings before it, once they have been instituted.

In the present case, the conduct which it is argued brings the defendant within the terms of the section, is characterised by the plaintiff as the institution of proceedings which:

(a) were certain to fail;

(b) constituted an attempt to re-litigate matters previously determined adversely to Miss Wentworth;

(c) duplicated other proceedings by which the same relief was sought;

(d) by the process and evidence filed in support, were scandalous, embarrassing etc;

(e) were brought in a form amounting to an abuse of process (not merely defective), or

(f) otherwise amounted to an abuse of process.

A All the litigation referred to, which is the subject of complaint by the Attorney-General, arises either directly or indirectly from Miss Wentworth's claim that in 1977 she was the victim of an aggravated assault at the hands of her then husband (Gordon Rogers), and her attempts to pursue both criminal and civil remedies in respect of that matter. The legal proceedings most directly arising from her claim, were committal proceedings in which Miss Wentworth was the informant, and a civil action in this Court in
B which she was the plaintiff. Although it is not suggested that they were vexatious proceedings, or that they were instituted without reasonable ground, it is convenient to review those proceedings briefly, before turning to the considerable body of litigation which they have spawned. Indeed it is necessary to have an appreciation of those basic proceedings, in order fully to understand what has arisen from them.

The committal proceedings were heard over a protracted period in 1981
C and 1982. That they were soundly based, and that their institution was justified, seems to flow from the fact that ultimately a committal order was made. Some persistence on the part of Miss Wentworth was necessary before that result was achieved. The magistrate found that there was a prima facie case, but declined to commit. An order in the nature of mandamus was sought in this Court. It was refused at first instance, but that decision was reversed on appeal to the Court of Appeal: *Wentworth v Rogers* [1984] 2 NSWLR 422. In the course of his judgment, Hutley JA
D (at 424) expressed agreement with Glass JA, that: "… the evidence raised a strong or probable presumption of the guilt of the respondent", and he said (at 426): "… the appellant has suffered a grave injustice at the hands of the magistrate …."

Glass JA (at 428) reviewed the material before the magistrate, and referred to Miss Wentworth's direct evidence of the assaults complained of, evidence of her complaints shortly thereafter, and evidence from a solicitor
E that Mr Rogers' response to the specific allegations upon which the charges of assault occasioning actual bodily harm and buggery were based, had been: "It's all my fault. It's all true."

A committal order was made, and a trial followed. In the event, Mr Rogers was acquitted by a jury, but that fact bears no relevance to the present proceedings — and of course Miss Wentworth, although a witness, was not a party to the trial.

F The civil proceedings are still pending. They were instituted in 1982, and in 1985 there was a trial, in which there were considered together the present defendant's claim for damages for assault, and a cross-claim for damages for malicious prosecution. It resulted in verdicts for Mr Rogers both on Miss Wentworth's claim and on his cross-claim. However, the judgment in that matter has been set aside on appeal, and a new trial has been ordered.

G The fact that there was material in the committal proceedings warranting an order that Mr Rogers stand trial, would seem, for the purposes of the present proceedings, to provide justification for the institution of the civil claim for damages; in any event, as I have said, it is not suggested that the civil suit is vexatious, or that it was instituted without reasonable ground.

In respect of that body of litigation, in all of which Miss Wentworth was the moving party — one criminal prosecution, one civil action, one

application for an order in the nature of mandamus, and two appeals to the Court of Appeal — the proceedings must be regarded as having been properly instituted and prosecuted, with a large measure of success; and indeed as yet no "defeat" that has not been reversed on appeal.

That seems immediately to distinguish this case from the vast majority of notable cases in which persons have been "declared" vexatious litigants.

The extent of the litigation that has flowed from those proceedings, or has arisen in consequence of them, can be gauged from the fact that the plaintiff has referred before me to some twenty-eight notices of motion, sixteen summonses, and in all a total of more than 180 documents, all either filed in court by Miss Wentworth, or being transcripts or judgments in matters instituted or initiated by her. Those against whom orders have been sought, include barristers and solicitors who had from time to time acted either for or against Miss Wentworth, and persons who had been witnesses, or potential witnesses, in the criminal and civil proceedings referred to. Her allegations include fraud, perjury, and conspiracy to pervert the course of justice. The reliefs and orders sought by her, include committal for contempt of court, and the setting aside of a judgment on the ground of fraud.

It is in those matters that I am asked to find the habitual and persistent institution of vexatious legal proceedings without reasonable ground, which would empower me to make the order now sought.

Questions of law:

Before I list the proceedings referred to, I should deal with a number of questions of law on which I invited and received argument, and which may have a bearing on the relevance of certain aspects of the defendant's conduct relied upon by the plaintiff. Those questions were:

1. For relevant purposes, what is the meaning of "vexatious", and in particular does the definition include any subjective element?

2. What, for relevant purposes, constitutes the institution of legal proceedings?

3. Is relevant vexation only to be found in the *institution* of proceedings?

4. Does "habitually and persistently" imply something more than great frequency?

5. What, for relevant purposes, is a "reasonable ground", and again is there a subjective element?

6. What bearing, if any, on each of the above, have:

(a) the form of process employed;

(b) the substance of the relief sought;

(c) the nature of the material relied upon, and

(d) the subsequent conduct of the proceedings?

7. If the requirements of the subsection are met, what criteria are relevant to the exercise of the court's discretion?

They give rise largely to questions of construction, and for the most part appear to be unresolved by authority, the courts having tended to make ad hoc decisions on the facts of particular cases, rather than produce definitive statements which might be of more general application.

What of course is required is a construction of the section as a whole. Particularly in the light of the provisions of the *Interpretation Act* 1987, s 33, it might be thought that the questions posed invite too pedantic an approach. However, the provision has the potential so seriously to interfere

with the basic right of access to the courts as to warrant a strict construction. In *Re Boaler*, Scrutton J (as he then was), dealing with the *Vexatious Actions Act* 1896 (UK), said (at 36):

> "… This right (of access to the courts) is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension."

In any event some analysis of the terms used is necessary before any construction of the section as a whole can be undertaken.

1. Meaning of "vexatious":

This is obviously a critical term, and can hardly be regarded as mere surplusage. If, as I believe must be the case, "habitually and persistently and without any reasonable ground institutes *vexatious* legal proceedings", means something different from "habitually and persistently and without any reasonable ground institutes legal proceedings", then relevant vexation cannot be found simply in the habitual or persistent manner in which legal proceedings are instituted, in a lack of reasonable ground for their institution, or in a combination of those factors. Something more is required. Similarly, the use of the words "without any reasonable ground", implies that it would be possible to institute vexatious legal proceedings, and indeed to do so habitually and persistently, *with* reasonable ground.

Where then to begin the search for a meaning of "vexatious" which requires something more than habit and persistence, or the absence of reasonable ground, and which is consistent with the *presence* of reasonable grounds?

Unaided by judicial guidance, one might turn to the *Oxford English Dictionary*. There it is acknowledged that the word may be used of persons or things, so as to allow either a subjective or an objective connotation. Significantly, the following appears: "Of legal actions: Instituted without sufficient grounds for the purpose of causing trouble or annoyance to the defendant." It seems that from the earliest, the word has been used in and in connection with the law, and has tended to have some subjective element. The first illustration in Oxford of the use of the word in any context is: "1534 Star Chamber Cases (Selden) II.319 — 'Henry … of his vexacyus mynde purchased a writte of monstrauerunt in the Comen place ageynst the seid defendaunt'." According to the *Oxford Companion to Law* (1980), "vexatious actions" are: "Actions brought, not *bona fide*, but brought to annoy or embarrass the other party or not likely to lead to any practical result."

A subjective element, such as malice, lack of bona fides, or ulterior motive, seems to be both appropriate and necessary to give significance to the term "vexatious" within the context of s 84(1). It provides the required "something more" than is conveyed by the other words in the section, and it is consistent with legal proceedings instituted either with or without reasonable ground. If I were unaided by judicial authority, I would opt for such a construction here. I appreciate that, isolated from its context, the expression "vexatious legal proceedings" could mean "legal proceedings which vex", irrespective of the motives of the person instituting them. A

construction requiring a purely objective test might also be applied to the word when used in the expression "vexatious litigant", which also appears in the section, although it would sit less happily there. The construction required for present purposes, however, is a construction within the context of the section as a whole; and for the reasons stated, I would, on first impression, opt for the inclusion of a subjective element. A

The matter, however, is not free from judicial authority to which I must have regard. And the question is of great importance in these proceedings, as the Crown Advocate, who appeared for the plaintiff, expressly disavowed any suggestion that Miss Wentworth had acted maliciously in any of the proceedings referred to. B

I turn then to those authorities. As I do so, I note that, for two reasons, they may be of limited assistance. One reason is that, as I have said, the courts have tended to make ad hoc decisions, rather than produce definitive statements; the other, that many of the authorities referred to, have been concerned with the use of the word in a different context. C

In *McHenry v Lewis* (1882) 22 Ch D 397, Bowen LJ said (at 407-408):

> "… I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end." D

The court there, of course, was not dealing with a provision such as s 84(1). It was considering staying an action because of the pendency of proceedings on the same cause of action abroad.

It is understandable that when exercising the inherent power to control proceedings which are already before the Court, an attitude might be adopted that if the intervention of the Court is called for, then the Court will intervene, and will give the conduct an appropriate description. Indeed the description given to such conduct is likely to involve any of the terms "vexatious", "oppressive", "abuse of process", "embarrassing", "scandalous", or any combination of them; and they may not be chosen with great precision. Precision in description or definition is hardly required, within the context of the Court acting in the exercise of its inherent jurisdiction to protect its own process from any form of abuse. It is more important that the conduct be recognised, than that it be defined. E F

That same lack of precision is evident in Rules of Court that have developed from the inherent power. I illustrate from the Rules of this Court (*Supreme Court Rules* 1970):

Part 13, r 5, relates to the power to stay or dismiss proceedings (in whole or part) — if they disclose no reasonable cause of action; or are frivolous or vexatious; or are an abuse of the process of the Court. G

Part 15, r 26, relates to striking out pleadings (in whole or part) — if they tend to cause prejudice, embarrassment or delay; or otherwise are an abuse of process.

Part 38, r 8, relates to striking out affidavits (or taking them off the file) — if they contain scandalous, irrelevant or otherwise oppressive matter.

A Part 65, r 5, relates to striking out parts of a document (including presumably pleadings and affidavits) — if they are scandalous, frivolous, vexatious, irrelevant or otherwise oppressive.

In those rules, all of which relate to the control of proceedings already before the Court, and which appear to mirror the inherent powers, frivolity, scandal, embarrassment, vexation, oppression, and abuse of process, are all referred to, without, it seems, it being intended that each should have a B clearly defined and distinct meaning.

It should be otherwise when dealing with provisions such as those of s 84, which in my view, for the reasons stated earlier, call for strict construction.

The principal authority relied on by Mr Gray, who argued for a purely objective test, was *Re Vernazza* [1960] 1 QB 197. There it was argued that "vexatious", in the *Supreme Court of Judicature (Consolidation) Act* 1925 (UK), s 51 (the equivalent of our s 84(1)), required a subjective element. The C proposition is referred to in the judgment of Ormerod LJ, who said (at 208):

> "… Therefore (counsel for the litigant) submitted that, in order to be satisfied before an order is made that the conditions of the section have been complied with, it is necessary to consider first from the objective point of view whether the proceedings were instituted without any reasonable ground, and that each separate action should be considered and decided on accordingly. Secondly, the question should be considered as to whether they were vexatious, and that was a subjective D matter, and really had to be decided by considering whether the appellant was acting maliciously or otherwise than in good faith."

Dealing with this argument, Ormerod LJ, again (at 208) said:

> "If I may deal first with that submission, in my opinion it is not the right way to look at the matter. The words of the section are 'without any reasonable ground instituted vexatious legal proceedings'. They are referring to legal proceedings, and *the question is not whether they* E *have been instituted vexatiously but whether the legal proceedings are in fact vexatious*. I suppose most proceedings are vexatious to the persons against whom they are directed, and, therefore the further question has to be considered whether, though they may be vexatious, they have been brought without any reasonable ground". (The emphasis is mine.)

This approach was adopted and followed by Yeldham J who, in *Hunters* F *Hill Municipal Council v Pedler* [1976] 1 NSWLR 478, said (at 485):

> "… as Lord Parker CJ observed in *Re Langton* [1966] 1 WLR 1575 (at 1578); [1966] 3 All ER 576 at 577, in asking whether proceedings are vexatious, it is not the manner in which they are conducted which is the subject of the inquiry, but whether, having regard to their nature and the substance of them, they properly bear that description. See also per Ormerod LJ in *Re Vernazza* ([1960] 1 QB 197 at 208)."

G I shall return later to the passage from Lord Parker's judgment referred to in *Pedler*. For immediate purposes, it is sufficient to note that Yeldham J referred to the passage in *Re Vernazza* which I have cited above, and that that is relied on by the plaintiff as further indicating that there is no subjective element in "vexatious" for the purposes of s 84.

As I have said, a number of the authorities dealing with "vexatious"

proceedings, relate to the exercise by courts of their inherent powers, or powers conferred by rules, to deal with proceedings already instituted. A

Consistently those authorities point to the availability of a purely objective test, and having regard to their weight, and *Re Vernazza*, I regard the requirement of vexation for the purposes of s 84(1) as capable of being satisfied even in the absence of malice or improper motive on the part of the litigant.

In *Lawrance v Lord Norreys* (1888) 39 Ch D 213, Bowen LJ said (at 234): B

> "The action appears to me to be vexatious and oppressive. It is an abuse of the process of the Court to prosecute in it any action which is so groundless that no reasonable person can possibly expect to obtain relief in it."

In *Cox v Journeaux [No 2]* (1935) 52 CLR 713, Dixon J, as he then was, said (at 720):

> "The inherent jurisdiction of the Court to stay an action as vexatious is to be exercised only when the action is clearly without foundation and when to allow it to proceed would impose a hardship upon the defendants which may be avoided without risk of injustice to the plaintiff. The principle, in general paramount, that a claim honestly made by a suitor for judicial relief must be investigated and decided in the manner appointed, must be observed. A litigant is entitled to submit for determination according to the due course of procedure a claim which he believes he can establish, although its foundation may in fact be slender." C D

That position has been consistently taken in the High Court. In *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, Barwick CJ said (at 129):

> "… There is no need for me to discuss in any detail the various decisions, some of which were given in cases in which the inherent jurisdiction of a court was invoked and others in cases in which counterpart rules to Order 26, r 18, were the suggested source of authority to deal summarily with the claim in question. It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action — if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal — is clearly demonstrated. The test to be applied has been variously expressed; 'so obviously untenable that it cannot possible succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them (the pleadings) to stand would involve useless expense'." E F

What those cases, and the line of authorities of which they form part, make clear, is that where an objective test is applied to determine whether the court should exercise its power to prevent litigation from running its normal course — either by striking out or by summary dismissal — what amounts to "utter hopelessness" must be shown. It seems to me that when there is an application for the far more drastic s 84(1) order, which would deny or limit a citizen's right of access to the courts, and that is considered G

A on a purely objective assessment of proceedings instituted by her, nothing less than that "utter hopelessness" must be shown.

Most recently the meaning of "vexatious" has been considered in the High Court in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 62 ALJR 389; 79 ALR 9. The context was different again, the court there considering the circumstances in which proceedings might be dismissed or stayed on inappropriate forum grounds. The preponderance of judicial opinion there
B expressed seems to favour an objective test, although the relevance of that is limited by the context.

There have, of course, been many cases in which relevant vexation has been found in the motivation of the litigant. A recent instance in this Court, when s 84 was under consideration, was *Attorney-General for New South Wales v Solomon* (1987) 8 NSWLR 667, where it was held that litigation is vexatious if it is brought for collateral or ulterior purposes, or if it is not a bona fide attempt to have the questions in dispute adjudicated.
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It seems then that litigation may properly be regarded as vexatious for present purposes on either objective or subjective grounds. I believe that the test may be expressed in the following terms:

1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.

2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they
D give rise.

3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

4. In order to fall within the terms of s 84:

(a) proceedings in categories 1 and 2 must also be instituted without reasonable ground (proceedings in category 3 necessarily satisfy that
E requirement);

(b) the proceedings must have been "habitually and persistently" instituted by the litigant.

2. Institution of Proceedings:

There is a distinction between the institution of proceedings, and the taking of a step in proceedings that are already before the court. The
F importance of that distinction is recognised in *Commonwealth Trading Bank v Inglis*, and an appreciation of it is necessary to an understanding of the circumstances for which s 84, and its counterparts elsewhere, are designed.

In *Hunters Hill Municipal Council v Pedler*, Yeldham J (at 485-488) considered a number of English decisions on the point. They were also referred to in argument before me, but I do not find it necessary to indulge in a further analysis of them. Yeldham J's conclusion was expressed in these terms (at 488):
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> "… While it is probably correct to say that interlocutory proceedings taken in the course of an action instituted by another person which is still current are not within the section, I think, without endeavouring to supply an exhaustive definition, that, where a final decision has been given, any attempt, whether by way of appeal or application to set it aside, or to set aside proceedings taken to enforce such decision, which

is in substance an attempt to re-litigate what has already been decided, is the institution of legal proceedings. It is to the substance of the matter that regard must be had and not to its form."

With respect, I adopt the final sentence of that passage.

I regard *Commonwealth Trading Bank v Inglis* as authority for the proposition that interlocutory proceedings taken in the course of an action, no matter by whom they are instituted, are subject to the inherent power of the court to protect its process from abuse. In so far as they are interlocutory proceedings in a pending action, they are not, in my view, "proceedings instituted" for the purposes of s 84. However, if they seek substantive relief, and particularly if they seek to bring an additional party into the proceedings, they are capable of being so regarded, even if they are properly commenced by notice of motion in existing proceedings. Like many before me, I decline the opportunity to produce a definition of "the institution of proceedings" for present purposes, a task described as "almost impossible" by Willmer LJ in *Re Vernazza* (at 215).

As I consider each of the matters relied upon by the plaintiff, I shall deal with the question of whether it can properly be regarded as the institution of proceedings for the purposes of s 84. In doing so, I shall have regard to the distinction between the institution of proceedings and the taking of a step in proceedings that are already on foot, but shall bear in mind that it is the substance of the matter rather than the form that must be considered.

3. Vexation — only in institution of proceedings?

The answer to the third question I have posed seems clearly to be "No". For this proposition it is only necessary to refer again to the passage from the judgment of Ormerod LJ in *Re Vernazza* referred to above. His Lordship said (at 208): "… the question is not whether they have been instituted vexatiously but whether the legal proceedings are in fact vexatious."

4. Habitually and persistently:

On first impression, these words clearly imply more than great frequency. "Habitually" suggests that the institution of such proceedings occurs as a matter of course, or almost automatically, when the appropriate conditions (whatever they may be) exist; "persistently" suggests determination, and continuing in the face of difficulty or opposition, with a degree of stubbornness. The need to give some force to those words seems the greater, as some corresponding provisions simply require that the proceedings be instituted "frequently": see, for example, O 63, r 6(1), of the *High Court Rules*, referred to in *Commonwealth Trading Bank v Inglis*. They have not, however, been the subject of much judicial consideration. Again I am reluctant to attempt a definition that might be of universal application. When I have resolved the question of which, if any, of the proceedings referred to are properly to be regarded as falling within the terms of the section, then I will consider, in context, what it is that the defendant has done "habitually and persistently".

5. What is a reasonable ground?

This question is not of importance in the present case, as in the absence of any suggestion of malice or ulterior motive, it is necessary, on an objective

A assessment, to find that "utter hopelessness" to which I have referred, in order to find that any of the proceedings relied upon by the plaintiff were in fact vexatious. Subjective considerations, such as a reasonable belief on the part of the litigant, based for example upon legal advice, could then only be relevant to the exercise of discretion.

6. The relevance of specific matters:

This question is really answered by the answers given to the earlier B questions. Of the matters listed under 6 (supra), it is probably only (c), "the nature of the matters relied upon", that is directly relevant, and that only to the extent that it bears upon the presence of reasonable grounds, or the "utter hopelessness" of the proceedings.

7. Matters relevant to discretion:

There in no fetter on the Court in considering all matters that bear upon C the appropriateness of making the order sought. I repeat that the prima facie right of access to the courts enjoyed by all citizens, and the availability of other powers to deal with abuse of process, will be relevant considerations. Regard would also be had inter alia to the various matters listed under 6 (supra).

The proceedings relied upon:

The proceedings relied upon by the plaintiff as vexatious, and habitually D and persistently and without any reasonable ground instituted by the defendant, relate to a number of incidental, and in some instances substantial, reliefs sought by her. As I have said, they all arose directly or indirectly from her claim against her former husband, which has not yet been resolved. They can conveniently be considered in groups as follows:

1. Miscellaneous matters arising from civil trial, viz:

(a) interlocutory appeal on evidence ruling,

(b) orders for security pending appeal, E

(c) costs of an order by Cantor J,

(d) jury.

2. Proceedings against Miss Wentworth's former solicitors, Messrs Sly and Russell, relating to costs and retained documents.

3. Proceedings for contempt of court against Mr Rogers and members of the firm of solicitors acting for him, Messrs Phillips Fox.

F 4. Proceedings for contempt of court against counsel and solicitor acting against her, Mr Rares and Mr Bartos respectively, and a related application that a subpoena be directed to Young J.

5. Proceedings to challenge grants of legal aid to Mr Rogers.

6. Proceedings against a wide array of persons alleging fraud, perjury and conspiracy to pervert the course of justice, and seeking to have a judgment set aside on the ground of fraud.

G 7. Miscellaneous applications that judges disqualify themselves, or that counsel and solicitor not act, in matters in which Miss Wentworth was involved.

8. Defamation proceedings against John Fairfax and Sons Ltd.

9. Defamation proceedings against Peter Cappe.

10. Various steps taken by Miss Wentworth in the matter currently before me.

I propose now to look at each of those matters in turn. As I do so, I am conscious of the fact that it is the combined effect of all the vexatious proceedings habitually and persistently and without any reasonable ground instituted by the defendant which must be considered. However, it is necessary first to look separately at each of the proceedings referred to, in order to determine whether it fits that description.

In this regard, I note that in *Attorney-General for New South Wales v Solomon*, Young J said (at 673):

> "The Court must examine the proceedings under review. It looks to see whether each is vexatious, though it remembers that an order is justified although there may have been reasonable grounds for the proceedings *in each case* considered by itself if the pattern emerges of vexatious proceedings being habitually and persistently instituted." (The emphasis is mine.)

Re Chaffers; Ex parte Attorney-General (1897) 45 WR 365, is cited as the authority for that proposition. A reading of the judgment of Wright J in that case, as reported at (1897) 76 LT 351, suggests that to represent it accurately, the words I have emphasised should read "in *some* of the cases". Wright J said (at 352):

> "… The other point was on the merits. It was argued that the language of the Act had not been satisfied. But, upon reading the section in question, it seems to me that this is a matter which does not depend upon any consideration of whether there may not have been possible causes of action *in some of these cases*. What we have to look at is the general character and result of the number of actions brought by the respondent; and, looking at these, it seems to me plain that there has been a great mass of litigation of a vexatious character, habitually and persistently instituted without any reasonable ground." (Again the emphasis is mine.)

The word "each" does appear in a condensed version of the report at (1897) 45 WR 365 at 366. The structure of the sentence is altered, and it reads:

> "… I think that the consideration of whether a person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground does not depend on a minute examination of whether in each particular action there was or was not a reasonable ground. …"

It is not just that the words used in the fuller report are "in some of these cases". If there had been reasonable grounds for the institution of *each* of them, there could not have been "a great mass of litigation … instituted without any reasonable ground". In any event, in *Re Chaffers* the facts were vastly different from those I have to consider. This is clear from the words immediately following those quoted above:

> "… Forty-seven actions out of forty-eight failed, and, if we add to that the fact that in none of them have any costs been paid by the respondent, I think it rather tends to strengthen the inference that they were vexatiously brought."

The view I take in the present case, is that such of the proceedings referred to by the Attorney-General for the institution of which there *was*

any reasonable ground, cannot be regarded as part of a body of litigation warranting an order under s 84.

It is interesting to note that Mr Chaffers and his propensity for litigation against such personages as the Archbishop of Canterbury, the Speaker of the House of Commons, the Trustees of the British Museum, the Lord Chancellor, the Master of the Rolls, the Public Prosecutor, the Solicitor for the Treasury and several County Court judges, were the catalyst for the introduction of the *Vexatious Actions Act* in England in 1896. This prodigious litigant had been indulging his thankfully rare propensity since 1891. The Court held that it was appropriate to look at the number, general character and result of the proceedings, to determine whether they met the requirements of the section. A consideration of those factors in *Re Chaffers* and here, show that they are vastly different cases.

[His Honour then considered, in a manner not calling for report, the various proceedings referred to. In this consideration he stated:]

6. Fraud, perjury and conspiracy:

Miss Wentworth asserts that in her attempts to litigate her claim she was the victim of an aggravated assault at the hands of Mr Rogers, she has been frustrated by a concerted effort on the part of a group of people, who are basically family members, friends and supporters, solicitors, doctors, and other people associated with them, to withhold the truth, and in some instances to give deliberately false testimony. She characterises this as involving perjury and conspiracy, and, quite apart from the criminal implications of those matters, she asserts that in consequence the judgment obtained against her in the civil proceedings before Maxwell J was obtained by fraud.

I have no doubt that it is primarily her attempts to ventilate that belief, and to pursue litigation with regard to it, that has led to the present application that she be declared a vexatious litigant. The other matters that I have listed, and have been considering, appear to be put forward as further evidence of the defendant's alleged propensity, and as being relevant to the exercise of my discretion, in the event of my finding that the requirements of the section have been satisfied, rather than as themselves warranting the making of the order sought.

Steps taken by the defendant in consequence of her assertion of perjury and conspiracy, include an application to have the judgment in the civil action set aside on the ground that it was obtained by fraud, and separate proceedings instituted with a view to the committal of the persons against whom the allegation is made, and for the recovery of damages from them.

I propose to complete my review of the other matters upon which the plaintiff before me relies, and then to return to this critical aspect of the case.

"Scandalous" material:

In addition to the specific complaints raised by the plaintiff with regard to the various proceedings relied upon as relevantly vexatious, and referred to above, many of the pleadings and affidavits filed in support by the defendant in those matters, were described as containing scandalous material, or as scandalising the court, or being embarrassing, irrelevant, or otherwise objectionable. There is no doubt that many of the defendant's documents

are aptly so described. This, it was argued, also went to the vexatious nature of the proceedings. I have grave reservations about that proposition. A

As is clear from the earlier references to *Commonwealth Trading Bank v Inglis* that type of abuse of process is already catered for by the court's inherent powers (and by Rules of Court). That does not preclude the possibility of overlap, and of the position being that s 84 gives additional powers to deal with that same situation. However, it must be borne in mind that s 84 also requires that there be an absence of reasonable ground for the B institution of the particular proceedings under consideration, and the presence of scandalous material cannot of itself establish that. If the litigant who has reasonable ground for the institution of proceedings, pursues them in what might properly be regarded as a vexatious manner, that is not sufficient to attract the provisions of s 84.

Reliance on "scandalous" material may, in many cases, be evidence of lack of reasonable ground. In others, it may be evidence of malice or ulterior C motive (neither of which is alleged here). But I do not believe that it has direct relevance to the questions I have to determine.

It is at this point that I revert to the passage from the judgment in *Re Langton* referred to by Yeldham J in *Hunters Hill Municipal Council v Pedler*. The relevant passage, in [1966] 1 WLR 1575 at 1578; [1966] 3 All ER 576 at 577, reads:

> "… There were apparently no less than sixteen interlocutory D applications, and it is clear from the judgment of Rees J in that action that he at any rate considered that the manner in which the proceedings had been conducted by the respondent were very vexatious and burdensome on the defendants. I should say that the defendant in that action were not only the executors but two other beneficiaries under the will of 1947, namely, a Mrs Halewood, who I think is the respondent's sister, and Mrs Irvine. E
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> The issue in the case was fully litigated; it occupied a number of days, and in giving judgment Rees J pronounced in favour of the will of 1949 and said that he had reached the conclusion that that will had been properly executed in accordance with the Wills Act and at a time when the deceased had full testamentary capacity. Despite the fact that it may be said that the manner in which that action was conducted was vexatious, it must be remembered that the respondent acted in person, F and, not only that, but that the action itself could not be said to be a vexatious action; it was one which the respondent was fully entitled to litigate and did litigate and accordingly, so far as these proceedings are concerned, I ignore that action except as a matter of history."

The distinction between an action which is vexatious, and an action which is conducted vexatiously, is clearly made, and with respect I agree that it is a valid and pertinent distinction for present purposes. G

The extent of the powers of the Court to control such matters without recourse to the provisions of the *Supreme Court Act*, s 84, and without interfering with the right of the litigant referred to by Lord Parker, is well illustrated by the orders made by Holland J in the *R De W Kennedy (Finance) Pty Ltd v Ley*.

The fraud, perjury and conspiracy matters:

These matters can be considered under two broad headings, viz:

1. Proceedings designed to have the judgment in the civil trial set aside on the ground that it was obtained by fraud.

2. Proceedings against some nineteen persons, allegedly involved in one way or another in the fraud, perjury and conspiracy complained of, and seeking that they be punished and ordered to pay damages.

Under each of these heads there were a number of proceedings — original, interlocutory and appellate.

The attempt to have the judgment in the civil trial set aside, began with a summons taken out in the Court of Appeal on 7 May 1986. The appeal from that judgment on grounds of error of law, in particular wrongful rejection of evidence, was already on foot. The application sought to have the judgment set aside by reason of "fraud, perjury and conspiracy to pervert the course of justice". It was remitted by the Court of Appeal to the Equity Division, where Miss Wentworth then filed a statement of claim and later an amended statement of claim which was struck out by Young J on 19 June 1986.

In his judgment Young J encapsulated the basis of Miss Wentworth's claim as follows:

> "It can be seen that in essence the plaintiff says that the verdict reached at the trial came about because the defendant instigated a conspiracy which involved not only a large number of witnesses but also several lawyers and which involved at least one judge, the Court, the Police Department and a few doctors either not performing their duty or being involved in activities which to say the least would be disreputable."

It does less than justice to his Honour's reasoning, but is sufficient for present purposes, to say that in concluding that the claim was without merit, his Honour had reference to two principles of law, viz:

1. in order to maintain an action to set aside a judgment on the ground of fraud, the plaintiff must adduce evidence of facts discovered since the judgment which raise a reasonable probability of success (*Birch v Birch* [1902] P 130, applied in *McHarg v Woods Radio Pty Ltd* [1948] VLR 496); and

2. perjury alone will not suffice as a ground upon which a judgment will be set aside: *Cabassi v Vila* (1940) 64 CLR 130.

A good deal of the material upon which Miss Wentworth sought to rely was held to be scandalous, and it seems would have been struck out for that reason in any event.

There followed an unsuccessful appeal to the Court of Appeal (*Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534), and an application for special leave was heard in the High Court on 12 June 1987.

In the High Court, Miss Wentworth was represented by senior counsel, who proposed to argue that Young J and the Court of Appeal were in error in holding that a party who seeks to establish that a judgment should be set aside due to fraud must establish that the claim is based on newly discovered facts. No doubt weight of authority was against the applicant, but that falls far short of making the proceedings — at first instance, before the Court of Appeal, or in the High Court — vexatious. The proposition to be argued

was that there had been confusion between two separate rules of law, one relating to the setting aside of judgments on the ground of fresh evidence, and the other to the setting aside of judgments on the ground of fraud. Her counsel had as a starting point, observations made by Menzies J in *McDonald v McDonald* (1965) 113 CLR 529. The first relevant passage is at 542:

> "… This proposition, which relates only to the granting of a new trial on the ground of the discovery of fresh evidence, leaves untouched the rule that, if by any means it be affirmatively proved that the earlier judgment was tainted by fraud, it will, without more, be set aside."

The second passage is (at 543):

> "… For the reasons which I have given, I regard as too narrow the learned author's propositions (i) that 'fraud as a ground for review is no exception to the rule that review can only be based upon new evidence', and (ii) that a judgment will not be set aside on the ground of fraud unless it is established by evidence (a) newly discovered since the trial; (b) which could not have been found by the time of the trial by the exercise of reasonable diligence; and (c) which would have produced an opposite result at the earlier trial."

Whatever its chance of success, there was at least a point to be argued.

It would be an unhappy situation indeed, if one could only argue a unique, doubtful, or "unlikely" proposition of law, at risk of being declared vexatious.

Counsel did in fact begin to argue the proposition I have referred to above, at the special leave hearing. Ironically it was Miss Wentworth's success in her appeal against the judgment in the civil trial, which precluded him from fully developing it. The High Court took the view that the appeal having succeeded, and the judgment having been set aside, there was no purpose to be served by allowing special leave, as the object of the proceedings in the High Court was to have Young J's decision reversed, and to obtain an order setting aside a judgment, which by this time had already been set aside on other grounds.

For the foregoing reasons, I conclude that, so far as the questions of law involved are concerned, there was nothing which would justify describing these proceedings as "utterly hopeless", or instituted without any reasonable ground. It remains to be considered whether there was any reasonable factual basis for them. That is a matter to which I will revert after outlining the proceedings instituted by Miss Wentworth against the nineteen persons alleged to have been involved in the fraud, perjury and conspiracy to which she refers. The questions of fact are common to both matters.

There were three sets of such proceedings, in all of which Miss Wentworth was unrepresented. They covered a considerable number of allegations against the many respondents. It is unnecessary to analyse them all.

On 7 October 1986, Miss Wentworth by notice of motion sought a variety of orders against seventeen respondents. The nature of the orders sought is illustrated by those sought against Mr Rogers, viz that he committed for contempt of court, perjury, attempting to pervert the course of justice by false swearing, and conspiring with legal advisers and officers to pervert the course of justice.

A On 16 June 1987, by a further notice of motion there were similar and further allegations made, and similar and further orders sought, against the same seventeen respondents and two additional parties who were joined. The nineteen respondents include members of the Rogers and Wentworth families; solicitors, doctors and a police officer who were connected with the original complaint of 1977; and lawyers involved in the subsequent proceedings. The burden of everything that was alleged was that each of the B respondents had, in one way or another, been involved with some or all of the others, in a concerted effort to thwart Miss Wentworth's vigorous pursuit of redress for the alleged assaults of which she complained.

The language used by Miss Wentworth in stating her grievances does not suffer from undue restraint or reticence. Some of the orders sought are inappropriate, unprecedented and beyond the powers of the court. Lawyers would describe some as grotesque. By way of example, she sought against one respondent, a serving police officer, that he be removed from the Police C Force of New South Wales permanently, and be declared to be a disgrace to the Police Force of New South Wales.

The third of this set of proceedings was a further notice of motion of 3 July 1987. This was in similar vein, and also contained a complaint of what was alleged to be an improper disclosure of the contents of a no bill application relating to the criminal trial, to a judge hearing one of Miss Wentworth's matters in Equity.

D I am in no doubt that there was considerable abuse of process involved in all three proceedings. “Scandalous”, “embarrassing”, and the other adjectives commonly used in this connection, were all well earned by these efforts by Miss Wentworth. It is no surprise that on 22 July 1987 they were all dismissed by the Court of Appeal, whose judgment of that date was before me. The unacceptability of the procedures adopted, is illustrated by the following passage from the judgment of Clarke JA:

E > “The collection of a number of criminal and civil charges against a large number of respondents in an initiating process in an appeal court and the obvious circumvention of the processes of the law designed to ensure that the rights of those persons charged with serious charges are properly protected is in my opinion a blatant misuse of the court's process.”

What was Miss Wentworth doing? I think that the answer has to be given F in two stages.

First, she was endeavouring to pursue litigation with a view to redressing what she asserted was a very serious wrong which had been done to her, and which had brought about, and threatened to reproduce, a grave miscarriage of justice in her substantive litigation against Mr Rogers. Secondly, in the course of doing that, she was thrashing about and lashing out wildly, with insufficient regard for the rights of others, and with a lack of understanding of the relevant principles of law and procedural requirements.

G It is the second of those matters — the manner in which she went about her litigation — that led to the considerable abuse of process which was appropriately dealt with in the Court of Appeal on 22 July 1987.

The substance of Miss Wentworth's allegations, however, is a different matter. There is no abuse of process necessarily involved in the making of allegations, no matter how serious, against persons in high places. The courts

must be, and are, prepared to receive and deal with such allegations. The courts must not be, and are not, outraged or affronted by them. Whether the defendant be barrister, doctor, policeman or judge, or whether he be "The Humblest In The Land", the questions, for present purposes, are the same. Are the allegations totally unsupportable? Is the claim "utterly hopeless"? Is it made without any reasonable ground? It is to those questions that I now turn, in considering the fraud/perjury/conspiracy allegations.

The factual basis — reasonable grounds?

The nature of Miss Wentworth's assertions has only to be stated, for their extreme gravity to be apparent.

Despite the fact that in the course of day-to-day litigation we frequently hear conflicting evidence in circumstances suggesting the likelihood that some of it is deliberately false, it is unusual for an allegation of perjury, and of conspiracy to pervert the course of justice by organised perjury, to be made and pursued as strenuously as it has been here by Miss Wentworth over a period now exceeding two years.

As an initial reaction, it is easy to label her allegations as bizarre; and she seeks to cast her net so widely that in many respects the initial reaction that the allegations are highly improbable, may well remain, even after a closer scrutiny of them. The manner in which Miss Wentworth has sought to go about the unusual burden she has cast upon herself, has been of no assistance to her cause. Her procedural blunders, and the extravagance, and at times inappropriateness, of her language, have understandably brought her into conflict with those to whom she might be expected to turn for assistance. They — and I include her own legal advisers and the courts themselves — have come from time to time to be included among those against whom the allegations of impropriety are made.

From a reading of many of the documents by means of which Miss Wentworth has instituted legal proceedings (or pursued interlocutory relief in proceedings already instituted), and affidavits by which she has sought to support her various applications, it would be easy to conclude, not only that there is a significant element of vexation, but also that she has become obsessed by the litigation and its subject matter, and that much of her outpourings flow from a fertile imagination, stoked by an abnormal capacity for groundless suspicion. I say that it would be easy so to conclude. It is another matter whether such conclusion would be warranted after a thorough analysis of her complaints and allegations.

Even the most difficult, irritating and frustrating of litigants, can be the victims of wrongs perpetrated by others. When they claim that they have been wronged, it is only in the rarest of cases, in my view, that there should be any fetter placed upon their right of access to the courts to pursue the appropriate remedies.

In approaching the task of determining whether Miss Wentworth's allegations are manifestly groundless, or fit whatever of the available epithets one may choose, I feel somewhat inhibited by the fact that a new trial has been ordered of the matters litigated before Maxwell J, and accordingly a jury may be called upon to determine matters the prima facie merits of which I would be considering. On the other hand, those inhibitions are lessened by the fact that a good deal of the relevant material is to be found in judgment of the Court of Appeal already published.

A The starting point must be that there is — or was — a sound prima facie case in support of Miss Wentworth's allegations of aggravated assault. That that is so is evidenced by the committal order that was made after the necessary intervention of the Court of Appeal: *Wentworth v Rogers* [1984] 2 NSWLR 422. The material deemed capable of constituting that prima facie case, is set forth in the judgment of Glass JA (at 428):

> "The plaintiff's evidence at the committal proceedings, if accepted, B was capable of establishing the following facts. A domestic dispute with the defendant culminated in a crescendo of violence in which he kicked her a number of times in the back, sooled the dog on to her and threatened to kill her. He next pulled off her clothes, forced her down on the bed and thrust a battery powered dildo into her vagina. He then subjected her to forcible anal intercourse. He later removed his penis from her anus and inserted it into her vagina alongside the dildo and continued until ejaculation. As the law then stood, cohabitation in C marriage was a bar to the commission of rape but not buggery. Although these incidents and their painful effects were described in florid detail, she was not cross-examined to suggest that she was not telling the truth as to what had happened.
>
> Corroborative evidence was given by Mrs Niesche and Dr Niesche, that she had come to their home in a distressed condition complaining that she had been raped. Mrs Niesche drove her to RPA Hospital D Outpatients' Department. The hospital notes refer to 'alleged assault, attacked by dog/husband, puncture marks hand, claw marks forearm, tenderness over spine' but do not refer to any complaints or examination respecting anus or vagina. A solicitor testified that on the following Tuesday, which was the first working day after a long weekend, the plaintiff came to his office with the defendant. In his presence she claimed that he had given her a hiding, set the family dog E upon her, raped her, used a dildo on her and committed an act of buggery. The defendant had said words to the effect: 'It's all my fault. It's all true.' He also said that he might as well jump out the window."

It would appear from that material that potential witnesses capable of supporting Miss Wentworth's case are, or include, Miss Wentworth herself, a doctor and his wife, and a solicitor, who combine to provide direct evidence of the wrongs alleged, and evidence of complaint and admission.

F An expectation that there would be other evidence, and other witnesses, available to support Miss Wentworth, arises from four documents which were exhibited before me, and which were considered in the Court of Appeal in *Wentworth v Rogers (No 10)* (1987) 8 NSWLR 398, where they were referred to as MFI's 8, 9, alpha and beta respectively. There may be limits to the use to which those documents could be put in evidence against persons named in them, in the course of any contemplated proceedings arising out of the allegations of fraud, perjury and conspiracy, but for present purposes G they are available to found an expectation that there are a number of people, including a solicitor, who could give significant evidence in support of the assault allegations.

At the heart of Miss Wentworth's allegations of fraud, perjury and conspiracy, is the failure of those witnesses to come up to those expectations at the trial before Maxwell J. Some apparently asserted lack of recall; others

gave evidence at variance with their earlier statements. The number of witnesses, or potential witnesses, concerned, and the relationship or association between and among them, are advanced as the basis for an inference that the position that they took was the result of concert among them.

A potentially critical witness at the civil trial, was a solicitor, who is now one of those against whom Miss Wentworth makes her allegations. In order to understand the significance that his evidence might have had, it is necessary to appreciate the manner in which Mr Rogers' case was presented to the jury. On his behalf it was put that Miss Wentworth had made no complaint of sexual assault at the time, and that what she alleged before the jury was the product of subsequent invention. That appears from a passage of the judgment of the Court of Appeal in *Wentworth v Rogers (No 10)* to which I shall shortly refer.

The solicitor was called on Miss Wentworth's behalf in the civil trial, apparently for the purpose of giving evidence that Miss Wentworth had in fact complained to him shortly after the events, and that her complaints included the very sexual assaults upon which she relied at the trial. He failed to come up to expectations. I quote from the Court of Appeal judgment (at 401):

> "… He recalled having seen her at her aunt's place on the Sunday or Monday of the long weekend and that she had spoken to him about the events of the Saturday. The only recollection he had of what she said was that her husband had tried to kill her."

Miss Wentworth's counsel sought to make use at the trial of the MFI documents referred to above, or some of them. They included a letter written by the solicitor witness, and two documents prepared by him and apparently in his own handwriting. All three acknowledged that Miss Wentworth had complained to him of the sexual assaults upon which she was seeking to rely at the trial. The witness' own documents did not, he said, assist his recollection with regard to the nature of the complaint, and attempts by Miss Wentworth's counsel to make further use of the documents, or to have the witness declared hostile, were unsuccessful. It was the trial judge's rulings on questions of evidence at that stage which ultimately led to the success of the appeal. In dealing with this matter, Glass JA delivering the judgment of the Court of Appeal in *Wentworth v Rogers (No 10)* said (at 407):

> "… The contemporary affidavits drafted by the witness in 1977 recount in florid detail his client's instructions that the assault upon her contained sexual ingredients of the most exceptional character. In 1981 he was able to recall her allegation that the defendant had forced her to have anal intercourse and had used a dildo on her. At the trial in 1985 he told the defendant's counsel that he could not recall 'any complaint by her of any activity of a sexual nature'. In re-examination he was asked to read his 1981 document. He was then reminded of his answer and asked what his recollection was after having read it. The document failed to refresh his memory.
>
> Solicitors receive many complaints by wives regarding the sexual behaviour of their husbands. The use of a dildo not as an instrument of sexual gratification but as a weapon to inflict hurt and degradation is by

A any standard an exceptional complaint. According to the witness the memory of it lasted for four years but not a further four years and after eight years was incapable of revival. After making full allowance for the advantage enjoyed by the trial judge of observing the witness' demeanour, we are satisfied that the witness was withholding material evidence and should have been treated as hostile."

The extent to which this withholding of material evidence (as the Court of B Appeal found it to be) undermined the case which Miss Wentworth was seeking to put, and may well have provided the basis for Mr Rogers' success, is highlighted by the following further passage from the same page of that Court of Appeal judgment:

"… The existence of this void in relation to other evidence of her complaints assumed critical significance before the jury. Counsel for the defendant armed with the transcript of evidence given at the criminal C trial repeatedly suggested in cross-examination that her complaints at the time had no sexual component. He put that a Dr Abrahams who saw her at Royal Prince Alfred Hospital noted only a dogbite on her wrist, that her aunt testified that no complaint was made to her of sexual assault, that Mr W C Wentworth had given evidence recalling a complaint of assault only, that Dr Niesche testified that he recalled no complaints of rape, buggery or dildo, that Dr Broughton had no record of any complaint of sexual assault. The husband's case as put in her D cross-examination was that her more sensational complaints about his behaviour were not voiced to anyone at the time. His evidence was that he had committed no assault but had merely fended off violence directed at himself. Since the plaintiff and defendant were the only eye witnesses the contemporary complaints made to others were given special importance. It was in this evidentiary setting that the evidence of (the solicitor) was of pivotal importance since he had according to all E four excluded documents been given instructions by her which in almost all respects matched the evidence she gave before the jury."

In the light of those observations made by the Court of Appeal, I have no difficulty in concluding that there is substantial material — certainly enough to constitute a reasonable ground — supporting allegations of the type made against the solicitor by the defendant. I appreciate that the conduct of one witness cannot support an allegation of conspiracy, and that unless it can be F shown that Mr Rogers was involved, it could not be established that he obtained a judgment by fraud. Nonetheless a starting point to Miss Wentworth's case can be seen. It is an important starting point, as if the facts are as the solicitor's own documents suggest, it is not unlikely that there are other persons among the nineteen named by Miss Wentworth, who were also in a position to know of her early complaints of sexual assault.

G It must be understood that I am not seeking to resolve any of these questions. I am simply seeking to establish whether these very serious allegations which the defendant makes, have any basis at all, or whether they are properly to be regarded as without any reasonable ground, so that any relevant proceedings instituted would be "utterly hopeless" and vexatious. I have not heard the solicitor, and of course I do not purport to make any finding against him.

I do not propose to analyse in detail the material, if any, which is available and might be capable of implicating other persons named by Miss Wentworth in the alleged conspiracy. I can, however, mention three other matters which were canvassed at the hearing.

The solicitor to whom I have been referring is not the same as the solicitor referred to as having testified at the committal proceeding that Mr Rogers had made a relevant admission to him. That solicitor, I am told, gave evidence at a later hearing, and in that evidence he did not attribute to Mr Rogers the words "it's all true". There is compelling evidence of forgery, or at least of a material alteration, in a relevant hospital record. And the passages from two Court of Appeal judgments which I have quoted above, disclose an apparent change of position by a doctor as to the nature of the complaint made to him.

As I say, I do not propose to go any further into an analysis of the material available against the various persons named. In view of the conclusion at which I have arrived as to the fate of the present proceedings, I am prepared to assume for present purposes (without so finding), that there was no reasonable ground for the institution of proceedings against some of those named by Miss Wentworth, and that those proceedings were relevantly vexatious.

Before I consider the consequence of that assumption, and of my regarding other proceedings (referred to earlier) as also vexatious for the purposes of the section and instituted without any reasonable ground, there is one further observation I would like to make. It is this. It is easy, but can be dangerous, to come to a conclusion that there is no reasonable ground or evidence to support an allegation, in proceedings such as these, where it may not be possible thoroughly to consider all relevant material in each of so many separate matters. This is graphically illustrated by what occurred in the Court of Appeal with regard to Miss Wentworth's complaint that the solicitor I have mentioned was deliberately withholding evidence in the civil trial.

That Court twice considered that matter. The first occasion was on 3 October 1986, in its judgment on the appeal from Young J's decision striking out the defendant's statement of claim. That judgment is reported, but in part only, at (1986) 6 NSWLR 534. The unreported portion of the judgment includes a consideration of some of the factual material upon which Miss Wentworth was seeking to rely. Dealing with the solicitor's evidence about the complaint the defendant had made to him, Kirby P, with whom Hope and Samuels JJA agreed, said (at 17 of the transcribed judgment): "The solicitor might simply have forgotten what the appellant had told him when he gave his evidence."

On the other hand, when the same matter was considered in the appeal from the judgment in the civil trial, and the evidence was presumably subjected to closer scrutiny, the proposition that he "might simply have forgotten", seems to have been rejected. I repeat part of the passage quoted earlier from the judgment of the Court, delivered by Glass JA:

> "… According to the witness the memory of it lasted for four years but not a further four years and after eight years was incapable of revival. After making full allowance for the advantage enjoyed by the trial judge of observing the witness' demeanour, we are satisfied that

A the witness was withholding material evidence and should have been treated as hostile."

The other members of the Court were the President and Hope JA, both of whom had been parties to the earlier decision.

Conclusions:

After the above review of the matters relied upon by the plaintiff, those B which I regard as vexatious proceedings instituted without any reasonable grounds, within the meaning of s 84, are:

1. Proceedings for contempt against Messrs Sly & Russell.

2. Proceedings for contempt against Mr Rares and Mr Bartos.

3. Proceedings against some of the persons named in the fraud/perjury/conspiracy matter (assumed for present purposes).

These form but part of the considerable body of litigation for which C Miss Wentworth has been responsible as she has pursued her claim against Mr Rogers. Considering the vexatious proceedings in that context, I do not regard it as appropriate to conclude that the defendant has *habitually and persistently* and without reasonable ground instituted vexatious proceedings. What she may properly be said to have done habitually and persistently, is vigorously pursue her claim, and avail herself of what she sees as every appropriate avenue of litigation towards that end. In the process, she has transgressed into the area of s 84 vexation from time to time. That however, D in my view, does not make the institution of vexatious proceedings something done habitually and persistently by her.

If I am wrong in my interpretation of "habitually and persistently", or in my application of a correct interpretation of that expression to the facts of this case, I would still not make the order sought. I do not believe that in all the circumstances I should exercise my discretion in favour of the plaintiff. Relevant considerations include the following.

E 1. The basic substantive litigation, namely the committal proceedings and the common law trial, are not properly to be regarded as either vexatious or instituted without any reasonable ground.

2. In those proceedings, and the various appeals to which they have given rise, the defendant has had significant success.

3. Other and less drastic measures are available to protect the court from such abuse of process as has occurred, or may reasonably be regarded as threatened.

F 4. The matters in issue between the defendant and Mr Rogers remain to be finally disposed of, and I am not satisfied that freedom to pursue her ancillary allegations against Mr Rogers and others, is not necessary to a proper pursuit of Miss Wentworth's substantive claim.

5. Some at least of the apparently more bizarre of the defendant's allegations, seem to be prima facie supportable.

G 6. Those against whom the defendant may proceed in consequence of her assertion of a conspiracy as outlined above, will have available to them the usual opportunities to present defences to those claims, and to seek orders to strike out pleadings or for summary dismissal, if any claim is made which is manifestly unsupportable.

7. There has not been such an array of proceedings improperly brought by the defendant against any of her potential opponents in future litigation, as

to warrant the making of the order sought, for the purpose of their special protection.

8. The defendant has generally — if not always — been unrepresented in the offending litigation.

Accordingly I decline to make the order sought, and the plaintiff's application is dismissed. I will hear counsel, if they wish, before making any order as to costs.

If Miss Wentworth appreciates that she has been sailing close to the wind, and now realises the virtues of restraint, and the value of having a pilot aboard, these proceedings may prove to have served a useful purpose.

Before I leave the matter, I would like to record my appreciation of the considerable co-operation and assistance which I received from counsel on both sides of the record. As must be obvious from the length and content of this judgment (which probably only skims the surface), there was a vast amount of material to be absorbed and dealt with in argument, and no shortage of questions of law to consider. I am indebted to Mr Gyles and Mr Gray, and their respective juniors, for their diligence in preparing summaries and chronologies on demand, and for the clarity with which they presented their respective arguments, to what might at times have seemed a singularly obtuse bench.

Summons dismissed

Solicitors for the plaintiff: *H K Roberts* (State Crown Solicitor).

Solicitors for the defendant: *Carneys*.

N J HAXTON,
Barrister.