ORDER PROHIBITING PUBLICATION OF NAMES AND ADDRESSES OF THE PARTIES.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-006851
[2014] NZHC 1767

UNDER	the Judicature Amendment Act 1972, the the New Zealand Bill of Rights Act 1990
IN THE MATTER OF	a judicial review of decisions of the District Court at Auckland
BETWEEN	N R Applicant
AND	DISTRICT COURT AT AUCKLAND First Respondent
	M R Second Respondent

Continued over

Hearing:	27 August, 2-5 December 2013 [Written submissions received on 24 February 2014]
Appearances:	N R (Self-represented Applicant/Appellant) in Person No Appearance of, or for the First Respondent (Abided decision of the Court) R J Hollyman, A J B Holmes and G N M Tompkins for M R (on 27 August 2013) R J Hollyman and A J B Holmes for M R (on 2-5 December 2013)
Judgment:	29 July 2014

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 29 July 2014 at 2.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

CIV-2013-404-002702

UNDER	the Harassment Act 1997
IN THE MATTER OF	an appeal against decisions of the District Court at Auckland
BETWEEN	N R Appellant
AND	M R Respondent

CIV-2013-404-003172

UNDER	the Harassment Act 1997, the District Courts Act 1947
IN THE MATTER OF	an appeal against a decision of the District Court at Auckland
BETWEEN	N R Appellant
AND	M R Respondent

Counsel: R J Hollyman, Auckland
A J B Holmes, Auckland

Solicitors: Crown Law (D N Soper), Wellington
Wilson Harle, Auckland

Copy To: N R, Auckland

[1] Because the subject matter is related, three proceedings commenced by Mr R were heard together. These proceedings raise legal challenges to decisions made in the District Court against Mr R in civil proceedings brought against him under the Harassment Act 1997 ("the Act").

[2] Mr R represented himself in the District Court proceedings and in the proceedings before this Court. There is some overlap and duplication in the way in which he has approached matters in this Court. However, for the sake of clarity, I propose to set out each challenge that he makes to the District Court decisions.

[3] They are:

(a) An appeal against all decisions made on 9 May 2013 by Judge Sharp in the District Court in relation to the making of a restraining order of five years duration under s 16 of the Act;

(b) An appeal against the indemnity costs order of $70,869.53 that Judge Sharp made on 14 June 2013 against Mr R following his unsuccessful defence against the making of the restraining order; and

(c) A judicial review against four interlocutory decisions of the District Court, as well as the decisions made on 9 May 2013 in relation to the making of the restraining order and the costs order by Judge Sharp.

[4] The appeals and the judicial review are opposed by Ms M, who is the respondent in all three proceedings.

[5] Whether there was a proper basis for making the restraining order is a relatively simple issue. However, the way in which the application for a restraining order was approached in the District Court, as well as the award of indemnity costs against Mr R have made the appeal more complex.

[6] Under r 7.2 of the District Court Rules ("DCR"), an application for a restraining order is referred to as the main application; any application that is

ancillary to the main application is an interlocutory application. I will use this terminology in this appeal. I propose to deal with the appeal against the making of the restraining order ("the main application") first. I will then deal with the judicial review of the main application and of the three earlier interlocutory decisions, as well as the appeal against, and the judicial review of the order made on the mode of evidence application of 9 May 2013. Finally, I will deal with the appeal against, and judicial review of the indemnity costs order.

Background

[7] At all material times, Ms M was a sex worker at the Pelican Club. Mr R was one of her regular clients. They enjoyed a sexual relationship for two hours once a week for about two months. Mr R is from another country. Ms M had some knowledge of Mr R's home country, and he enjoyed having discussions with her about his native land. Over time, Mr R became emotionally attached to Ms M. He gave her gifts and sought to persuade her to become exclusively available to him. Ms M accepted the gifts, but she was not prepared to have anything other than a commercial relationship with Mr R.

[8] There appears to have been no problems with the relationship between Mr R and Ms M until 8 February 2012, which was the last occasion on which they met at the Pelican Club. Mr R had purchased a smart phone like his own for Ms M. While he was using his own phone as a demonstration model in order to show her how to use the gift, he inadvertently revealed that he had been using the internet to attempt to find out information about Ms M's car registration. She became very upset, and he was asked to leave. Mr R initially refused to go and instead sought to placate Ms M. He sought to persuade her that he had simply wanted to know the age of her car. He countered her accusations of searching for her personal information by saying that if wanted to find this out, he could hire a private detective. Ms M interpreted the statement as a threat. Mr R denies he intended the statement to have this meaning. Ms M would have none of Mr R's explanations and so ultimately with the assistance of other persons at the Pelican Club, he was induced to leave. He later made a number of attempts in different ways to contact her. She did not welcome

those attempts, so she applied for a restraining order, which was granted by Judge Sharp.

Approach on appeal

[9] I consider that this is a general appeal that is to be approached in accordance with the principles in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. My reading of the Act's provisions leads me to conclude that an appeal against a restraining order involves an assessment of fact and degree and entails a value judgement regarding whether there is the need for such an order to be made: see *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 (SC) at [32], all of which is consistent with this being a general appeal. Moreover, in *Clarke v Watts* [2014] NZHC 822 at [22], Clifford J discussed the appellate jurisdiction regarding a restraining order and concluded that under s 34 of the Act, appeals are to be conducted by way of rehearing, which entails an *Austin, Nichols* approach. This means that if the appellate court reaches a different conclusion to the court appealed from, the decision under appeal is wrong.

The main application

[10] The appeal against the decision of Judge Sharp on the main application requires me to consider the merits of the case afresh: see *Austin, Nichols* at [5]. The criticisms that Mr R has made of the procedures that were followed in relation to the interlocutory applications and the main application have led me to conclude that the best approach to this appeal is for me to look at whether there was something that supported the making of the restraining order, rather than to look at whether the decision of the District Court is supportable or not. This involves a consideration of the facts of this case, the scheme and purpose of the Act and the relevant law.

Facts

[11] Mr R did not challenge Ms M's evidence in the District Court outlining the acts and behaviour that Ms M relies upon to establish harassment ("the specified acts"). Mostly, Mr R's evidence confirms that the events and behaviour Ms M

describes did occur. His rejection of her claims is based on a denial of the inferences and the legal consequences that she would have the Court draw from those events and behaviour. At times, his evidence fills in the details of the specified acts that she relies upon.

[12] Mr R has referred me to case law where the Court found that there was no absolute requirement for evidence to be challenged by cross-examination. Those arguments are not relevant to the primary facts set out below, which I understand him to accept. I deal with the arguments about the need for cross-examination later in another context.

[13] The specified acts that I set out below are those that were relied upon by Ms M at the hearing before Judge Sharp on 9 May 2013 and on appeal. They are taken from the schedule of specified acts that Ms M's counsel provided to Judge Sharp.

[14] The incident at their last engagement at the Pelican club where Mr R admitted to searching for Ms M's car registration details was relied on by her as the first specified act. Mr R's reference to hiring a private detective if he had wanted to find out about her private details was relied on by Ms M as the second specified act. Each act was said to come within s 4(1)(f) of the Act, being an act that caused her to fear for her safety.

[15] After 8 February 2012, Mr R made a number of attempts to contact Ms M. These attempts later formed the basis of Ms M's other grounds for a harassment order.

[16] Later on 8 February 2012, Mr R returned to the Pelican Club with a letter, incorrectly dated 2 February 2012, for Ms M. The letter is apologetic and conciliatory in tone, but it did seek further contact with Ms M. Ms M relies on the letter as constituting a third specified act: namely, contact by correspondence under s 4(1)(d).

[17] Between 8 and 10 February 2012, Mr R attempted to make further bookings with Ms M. The management of the Pelican Club refused the bookings. Ms M relies on these attempts as specified acts constituting conduct directed against her under s 4(1)(d) via s 3(2)(b) of the Act.

[18] On 14 February 2012, Mr R met with the manager of the Pelican Club and requested him to order Ms M to see Mr R. The manager refused to do this. Ms M relies on this event as another specified act, which she asserts constitutes contact directed against her under s 4(1)(d) via s 3(2)(b). She also asserts that it constitutes an act that caused her to fear for her safety under s 4(1)(f).

[19] Also on 14 February 2012, Mr R wrote Ms M a letter through the Pelican Club, which he asked to be forwarded to her. In the letter, he sought further contact with Ms M. Ms M relies on this letter as constituting a specified act: namely, contact by correspondence under s 4(1)(d). In the same week, Mr R returned to the Pelican Club. On this occasion, the management banned him from attendance at the Pelican Club. Ms M relies on this action as constituting a specified act under s 4(1)(d) via s 3(2)(b), being contact directed against her.

[20] On 15 February 2012, Mr R waited near the Pelican Club to try and see Ms M. Ms M relies on this as a specified act: namely, loitering under s 4(1)(a). Mr R repeated this exercise on 22 February 2012. Ms M relies on this as another specified act by loitering under s 4(1)(a).

[21] On 5 March 2012, Mr R sent an email to the Pelican Club requesting to be able to speak to Ms M and advising that if his request was refused, he would find another way to talk to her. Ms M relies on this as a specified act: namely, contact by correspondence to the Pelican Club directed against her: s 4(1)(d) via s 3(2)(b).

[22] On 12 March 2012, Mr R sent an email in reply to an email from the manager of the Pelican Club. In the reply email, Mr R alleged that Ms M had mental health issues and sought an apology from her. Ms M relies on this as constituting a specified act: namely, contact by correspondence to the Pelican Club directed against her under s 4(1)(d) via s 3(2)(b).

[23] On 2 May 2012, Mr R instructed a private investigator to obtain personal details about Ms M, including her real name and contact details. Ms M relies on this as constituting a specified act that caused her to fear for her safety (s 4(1)(f)).

[24] On 3 May 2012, someone contacted Ms M's mother to try and obtain Ms M's telephone number and address. Mr R denies doing this himself, but he accepts it may have been his private investigator, who "was just doing his job". Ms M relies on this as constituting a specified act: namely, contact by telephone under s 4(1)(d) and s 5(b).

[25] On a date unknown, someone contacted Ms M's former landlord to try and obtain Ms M's telephone number and address. Ms M relies on this as constituting a specified act: namely, contact by telephone directed against her under s 4(1)(d) via s 3(2)(b).

[26] On 5 May 2012, Mr R sent an email to Ms M at her personal email address seeking a meeting and saying he would contact her in person. Ms M relies on this as constituting a specified act: namely, contact by correspondence under s 4(1)(d).

[27] On 10 May 2012, Mr R phoned Ms M's personal mobile phone twice. On recognising his voice, she ended the call on both occasions. She relies on this as contact by telephone under s 4(1)(d). On the same date, Mr R sent Ms M two text messages on her personal mobile phone, threatening to sue her and to make everything public unless she spoke with him. She relies on this as contact by telephone under s 4(1)(d). Again on the same day, Mr R sent Ms M a letter via the Pelican Club. She relies on this as contact by correspondence to the Pelican Club directed against her: s 4(1)(d) via s 3(2)(b).

[28] On 30 August 2012, Mr R wrote to Ms M's lawyers and attempted to arrange a further meeting with Ms M. She relies on this as contact by correspondence under s 4(1)(d).

[29] On 26 October 2012, Mr R wrote to Ms M's lawyers referring to civil proceedings he had brought as amusing him and stating he was ready to pay for his entertainment. Ms M relies on this as contact by correspondence under s 4(1)(d).

[30] On 28 October 2012, Mr R wrote to Ms M's lawyers and threatened to amend and increase his civil proceeding if she did not pay him more than the amount claimed, and attempted to arrange a further meeting with her. She relies on this as contact by correspondence under s 4(1)(d).

[31] On 29 October 2012, Mr R wrote to Ms M's lawyers and threatened to amend and increase the civil proceeding if she did not pay him more than the amount claimed and referred to her as "silly whore", and to the manager of the Pelican Club as a "shy rapist". He attempted to arrange a further meeting with Ms M: s 4(1)(d), contact by correspondence; s 4(1)(e), offensive material.

[32] Also on 29 October 2012, he later wrote to Ms M's solicitors seeking to withdraw his inappropriate comments, whilst stating that he had grounds to believe they were true. Ms M relies on this as s (4)(1)(d), contact by correspondence; and s 4(1)(e), offensive material.

[33] Judge Sharp expressly found some of the behaviour that Ms M relies upon as amounting to specified acts. The Judge attached to her oral judgment the submissions of Ms M's counsel, his chronology, his schedule of Ms M's "evidence of fear and distress" and his schedule of Mr R's inflammatory and inappropriate comments in District Court proceedings. At [11] of her judgment, Judge Sharp found that all the specified acts, as set out in the material provided by Ms M's counsel, had occurred. At [12], Judge Sharp recorded her acceptance of the other matters set out in the material provided by Ms M's counsel that was attached to her judgment.

Scheme and purpose of the Act

[34] The scheme and purpose of the Act can be gleaned from its provisions. The objects of the Act are set out in s 6:

6 Object

(1) The object of this Act is to provide greater protection to victims of harassment by—

(a) Recognising that behaviour that may appear innocent or trivial when viewed in isolation may amount to harassment when viewed in context; and

(b) Ensuring that there is adequate legal protection for all victims of harassment.

(2) This Act aims to achieve its object by—

(a) Making the most serious types of harassment criminal offences:

(b) Empowering the Court to make orders to protect victims of harassment who are not covered by domestic violence legislation:

(c) Providing effective sanctions for breaches of the criminal and civil law relating to harassment.

(3) Any court which, or any person who, exercises any power conferred by or under this Act must be guided in the exercise of that power by the object specified in subsection (1).

[35] Also relevant is s 16 of the Act:

16 Power to make restraining order

(1) Subject to section 17, the Court may make a restraining order if it is satisfied that—

(a) The respondent has harassed, or is harassing, the applicant; and

(b) The following requirements are met:

(i) The behaviour in respect of which the application is made causes the applicant distress, or threatens to cause the applicant distress; and

(ii) That behaviour would cause distress, or would threaten to cause distress, to a reasonable person in the applicant's particular circumstances; and

(iii) In all the circumstances, the degree of distress caused or threatened by that behaviour justifies the making of an order; and

(c) The making of an order is necessary to protect the applicant from further harassment.

(2) For the purposes of subsection (1)(a), a respondent who encourages another person to do a specified act to the applicant is regarded as having done that specified act personally.

(3) To avoid any doubt, an order may be made under subsection (1) where the need for protection arises from the risk of the respondent doing, or encouraging another person to do, a specified act of a different type from the specified act found to have occurred for the purposes of paragraph (a) of that subsection.

[36] "Harassment" is defined in s 3 of the Act:

3 Meaning of "harassment"

(1) For the purposes of this Act, a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.

(2) To avoid any doubt,—

(a) The specified acts required for the purposes of subsection (1) may be the same type of specified act on each separate occasion, or different types of specified acts:

(b) The specified acts need not be done to the same person on each separate occasion, as long as the pattern of behaviour is directed against the same person.

[37] Section 4 defines what a "specified act" is:

4 Meaning of "specified act"

(1) For the purposes of this Act, a specified act, in relation to a person, means any of the following acts:

(a) Watching, loitering near, or preventing or hindering access to or from, that person's place of residence, business, employment, or any other place that the person frequents for any purpose:

(b) Following, stopping, or accosting that person:

(c) Entering, or interfering with, property in that person's possession:

(d) Making contact with that person (whether by telephone, correspondence, or in any other way):

(e) Giving offensive material to that person, or leaving it where it will be found by, given to, or brought to the attention of, that person:

(f) Acting in any other way—

(i) That causes that person ("person A") to fear for his or her safety; and

(ii) That would cause a reasonable person in person A's particular circumstances to fear for his or her safety.

(2) To avoid any doubt, subsection (1)(f) includes the situation where—

(a) A person acts in a particular way; and

(b) The act is done in relation to a person ("person B") in circumstances in which the act is to be regarded, in accordance with section 5(b), as done to another person ("person A"); and

(c) Acting in that way—

(i) Causes person A to fear for his or her safety; and

(ii) Would cause a reasonable person in person A's particular circumstances to fear for his or her safety,—

whether or not acting in that way causes or is likely to cause person B to fear for person B's safety.

(3) Subsection (2) does not limit the generality of subsection (1)(f).

[38] Section 5 defines when a specified act will be seen as having been "done to" a person.

5 Meaning of act "done to" person

An act is done to a person ("person A"), for the purposes of this Act, if that act is done—

(a) In relation to person A; or

(b) In relation to any other person ("person B") with whom person A is in a family relationship, and the doing of the act is due, wholly or partly, to person A's family relationship with person B.

[39] Sections 3 to 6 and s 16 show that Parliament intended that the Act would provide protection in the civil context from a range of conduct that at one end of the

spectrum caused the object of attention to fear for his or her safety and at the other end amounted to no more than an ongoing nuisance or irritation that, when both subjectively and objectively assessed, would be recognised to be distressful for the person at whom it was directed. Even then the Court must be satisfied that a restraining order is necessary to stop further harassment.

[40] For the Act to apply, there needs to be something more than one specified act. The language of ss 3, 4, 5 and 6, as well as ss 16 and 17 suggests that at a minimum, actionable harassment involves what reasonable persons would view as a pattern of unwelcome and distressing behaviour that is directed without lawful purpose at a distressed applicant over a period of time that fits within the statutory timeframe.

[41] Section 17 provides a defence when a "specified act" is done for a lawful purpose:

> **17 Defence to prove that specified acts done for lawful purpose**
>
> A specified act cannot be relied on to establish harassment for the purposes of section 16(1)(a) if the respondent proves that the specified act was done for a lawful purpose.

Relevant law

[42] The application of the Act's provisions is relatively straightforward. In general, the nature of harassment and the type of behaviour that comes within the Act's scope is self-explanatory. I address below relevant legal issues that arise under the Act.

Are attempts within the meaning of specified acts in s 4?

[43] The language of s 4(1)(a) to (e) refers to completed actions or behaviours: for example, s 4(1)(d) refers to "making contact … whether by telephone, correspondence or in any other way". It would seem, therefore, that those specified acts do not include attempts at doing any of the behaviours set out therein. Section 4(1)(f) covers acting in any other way that (when subjectively and objectively viewed) causes a person to fear for his or her safety. Attempts at any of the behaviours in s 4(1)(a) to (e) that have the effect of generating such fear would

qualify as a specified act under s 4(1)(f). But attempts that cannot meet the test in s 4(1)(f) appear to me to fall outside the scope of s 4(1).

The distress requirements of s 16(1)(b)

[44] As was recognised at [15] in *Clarke v Watts*, there are three preconditions to the Court making a restraining order under the Act:

(a) The defendant must have engaged in a pattern of behaviour that includes doing a specified act on at least two separate occasions within a period of 12 months;

(b) The behaviour must meet the "distress" requirements of s 16(1)(b); and

(c) The making of the order must be necessary to protect the applicant from further harassment.

[45] In my view, the distress requirements of s 16(1)(b) relate to the pattern of behaviour (the totality of the specified acts) and not to each specified act. So there is no need for an applicant to prove that each specified act meets the requirements of s 16(1)(b). Provided that the pattern of behaviour represented by the specified acts meets the distress requirements of s 16(1)(b), that will be sufficient.

Meaning of "fear for safety" in s 4(1)(f)

[46] The definition of "safety" in s 2 of the Act includes "mental well-being". However, disturbances that lead to feelings of anger, annoyance or upset will not qualify as causing a fear for mental well-being. In *Beadle v Allen* [2000] NZFLR 639 (HC) at [38], Potter J described s 4(1)(f) as a "wash-up" provision:

> [38] Firstly, as a matter of statutory interpretation, the provisions of s 4 are in my view quite clear. Section 4(1) describes a series of specified acts in paragraphs (a)-(e) and then in paragraph (f) introduces a final "wash-up" category …

Potter J cited with approval a District Court decision in *C v G* [1998] DCR 805 that said that, in the context of s 4(1)(f), "it was not enough that the person was angered, annoyed or upset": [25].

[47] A similar view was taken regarding the meaning of "fear for … safety" by Cooper J in *Kern v District Court at North Shore* [2014] NZHC 986, though this was in the context of s 8(1)(b) of the Act. Mr Kern sought judicial review of a District Court Judge's decision declining to issue a summons in a private prosecution brought under the Act. The summons was sought against someone who was a former partner of Mr Kern and the mother of his daughter. They separated in 2009. Subsequently, Mr Kern was in a relationship with another woman who made various allegations about Mr Kern to Mr Kern's former partner. Those allegations were repeated by the former partner to Child, Youth and Family employees, including concerns that Mr Kern might have mental health issues, and that he was sexually abusing his daughter. Mr Kern relied on s 8(1)(b) of the Act, alleging that he was being harassed in circumstances where his former partner knew that the harassment was likely to cause him to reasonably fear for his safety or the safety of his daughter.

[48] Before this Court, Mr Kern argued that the nature of the allegations were very damaging and would cause third parties to have "adverse feelings towards him" and that their potentially extreme reactions to the allegations "legitimately caused him to fear for his safety" and the safety of his daughter: [16].

[49] Cooper J discussed s 4 of the Act in considering whether Mr Kern had any reason to fear for his safety. Cooper J did not think that the matters raised would fall within the definition of a "specified act" in s 4. The only subsection that could apply was s 4(1)(f). In regards to this subsection, Cooper J said:

> [27] Insofar as s 4(1)(f) is concerned, Mr Kern would need to establish that Ms Kern had acted "in any other way" that caused him to fear for his safety, or that would cause a reasonable person in his particular circumstance to fear for his safety. Mr Kern attempted to bring himself within this provision by asserting that the abhorrent nature of the allegations was such as would cause other people, learning of the allegations, to have a very low opinion of him, such that they might be led to act violently against him as a consequence. However, that suggestion is in my view implausible, particularly in the circumstance where the complaints have been made only to persons with a legitimate interest in hearing them.

[50] There was no suggestion or consideration in *Kern* that fear for the loss of reputation or privacy could come within the meaning of "fear for … safety" in s 4(1)(f). I think that this was because Cooper J had implicitly rejected that possibility. Mr Kern was representing himself. It is likely, therefore, that the Judge would have considered all available interpretations, rather than just relying on those put to him by Mr Kern.

[51] Based on the definition of "safety" in the Act and the relevant case law, the phrase "fear for … safety" in s 4(1)(f) should be understood to apply to those circumstances where the person at whom the behaviour is directed fears that his or her physical or mental well-being will be harmed. In the case of the latter, I consider that the envisaged harm must entail the prospect of psychological, psychiatric or emotional harm. I do not consider that fear of experiencing the type of temporarily disturbed feelings that most people experience when something they do not like happens to them would qualify under s 4(1)(f).

[52] It follows that s 4(1)(f) was not intended to cover disturbing incidents that cause the affected person to fear an invasion of privacy, or damage to reputation from certain information, which he or she wants to keep secret, becoming generally known. Such revelations can cause unhappiness, anger, annoyance and emotional upset, but they are not usually harmful to a person's mental well-being.

[53] Further, protection of personal privacy and reputation are generally understood to be legally distinct from concepts of personal safety. I consider, therefore, that had Parliament wanted to include as harassment behaviour that caused the person at whom it was directed to fear the public disclosure of damaging information that he or she wanted to keep secret, it would have made express provision for this in s 4. On the other hand, I accept that insofar as such revelations can be shown to be so disturbing as to cause actual psychological, psychiatric or emotional harm, they would come within s 4(1)(f). However, in such cases, there would need to be a reliable evidential foundation to support this conclusion. The applicant's opinion on the harm she had suffered would not be enough.

Section 3(2)(b) mixed with s 4(1)

[54] One occasion where the application of the Act is not straightforward is when s 3(2)(b) interacts with a specified act in s 4. In this appeal, on more than one occasion Ms M relied on a mix of these sections to establish harassing behaviour on the part of Mr R.

[55] The purpose of s 3(2)(b) is to cover specified acts that are made directly to one person when the target of this attention is actually someone else. Thus, the specified act is made indirectly to the target person.

[56] Some of the specified acts that Ms M relies on were not made directly to her but to others. She contends that in terms of s 3(2)(b), these were acts directed at her and so they contribute to the pattern of behaviour that she contends amounts to harassment.

[57] I consider that when dealing with an allegation of harassment based on a mix of s 3(2)(b) and s 4, it is important to identify if the action concerned is indirectly targeted at the person who is the object of the harassment. Actions that involve a defendant doing no more than making contact with one person in a way that raises an issue about the target person will not in my view qualify for consideration under s 3(2)(b). I consider that within this topic, some care is required. The Act imposes civil and criminal restraints on conduct that formerly was unregulated. If read too broadly, the Act could impose constraints on freedoms such as freedom of expression, freedom of association, freedom of movement in public places and the implied licence recognised at common law to enter on to private property. This was touched on by Clifford J in *Clarke v Watts* when he discussed the need to balance freedom of expression as protected by the New Zealand Bill of Rights Act 1990 and the making of a restraining order.

Does the Act cover behaviour incidental to vexatious civil proceedings?

[58] Another relevant legal issue raised by this appeal arises from the apparent breadth of the language used in s 4 of the Act. Section 4(1)(d) refers to making

contact with the applicant whether by telephone, correspondence or in any other way. If this provision is read literally, it may capture communications that are the starting shot or otherwise incidental to legal proceedings ("legal demands/ communications"). Certainly this is how s 4(1)(d) was read in the present case. Further, when s 4(1)(d) is read together with s 3(2)(b), on the interpretation given to those provisions in this case, they are capable of rendering legal demands/ communications made to solicitors for an applicant to be a specified act.

[59] A letter of legal demand is often the opening shot before the commencement of legal proceedings. Such demands can be made more than once and they may be made against a background of vituperative exchanges. An example of this is the offensive letter that featured in *McKaskell v Benseman* [1989] 3 NZLR 75 (HC). Such correspondence can be written in an increasingly offensive way as the temperature rises in the course of ongoing aggressive and adversarial engagement. Written settlement offers can occasionally be sent to insult and wound the opposing party, rather than to offer a genuine settlement proposal. Other legal communications can be made between opposing parties or their solicitors that fall outside the scope of settlement offers

[60] The common law recognises various forms of privilege: some of which protects a party in judicial proceedings from having certain communications form the basis of a civil suit against him or her (for example see *Teletax Consultants Ltd v Williams* [1989] 1 NZLR 698 (CA) and see the discussion in *Lincoln v Daniels* [1962] 1 QB 237 (CA); whereas other forms of privilege preclude the communication from being used in evidence against the writer in another civil proceeding. The various forms of privilege have now been largely provided for in part 2, subpart 8 of the Evidence Act 2006. In *New Zealand Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264 (HC), Keane J rejected the idea that since the enactment of the Evidence Act that questions of privilege would be solely governed by the provisions of that Act. Instead, Keane J found at [44] that, in addition to s 67 of the Evidence Act, the common law continued to have "a place in setting boundaries to the privilege conferred". Whilst this was said in relation to s 57 privilege, I consider this comment may also be applicable to other instances of privilege under the Evidence Act. Certainly it warrants further consideration.

[61] Ms M was able to persuade Judge Sharp that communications from Mr R in the form of legal demands/communications that were made either to Ms M or to her solicitors, in relation to other proceedings that he initially threatened and then did commence, amounted to specified acts within the meaning of s 4(1)(d) and s 3(2)(b). If this finding is correct, it means that in principle, those who find themselves the target of vexatious litigation have a new weapon available to them. In saying this, I make no comment on the character of the other proceedings brought by Mr R, though I understand that they have been struck out on this ground. Previously, until the party bringing the vexatious litigation was declared a vexatious litigant or committed a tort, there was no civil form of redress against such a person. Further, as the orthodox view is that there is no tort of bringing malicious civil proceedings (see *Jones v Foreman* [1917] NZLR 798 (SC)), the fact that litigation was being vexatiously or maliciously pursued did not itself give rise to a remedy. All that the affected party could do was to apply to have the vexatious proceedings struck out and to seek costs against the plaintiff.

[62] The common law has always tolerated some degree of malice on the part of civil litigants because of the public interest in persons having access to the courts and because of the recognition given to the right to adjudication. This is demonstrated by the fact that the power to have someone declared a vexatious litigant is reserved to the Attorney-General alone.

[63] Alongside vexatiously brought litigation, such plaintiffs may send strongly worded and offensive communications to the target of their litigation. I am reluctant to accept that someone who sends two or more strongly worded, frivolous or vexatious legal demands/communications, thus making contact with the recipient, might find that he or she has committed specified acts under s 4(1)(d) of the Act. Yet this is where a literal reading of the Act and Judge Sharp's decision would take matters. It is not clear to me that Parliament intended the Act to have such a broad scope.

[64] Statutory provisions must take their meaning from the relevant context and purposes of the Act in question: see *Vu v Ministry of Fisheries* [2010] NZSC 162, [2011] 3 NZLR 1 (SC) at [10]. The type of public policy reasons that have caused

the common law to be somewhat tolerant of persons who commence frivolous or vexatious litigation may be relevant when it comes to interpreting the scope of the Act. However, no thought was given to those concerns in the present case.

[65] There is the defence provided in s 17. But this defence applies to specified acts that can be shown to have been done for a lawful purpose. In general, legal demands/communications will be done for a lawful purpose, so they would have no difficulty coming within s 17. However, s 17 seems to me to require a case by case analysis in order for a court to determine if on the particular occasion in question the specified act was done for a lawful purpose. This is of no assistance when it comes to considering if legal demands/communications that arise from vexatious litigation should be subject to the Act. It is hard to see how they could be characterised as having a lawful purpose. A court could start from the point that the right to adjudication means that all legal demands/communications relating to legal proceedings have a lawful purpose; however, this does not fit well with the case by case analysis that s 17 appears to require.

[66] So, s 17 does not help. Moreover, any attempt to apply s 17 would bring further problems. Not every legal proceeding is properly brought. Whilst the number of cases may be small, from time to time proceedings are struck out for disclosing no reasonable cause of action, being frivolous, vexatious, brought for an improper purpose, or otherwise an abuse of process. These assessments are made objectively. In some cases, the plaintiffs will genuinely believe in the merits of their hopeless claims, whilst in other cases the proceeding may be brought vexatiously. Some civil proceedings will be on the cusp of being vexatious, others clearly so. With individual cases of legal demands/communications, under s 17 a court could only assess whether the communication was related to, or incidental to a legal proceeding that was properly brought, or was one that fell into the frivolous, vexatious, improper purpose or abuse of process category. This brings its own problems. A court hearing an application for a restraining order may not be best placed to form a view on whether other proceedings, perhaps in a different court, have been properly brought. Further, with borderline cases, what might appear to be a frivolous, scandalous, or vexatious proceeding to the court hearing the application

for a restraining order, might survive a strike-out on those grounds from the court seized of the other proceedings.

[67] Also of relevance is the right of freedom of expression under the New Zealand Bill of Rights Act. An example of this is *Clarke v Watts* where at [32], Clifford J took the view that a letter of objection by the appellant, Mr Clarke, to Mr Watts' real estate licence application, although motivated by a grudge, fell outside the scope of behaviour that is to be taken into consideration under, or constrained by the Act.

> [32] I do accept that, when Mr Clarke objected to Mr Watts' real estate licence application, he took an action that, as a member of the public, he was entitled to. I accept his objection, and its contents, may have been motivated by his grudge against Mr Watts. But I do not see participation in such a process, albeit so motivated, being the type of behaviour that may be taken into consideration under, or constrained by, the Harassment Act. There are, in my view, very real free speech issues here. Moreover, and as Mr Tennet submitted, those and similar processes have their own rules to protect against abuse of process.

[68] Clifford J considered that it was proper to read down the language of the Act to ensure that other legal rights were not unduly curtailed. I consider that the public policy reasons for this approach might apply to the sending of legal demands/ communications as well.

[69] In principle, when a court is making a decision on whether or not to make a restraining order, I doubt that it is in a good position to determine if an offensively worded legal demand/communication is so extremely worded that it justifies making a restraining order. I also doubt that when the communication is made in relation to other civil proceedings, a court is in a good position to determine if the other legal proceedings, or the threat of commencing those proceedings, is so lacking in merit, so vexatious and so in need of curtailment that a restraining order on sending further communications should be made. If the court dealing with the harassment matter were to embark on such a venture, it would open up the possibility of that court reaching a different view on the merits of the other litigation than the court that was charged with dealing with it.

[70] Courts have their own ways of dealing with vexatious, oppressive and scandalous proceedings and the communications that those can generate. Whilst those ways may at times appear to those who are afflicted by such litigation to be slow and cumbersome, there are good reasons for this. The courts realise that the freedoms to bring and to engage in legal proceedings or to threaten to do so are precious, and not to be curtailed readily. In short, there are good public policy grounds for acts and behaviour relating to matters to do with legal proceedings being treated as being beyond the scheme and purpose of the Act.

The duration of a restraining order

[71] The last legal issue that arises in this appeal relates to the duration of a restraining order. The duration of such orders is covered by s 21 of the Act. The default period is 12 months, but a court can make an order for a longer (or a shorter) period than one year as the court considers necessary to protect an applicant from further harassment.

[72] In *Clarke v Watts* at [25], Clifford J paid heed to the impact of a restraining order on a defendant's right to freedom of expression under the New Zealand Bill of Rights Act. Such an order can have an impact on other freedoms as well, including freedom of association and freedom to move in and about public places. Clifford J considered that there was a balance to be struck between those freedoms and the Act's purpose of protecting persons from harassment. He approached matters in this way:

> [25] Importantly, when considering applications under the Harassment Act judges must bear in mind that a restraining order curtails the respondent's right to freedom of expression guaranteed by s 14 of the New Zealand Bill of Rights Act 1990. In determining whether to make an order the Court should ask "[w]hat is the degree of restraint that is reasonably justifiable to protect the applicant from harassment and to curtail as little as possible the right to freedom of expression to which the respondent is entitled?". (footnote omitted)

[73] In *Clarke v Watts*, the Court was dealing with the third restraining order that was made against Mr Clarke. At this time, there had already been an eight year pattern of harassment. The judgment shows that the second such order was for five years. Nothing is said about the duration of the third order. There the harassment

was persistent and ongoing. I find the test that Clifford J applied in [25] to be a helpful guide for ascertaining the duration of a restraining order.

Analysis

[74] Ms M relies on more than 25 alleged specified acts within a 12 month period to establish the requisite pattern of behaviour required by s 16. I do not think that each of the acts that Ms M relies on constitute specified acts under s 4, though I do think that some of them qualify as such.

[75] Whether certain behaviour does amount to a specified act requires me to take into account the evidence of Ms M. She gave evidence in the District Court hearing by way of affidavit. She was not cross-examined on her affidavit evidence. Accordingly, I consider that I am in the same position as Judge Sharp was when it comes to assessing Ms M's evidence.

[76] In my view, the behaviour in the period from 8 February 2012 up to and including 14 February 2012 did not amount to specified acts.

[77] Up until 8 February 2012, Ms M had willingly engaged in sexual relations with Mr R on a commercial basis. It is hard to see why she would have done so if she had cause at that time to fear for her safety. On that day, there were two aspects of Mr R's behaviour that she says caused her to fear for her safety. They were the internet search for her car registration details, which she discovered through him inadvertently showing her the details of this search, and his reference to using the services of a private detective if he wanted to find out more about her.

[78] The behaviours on 8 February 2012 happened as part of the same exchange between Mr R and Ms M. I propose to deal with those behaviours together as, for much the same reasons, I do not consider that either behaviour amounts to a specified act under s 4(1)(f). In her first affidavit, Ms M describes this encounter as having occurred on 31 January 2012. She later accepted that she had the dates wrong and that the encounter occurred on 8 February 2012.

[79] Ms M had kept her work at the Pelican Club from her mother. Ms M was using her earnings from the Pelican Club to establish herself in what many might see as a more respectable career. The general impression I have of her evidence is that she kept a clear divide between her life as a sex worker and other aspects of her life. Further, the terms on which Ms M engaged with Mr R were designed to exclude her clients gaining knowledge of her personal life and details. Therefore, when she realised that Mr R was attempting to find out some personal details, naturally she would have been upset by this. Similarly, the reference to hiring a private detective would have been unsettling, even though Mr R put it forward as a hypothetical statement to counter her belief that the internet search was done for the purpose of discovering her personal details. Ms M gave evidence that she was "horrified" to learn about the internet search. She said that she was "frightened … even more" by the reference to hiring a private detective. She described the incident on 8 February 2012 as leaving her "very upset"; she could not continue working for the rest of that day. This evidence shows that Ms M was distressed by Mr R's behaviour on that day. But people can be horrified and frightened without those states amounting to having a fear for safety. Fear of her sex work becoming more generally known; known to her mother or other family members and to her friends would have the effect of leaving Ms M horrified and frightened to the extent that she was.

[80] Mr R's behaviour during the encounter on 8 February 2012 warranted ending her business relations with him. Her willingness on earlier occasions to engage in sexual relations with him shows that earlier she had never perceived him to be a threat to her physical or mental well-being. She may have been very unhappy, for the reasons that I have outlined, that he was trying to enter into a relationship that went beyond the scope of their business relationship. But that is very different from having a fear for one's safety. There is no evidence to support the view that at the time, Mr R's behaviour on 8 February 2012 caused Ms M to fear for her safety. Nor is there evidence to show that later on reflection such fear developed.

[81] Moreover, in terms of s 4(1)(f)(ii), I consider that no reasonable person in Ms M's circumstances on 8 February 2012 or later would have feared for her safety as a result of Mr R's behaviour on 8 February 2012. There was evidence from the Pelican Club's manager that the sex workers tend to have regular ongoing

relationships with their clients. This must open the way to some clients becoming overly fond and unrealistically attached to the sex workers. I can see that it would be distressing for the sex workers and a nuisance for the management of the Pelican Club. But I cannot see how a reasonable person in the circumstances of Ms M would be so concerned by Mr R's conduct on 8 February 2012 that she would have feared for her safety. Accordingly, I do not find that his behaviour on that day amounts to a specified act under s 4(1)(f).

[82] Then there is the letter that Mr R delivered to the Pelican Club later on 8 February 2012, but which is incorrectly dated 2 February 2012. Ms M relies on this letter as a specified act under s 4(1)(d). This subsection refers to "making contact", not attempting to make contact. In this instance, there is no evidence to show that the letter was delivered to Ms M. Indeed in her affidavit dated 15 May 2012, Ms M states that Mr R delivered letters to the Pelican Club "which I asked not to see". For this reason alone, I do not think that the letter qualifies under s 4(1)(d). Further, the letter is apologetic in tone, though it did seek further contact with Ms M. Many persons who found themselves in Mr R's circumstances would seek to undo the damage that discovery of the internet search had done by sending a letter of apology, which included the wish to recommence their relationship on the same footing as before. To argue that this letter constitutes a specified act seems to me to trivialise the Act's purpose.

[83] The rebuffs that Mr R experienced on 8 February 2012 were not enough to dissuade him from attempting to make further contact with Ms M. Between 8 and 10 February 2012, he contacted the Pelican Club and attempted to make bookings with Ms M. These were refused. Ms M contends that those actions were specified acts as they constituted conduct directed against her under s 4(1)(d) via s 3(2)(b) of the Act.

[84] Section 3(2)(b) provides that conduct can amount to a specified act, even when it is not done to the same person but is directed against the same person. Ms M argues that Mr R made contact with her under s 4(1)(d) through asking the Pelican Club management to make bookings with her.

[85] Mr R attempted to make contact with Ms M through booking her services. This action did not involve Ms M. Had it succeeded, Mr R would have achieved the object of contact with her, but that is something different. The booking was done with the aim of meeting with Ms M; the act of making the booking was not directed at her. Therefore, I do not think that what occurred fits with the combination of s 4(1)(d) and s 3(2)(b) that Ms M relies upon. Further, nothing came of the attempts to book further time with Ms M. At best, this action is no more than a failed attempt at making contact with Ms M through the Pelican Club.

[86] On 14 February 2012, a number of things happened that Ms M relies upon as specified acts under s 4. First, there is the meeting between Mr R and the manager of the Pelican Club at which Mr R requested the manager to order Ms M to meet with him. She contends that this is a specified act because: (a) it is contact directed at her under s 4(1)(d) via s 3(2)(b); and (b) it is contact that caused her to fear for her safety, which is a specified act under s 4(1)(f). Secondly, after Mr R was unsuccessful in persuading the management of the Pelican Club to order Ms M to meet with him, he asked for the management to forward a letter to her in which he asked for further contact with her. Ms M contends that this is a specified act as it is contact by correspondence under s 4(1)(d).

[87] The meeting with the manager of the Pelican Club was contact with him, not with Ms M. The object of the meeting was to secure a meeting with Ms M, but the contact was directed solely at the manager of the Pelican Club. This was not an indirect form of contact with Ms M. I am satisfied, therefore, that the meeting on 14 February 2012 between Mr R and the manager of the Pelican Club was not a specified act under s 4(1)(d) via s 3(2)(b). I also do not consider that Mr R's request can amount to a specified act under s 4(1)(f). Ms M knew that the manager would not accede to Mr R's request to see her. The Pelican Club management had already refused to make further bookings for Mr R with her. There was nothing to suggest that Mr R posed a risk to her safety. In her affidavits, Ms M does not specifically address the meeting of 14 February 2012 in terms of saying what it was about that meeting that caused her to fear for her physical or mental well-being. Without such evidence, this alleged specified act cannot be established. Finally, no reasonable person in Ms M's circumstances would have feared for her safety.

[88] Next there is the letter that Mr R requested the manager of the Pelican Club to give to Ms M at the meeting on 14 February 2012. The letter is politely worded, placatory in tone and apologetic for what had happened on 8 February 2012. It was given to the manager to hand to Ms M. Therefore, the letter was not a communication that was made to the manager but directed at Ms M as is envisaged by s 3(2)(b). The letter was no more than a failed attempt to make direct contact with Ms M. In her evidence, Ms M said she had asked the club manager not to pass on to her letters from Mr R. I have the impression, therefore, that were it not for the decision to apply for a restraining order, the letter of 14 February 2012 may not have come to her attention. I do not consider that this letter comes within s 4(1)(d).

[89] In the same week as the meeting on 14 February 2012, Mr R returned to the Pelican Club and was banned by the management. Ms M contends that Mr R's return to the Pelican Club amounted to contact directed against her, which was a specified act by a combination of s 4(1)(d) and s 3(2)(b). For the same reasons as I have given before, I do not consider that this action amounts to making contact with Ms M through another person: namely, the club management. It was a direct failed attempt to make contact with Ms M. The management prevented the contact. This futile attempt on the part of Mr R cannot be said to amount to him making contact with Ms M through the auspices of the club management. Therefore, I do not consider that it amounts to a specified act under s 4(1)(d).

[90] I consider that the first actions on the part of Mr R that amount to specified acts are his waiting outside the Pelican Club on 15 and 22 February 2012. By then he was banned from attending the Pelican Club. In her evidence, Ms M makes a passing reference to other sex workers seeing Mr R watching sex workers arrive at the Pelican Club. In his affidavit sworn on 11 June 2012, Mr R states that on those occasions, he waited in his car by the Pelican Club in an attempt to see Ms M. Had he not made this admission, the evidence would have been insufficient to prove his presence in the vicinity of the Pelican Club on those dates. I am satisfied that this behaviour comes within the meaning of loitering under s 4(1)(a).

[91] I consider that the email that Mr R sent to the Pelican Club on 5 March 2012 seeking contact with Ms M and stating that if such contact did not eventuate, he

would find another way to talk to her, amounts to a specified act. The inclusion of this statement is a statement directed at Ms M, rather than at the Pelican Club. In my view, this email constitutes indirect contact directed at her through the Pelican Club. The purpose of sending it to the Pelican Club being to have its management persuade Ms M to agree to further contact with Mr R. I am satisfied that this amounts to a specified act under s 4(1)(d) via s 3(2)(b).

[92] The email that Mr R sent on 12 March 2012 to the manager of the Pelican Club in which Ms M was said to suffer from mental health issues amounts to a specified act under s 4(1)(d). The tone of the email is unpleasant and insulting to Ms M. This email can be read inferentially to suggest that Ms M was mentally unbalanced and this was the reason for her refusal to meet with Mr R. Thus, the email was an attempt to undermine her decision not to meet with him anymore and to portray her in a bad light. I consider, therefore, that whilst the email was sent to the manager, it was contact directed towards Ms M under s 3(2)(b).

[93] I consider that Mr R's instructing a private detective to discover personal contact details of Ms M was a specified act under s 4(1)(f). Ms M came to learn of this behaviour inferentially as a result of Mr R contacting her personal email address in May 2012. He had alluded to the use of a private detective at their last meeting on 8 February 2012 and so once she realised he had her personal contact details, she rightly surmised that he had hired a private detective to obtain them. Mr R confirmed this in his affidavit. Had he not done so, it is unlikely that Ms M would have been able to prove this act.

[94] Nowhere in her evidence does Ms M expressly address this act in terms of outlining how it caused her to fear for her physical or mental well-being. However, at [17] of her affidavit of 15 May 2012, she says that she is scared that Mr R is watching her, that she is terrified he will turn up at her home; and she goes on to say that Mr R is "obsessive, intimidating and I am very frightened for my safety". Later at [19] she says that she is frightened for herself, her partner and her family. These fears, which include a fear for her safety, can inferentially be linked to Mr R's engagement of a private detective to find out her personal address and other contact details. Without the help of the private detective, he may not have been able to find

her. Thus, the use of the services of a private detective has sufficient connection with Ms M's expressed fear for her safety to bring this action on the part of Mr R within the scope of s 4(1)(f). I also considered that by this time a reasonable person in Ms M's circumstances would also have feared for her safety once she learned a private detective had been hired to find her whereabouts.

[95] The contact that an unknown person seeking details of Ms M had with Ms M's mother fits with the unknown person being Mr R's private detective. Mr R accepted that. Had he not accepted this, it is unlikely that Ms M could have proved it was Mr R's agent who contacted her mother on Mr R's behalf. This was telephone contact by Mr R's agent with a family member of Ms M. As such, the conduct fits within s 4(1)(d) and s 5(b).

[96] The incident on a date unknown when someone contacted Ms M's former landlord to try and obtain Ms M's telephone number and address was not addressed by Mr R in his evidence. He did not challenge Ms M's factual narrative of events. However, the fact that he did not dispute her evidence on this incident cannot of itself amount to an admission that it was either him or his agent who made the enquiry of the former landlord. Without any acknowledgement from Mr R that this enquiry was undertaken by him or his private detective, I find it hard to see how the conduct can be attributed to him. It may look suspiciously like something he might have done or instigated but, even on the civil standard of proof, suspicion is not enough to prove he was responsible for this conduct. Judge Sharp made no specific finding on this allegation. Insofar as her finding on [11] of her judgment amounts to an implicit finding that this particular specified act was proven, I consider that she was wrong. There is no evidence to link Mr R to this act.

[97] The email that Mr R sent to Ms M at her personal email address on 5 May 2012 seeking a meeting and saying that otherwise he would attempt to contact her in person is difficult to characterise. It is a direct communication to Ms M that is threatening and unpleasant. By then, Mr R was engaging in a pattern of behaviour that flew in the face of reason. He had no reason to think that Ms M would welcome this email, or even view it neutrally. This supports the view that the email was a specified act under s 4(1)(d). However, the email contained explicit threats of legal

action that Mr R would commence if Ms M was not willing to meet with him to give him the opportunity to present "things from his standpoint".

[98] Though it does not occur often, there are times when persons in disputes can send communications of this type before commencing litigation against the intended recipient. The public policy reasons that I have discussed earlier have led me to question: (a) whether the Act was intended to cover the type of communications made in legal proceedings; (b) whether communications of this type have a lawful purpose, even though on particular occasions they are the prelude to proceedings that are vexatious and oppressive; and (c) the ability of a Court dealing with an application under the Act to make determinations on the merits of separate legal proceedings or the threat of such proceedings. These factors weigh against me finding that this email amounts to a specified act under s 4(1)(d). I consider that it was for Ms M as the applicant to make out a case for s 4 extending to cover those circumstances. She did not do so as her case was silent on those matters.

[99] There is a further difficulty with this case in that there was no consideration either before Judge Sharp or before me on appeal regarding whether s 4 should be read so literally as to include legal demands/communications sent by a defendant to an applicant for a restraining order. Nor was there any proper consideration of whether such communications would be protected by any of the various heads of privilege in part 2, subpart 8 of the Evidence Act. Mr R as a lay litigant could not cover this topic adequately. The respondent did address certain aspects of privilege. In her decision, the Judge does not consider the merits of the privilege issues that were raised. Consequently, no one considered whether in principle the Act could preclude a defendant who represented himself from writing offensively to the applicant for a restraining order, or to his/her solicitors regarding the application or regarding other civil proceedings.

[100] Unfortunately, Judge Sharp did not expressly address the relevant communications in her judgment. She referred specifically to other allegations of specified acts, which she found established, and then she made a general finding that she found established all the specified acts set out the schedule of specified acts attached to the closing submissions of Ms M's counsel. The legal demands/

communications sent by Mr R fell into the latter category. Thus, there are no reasons for the Judge finding that those legal demands/communications were specified acts.

[101] Mr R claimed that some of the relevant communications were privileged. He claimed that they were without prejudice settlement offers, which would bring them within s 57 of the Evidence Act. Unfortunately, those claims were not properly addressed.

[102] On 7 November 2012, Mr R filed an application that parts of Ms M's updating affidavit dated 1 November 2012 and the exhibits attached thereto not be read. The application was called before Judge Cunningham at an interlocutory hearing on 12 November 2012. Her directions ruling that day at [22] records that she deferred this application by Mr R until the hearing on 9 May 2013. Thus, as at November 2012, the issue regarding the admission of privileged material remained alive.

[103] On 14 March 2013, Judge Cunningham made timetable directions for the parties to file their submissions for the 9 May 2013 hearing. On 29 April 2013, Mr R filed a memorandum which listed the outstanding interlocutory applications, including the application that parts of Ms M's affidavit and exhibits (including material subject to Mr R's privilege claim) be struck out. He advised the Court that he was withdrawing all interlocutory applications. His memorandum refers to the half day fixture allocated for the main application. It is not completely clear to me if he intended to withdraw his privilege claim altogether, or simply to withdraw from making it in the context of an interlocutory application. The latter is understandable, given that the objection to the privileged material was now also to be heard on the same day as the main application.

[104] At the hearing of the main application on 9 May 2013, Mr R objected to the admission of the communications that he claimed were privileged. Ms M's counsel argued that Mr R had withdrawn his objection by abandoning the interlocutory application for those parts of Ms M's affidavit and exhibits not to be read. Mr R acknowledged he had withdrawn the interlocutory application, but asserted that he did not waive his privilege over the relevant documents. Ms M's counsel suggested

the material over which Mr R claimed privilege be put to him and the legal point be determined later in submissions: "perhaps I can put the documents to the witness [(Mr R)] and we can discuss this issue in submissions". Judge Sharp decided to follow the proposed course of action.

[105] Later, at the stage of legal submissions, Ms M's counsel submitted that the privilege objection was no longer maintained. Counsel submitted:

> Your Honour I don't apprehend there's any ongoing issue about without prejudice. I understood it to have been waived, any final objection to that to have been waived so I don't propose to address you on that.

To which Judge Sharp responded:

> I think it was because [Mr R] became quite expansive about the documents in question in the evidence.

[106] What is not clear to me is whether Mr R became expansive in evidence about the documents because he had decided to waive privilege or because faced with the Judge directing this material would be admitted de bene esse, with its privileged status to be determined later in legal submissions, he decided to deal with the material on its merits, rather than not address it at all. While Mr R was addressing Judge Sharp in his closing submissions, he still claimed that privileged material was wrongly included in Ms M's second affidavit. Judge Sharp made no formal ruling on the question of Mr R's privilege claim. It is unfortunate that the position on the privilege claim was not better recorded. It is not clear to me if Mr R knowingly and willingly waived privilege over the legal communications that he sent to Ms M's solicitors.

[107] Because the privilege claim was not addressed specifically by Judge Sharp in her decision, the important legal questions that I consider her decision has raised regarding the susceptibility of legal demands/communications to s 4 of the Act were not readily apparent to me. Had the question been clear to me at the outset of the appeal, I would have considered adjourning the hearing and appointing an amicus curiae so that when the appeal next came on for hearing, those questions could be fully addressed. But, without having a clear factual foundation, or the

benefit of hearing fully informed argument on this topic I am in no position to reach a firm conclusion on it.

[108] 10 May 2012 is a day on which matters deteriorated. Mr R twice telephoned Ms M's personal mobile telephone, which constitutes specified acts under s 4(1)(d). He sent her two text messages threatening to sue her and to make everything public unless she spoke with him. These communications suffer from the same problem as the communication on 5 May 2012.

[109] Also on 10 May 2012, Mr R sent a letter to the Pelican Club. The letter takes the form of a legal demand. It threatens to sue the Pelican Club and Ms M for failing to deliver the promised services on 8 February 2012, defaming Mr R and breaching his privacy by disclosing details of his family. Such correspondence can be generated by persons holding a grudge against the addressee and followed by proceedings that are later held to be vexatious and frivolous. I am sure that many persons finding themselves faced with litigants of this type would like to take action against them under the Act. However, for the reasons that I have already outlined, such behaviour may not be susceptible to a restraining order under the Act. I consider that the same reasoning applies to the letters sent to Ms M's lawyers on 30 August 2012, 26 October 2012, 28 October 2012 and the two letters sent on 29 October 2012.

[110] In the end, the difficulties that I see with assessing the legal demands/communications are difficulties that do not influence the outcome of this appeal. Putting the legal demands/communications to the side for the moment, whilst there are fewer remaining specified acts than were found by Judge Sharp, nonetheless, there are enough of them to constitute a pattern of behaviour that satisfies the Act's meaning of harassment under s 3.

[111] Before determining whether the pattern of harassment that I have found meets the requirements of s 16, I will consider if any of the specified acts that I have found to be established were done for a lawful purpose.

[112] I can see no lawful purpose for Mr R being outside the Pelican Club on 15 and 22 February 2012. By then he was banned from attending the Club. The explanation he gave in his evidence was that he wanted to see Ms M, which is the very reason he was banned from the Club.

[113] I can see no lawful purpose for Mr R sending the email communications of 5 March 2012 and 12 March 2012 in the form that they were in, let alone at all.

[114] I can see no lawful purpose for Mr R instructing a private detective to find out private details about Ms M's whereabouts. Nor can I see any lawful purpose in Mr R having his private detective ring Ms M's mother for the purpose of finding out contact details of Ms M. By that time, it had been made plain to Mr R that Ms M did not welcome further contact with him.

[115] I can see no lawful purpose for the direct contact that Mr R made to Ms M on 10 May 2012 by cellphone calls.

[116] I now consider if the pattern of behaviour that the harassment represents satisfies the distress requirements of s 16(1)(b).

[117] There is express evidence from Ms M that the acts of loitering on 15 and 22 February 2012 caused her distress. In her affidavit of 15 May 2012, Ms M refers to other sex workers informing her that they had seen Mr R in the vicinity of the Pelican Club. The timeframe that she refers to coincides with the dates on which Mr R has admitted being present outside the Club. She describes herself as feeling "scared it was [Mr R]" when she was told by the other sex workers that they had seen a man standing outside the club premises. I am satisfied that a reasonable person in Ms M's circumstances would have found it distressing to learn that Mr R was waiting outside the Pelican Club. By then it would have been clear to a reasonable person in Mr R's circumstances that his attention was not wanted, and that he should abandon hope of meeting Ms M again. Mr R's persistence in the face of the clear indications he had received that he was no longer welcome at the Pelican Club or to Ms M would have been distressing for any reasonable person in those circumstances.

[118] I am satisfied that Ms M was distressed by the cellphone calls of 10 May 2012. Regarding those telephone calls, there is express evidence from Ms M that she was "terrified" by the fact that Mr R had been able to obtain details of her personal cellphone number. I consider that any reasonable person in Ms M's circumstances would be distressed by those behaviours.

[119] There are the emails of 5 March 2012 and 12 March 2012. Ms M does not specifically address those emails in terms of the distress they caused her. I consider that any reasonable person in Ms M's circumstances would have been distressed by the emails of 5 March 2012 and 12 March 2012.

[120] Ms M's evidence expressly describes her distress regarding certain specified acts. Her evidence also generally describes a level of unhappiness and fear for her privacy as a result of the harassment, from which I infer that it caused her distress. I am satisfied that the overall pattern of behaviour revealed by the specified acts that I have found to be established did cause distress for Ms M and would do so to a reasonable person in her circumstances.

[121] I next consider whether the degree of distress caused or threatened by the behaviour justified making a restraining order. I am satisfied that it did. The distress disturbed the pattern of Ms M's life. Her evidence was that in mid February 2012, she stopped going to work for three weeks. The distress was ongoing. The threat of Mr R's unwelcome presence in a part of her life that she had kept separate from her sex work would have been most distressing. The pressure from Mr R showed no signs of alleviating. His approach to the application for a restraining order reveals that he had little insight into the impact he was having on Ms M. In such circumstances, I consider that the harassing behaviour justified the making of a restraining order.

[122] The final question is whether at the time the application was before the District Court, a restraining order was necessary to protect Ms M from further harassment. I think that it was. Mr R's efforts to make contact with Ms M were escalating. By the end of February 2012, it should have been clear to him that she wanted nothing more to do with him. In such circumstances, he should have

withdrawn and left her alone. The fact that he did not do so, and that he continued to attempt to make contact with her in numerous ways up to the filing of the application for the restraining order is sufficient to lead me to conclude that a restraining order was necessary.

[123] Secondly, Mr R's communications and his evidence in the District Court show that he lacked any insight into how his behaviour would be objectively viewed. He was unhappy that the relationship had ended. He did not like the way that the management of the Pelican Club had engaged with him after 8 February 2012. From his perspective, the management had threatened him. He believed that Ms M had revealed to the management personal information about himself that he had divulged to her in confidence. The tone of his communications changes over time from being placatory and apologetic to being angry and demanding. In short, Mr R failed to appreciate that Ms M was entitled to determine whether she continued to have contact with him or not. Were it not for the application for a restraining order, the harassment may have continued. The standard of proof under s 16 is the balance of probabilities. I am satisfied on that standard that a restraining order needed to be made. On this point, Mr R's appeal fails.

[124] I consider that the fact I have found there were specified acts that warranted the making of a restraining order means that it is unnecessary to consider whether the legal demands/communications that he sent to Ms M or to her solicitors amounted to specified acts. My view on the seriousness of the harassment overall would remain the same whether I took the legal demands/communications into account or not. The wider implications of treating them as specified acts lead me to conclude that this topic should not be addressed without the benefit of full considered argument on the public policy issues that it raises, and without a clear understanding of the factual basis for any claim for privilege. As all this was absent here, I consider that this is not an appropriate case in which to explore this topic.

[125] I have difficulty with the duration of the restraining order. It was made for five years. Once the application for a restraining order was made, the specified acts stopped. Mr R proceeded to defend the application vigorously and he commenced other civil proceedings against Mr M. In doing so, he displayed a degree of

persistence and stubborn adherence to his view of how things had transpired with Ms M without any regard for how others might perceive his conduct.

[126] On the other hand, there is nothing about the actual harassment that suggests an order of five years duration was reasonable. When the harassment is viewed in isolation, I do not think that it warranted a five year order. It was increasing and persistent from mid February to May 2012. Nonetheless, it was at a low to moderate level. After the application for a restraining order was made, the behaviour stopped or reduced, depending on whether the legal demands/communications are taken into account as specified acts or not. Either way, they are not sufficiently serious to influence the duration of the restraining order. I can see no basis for making a five year restraining order against Mr R.

[127] Mr R showed respect for legal process in that once the application for a restraining order was made, he committed no further obvious specified acts. I acknowledge that he then turned his attention to the legal process; he filed affidavits and sent communications to Ms M's solicitors that made offensive statements about her. He commenced other proceedings against her. However, in principle and for the reasons I have given already, I am not persuaded that vexatious or oppressive conduct in legal proceedings is something that a Court should take into account when it is considering the making of a restraining order under the Act.

[128] When I undertake the balancing exercise outlined by Clifford J in *Clarke v Watts* at [25], I find that a period of no more than 12 months restraint would have been appropriate. An order of 12 months duration imposes the degree of restraint that is reasonably justifiable to protect Ms M from harassment, whilst at the same time curtailing Mr R's freedom as little as possible. Under s 22, the Act permits extensions of restraining orders. Second or subsequent orders can be made, as was done in *Clarke v Watts*. Therefore, if Mr R renews his harassment of Ms M, the Act provides ways in which she can be protected. This is a better approach than the use of a five year restraining order.

[129] The views that I have reached on the duration of the restraining order would have been the same, even if I had found that all the legal communications that Mr R

made to Ms M or her solicitors were specified acts under s 4. Their impact was not serious. They would largely have been a nuisance or minor irritation. Insofar as the solicitors were under an obligation to inform Ms M of their receipt, the solicitors would also have been in a position to alleviate the letters' impact on her. This is another reason why I consider that it is not necessary to engage with the legal issues that those communications raise.

Judicial review and appeal against interlocutory decision on 9 May 2012

[130] Mr R has judicially reviewed the rulings/decisions that followed interlocutory hearings on 6 November 1012, 12 November 2012, 14 March 2013 and the pre-trial hearing application on 9 May 2013, as well as the decision on the main application. In this proceeding, Mr R has made a number of complaints about the way in which the interlocutory applications and the main application were handled procedurally by the District Court. There is also the appeal against a ruling made on 9 May 2013 on the mode of evidence. Under r 7.2 of the DCR, this ruling, which was ancillary to the application for the restraining order application, is defined as an interlocutory ruling. Mr R faces obstacles in bringing those challenges.

[131] Regarding the challenges to the interlocutory decisions, Mr R faces the problem that ordinarily it is not possible to continue a direct challenge, either by appeal or by judicial review, against an interlocutory decision once the substantial matter has been determined. This is because ordinarily, by then an interlocutory decision is spent, so there is nothing to be gained by either appealing against or judicially reviewing it: see discussion in *Rakich v Wrightson NMA Ltd* HC Whangarei B25/89, 16 November 1989 at 5 where Henry J said "the interlocutory decision refusing an adjournment is spent now that a final decision on the substantial proceeding has been made". Henry J said this in the context of a review of a decision of a Master of this Court refusing an adjournment. However, the principle that he applied is of more general application. On the other hand, when a spent interlocutory decision can be shown to have been made in error; and the error has materially affected the outcome of the substantial proceeding, this will provide an appealable and/or judicially reviewable point to be taken in any such challenge to the

substantial proceeding: see *Siemer v Heron* [2011] NZSC 133, [2012] 1 NZLR 309 at [32].

[132] Regarding the judicial review of Judge Sharp's decision on the main application, the success that Mr R has achieved in the appeal makes any assessment of the same subject matter in a judicial review proceeding moot. In principle, the Court will not give a remedy if it is futile to do so: see *Fowler v Rodrique Ltd v Attorney-General* [1987] 2 NZLR 56 (CA) at 78:

> [E]vents have overtaken this application, rendering any order that the Court may make of academic interest only.

[133] In *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478 (HC), Williams J refused relief on the ground of futility and on the related doctrine of mootness. This decision recognises that an actual controversy must exist at all stages of the proceedings, and a case becomes moot when the issues presented are no longer live. In *Maddever*, the pupil's departure from a school was seen to render the case against the legality of his expulsion moot.

[134] Inevitability of outcome is another ground on which the Court can deny relief. In general, where appeals precede a judicial review, a court has been reluctant to entertain the judicial review proceeding later when the outcome would be the same. In *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA), the Court of Appeal expressed doubt that once the applicant had taken his opportunity of appealing and lost, he should be permitted to contest the same matters on review. This decision was upheld by the Privy Council in *Wislang v Medical Council of New Zealand* [2005] NZAR 670 (PC).

[135] In *Nichols v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA) at 437, Tipping J made observations on how a court should approach judicial review proceedings when an appeal right has already been exercised:

> The correct approach is this. This Court should first identify the error, or errors, which are said to vitiate the first instance decision. The second step is to examine what effect the appeal had on the error, or errors, found at the first stage. If the appeal has in substance removed the prejudice which would otherwise have resulted to the complaining party, the Court should

> exercise its discretion against relief, because overall no continuing prejudice from what went wrong at first instance can be shown.

[136] The more limited basis on which I found that a restraining order of 12 months duration was appropriate remains a live issue for the judicial review proceeding. Three questions are raised. First, whether the alleged procedural flaws in the decisions on the interlocutory applications have influenced my decision on: (a) the specified acts that I found; (b) the findings that I made on the s 16(1)(b) distress requirements as they relate to the established harassment; and (c) the finding I made that a restraining order, albeit of shorter duration, should have been made. Secondly, whether the alleged procedural flaws in the judicial review of the main application have a similar influence. Thirdly, whether the appeal against the mode of evidence ruling on 9 May 2013 can establish that this ruling has a similar influence.

[137] The interlocutory decision made on 6 November 2012 emanates from a strike-out application filed by Mr R. Ms M failed to file a notice of opposition within the prescribed time under r 3.52.6 of the DCR. The Court decided to permit Ms M to file a late notice of opposition. Mr R has referred me to relevant case law on the need for a party seeking an indulgence from the Court first to make out a proper basis for such leave. In the present case, Ms M did not do so. That may be so, but the decision to accept her notice of opposition out of time is now spent. Whilst the refusal to reject the late notice of opposition may have deprived Mr R of success with the strike-out application, there is no practical benefit in traversing the lawfulness of that decision now. It has had no direct impact on the findings that I have made in the appeal against the main application.

[138] Once Ms M was given leave to file her notice of opposition out of time, the hearing of the strike-out application proceeded on 12 November 2012. As with the decision of 6 November 2012, the 12 November 2012 decision has no direct impact on the findings that I have made on the appeal. Accordingly, there is no practical benefit in judicially reviewing the dismissal of the strike-out application now.

[139] There were other interlocutory applications before the Court that day. There was an application regarding publication of the proceeding. Mr R wanted to have the names and identifying details of the parties removed but the proceedings to be

otherwise published in the normal way. The Judge declined the application. I consider this decision to be spent. Any issue regarding publication is something I can deal with separately.

[140] There was an application to strike out the late filed notice of opposition. The Judge dismissed this application on the ground that leave to file out of time had been granted by a Judge on 6 November 2012. This application is now spent.

[141] There was an application to strike out parts of an updating affidavit filed by Ms M and to admit an agreed statement of facts. That application is now spent. The specified acts that I have found and the reasons for making a restraining order are not dependent on the evidence that Mr R wished to have struck out.

[142] The evidence to support the loitering on 15 and 22 February 2012 was given by Ms M in her first affidavit and confirmed in greater detail by Mr R in his first affidavit.

[143] The email communications of 5 and 12 March 2012 speak for themselves. They were exhibited to Ms M's first affidavit and to Mr R's first affidavit.

[144] The instructing of a private detective was confirmed by Mr R in his first affidavit. The approach of that detective to Ms M's mother was implicitly confirmed by Mr R in his third affidavit where he said "[i]f it was the private investigator, then he was only doing his job".

[145] The contact by cellphone on 10 May 2012 is referred to by Ms M in her first affidavit and confirmed by Mr R in his first affidavit.

[146] On 14 March 2013, the District Court made determinations on an oral application by Mr R to stay the proceeding. Following the decision of the District Court on 6 and 12 November 2012 regarding leave given to Ms M to file a notice of opposition late to Mr R's strike-out application, he commenced the judicial review proceedings in this Court. A judicial conference in the District Court for the harassment proceeding took place on 14 March 2013. At this conference, Mr R

sought to have the hearing of the main application stayed until his judicial review of the decisions of 6 and 12 November 2012 was heard. The decision to refuse to stay the harassment proceeding until the judicial review proceeding was determined is now spent. At the judicial conference, Ms M's counsel suggested that the Court appoint an amicus curiae to conduct any cross-examination of Ms M that Mr R might want made. The Judge noted as an addendum to her judgment that after delivering her oral decision on the appointment of an amicus curiae, Mr R advised her that he did not oppose such an appointment. Whether he did or did not seems to me now to be of no relevance. As I have already stated, the evidence on which I have relied to find specified acts is not disputed, and indeed is substantially confirmed by Mr R. His personal inability to cross-examine Ms M could have no impact on those findings. I am satisfied this decision is spent.

[147] The interlocutory decision on 9 May 2013 on the mode of evidence has no direct impact on the findings that I have made regarding what I found to be specified acts under the Act. The evidence of those acts could not be in any way affected by the ruling on the mode of evidence. Thus, that decision is spent.

[148] Regarding the judicial review of the decision on the main application, Mr R's third amended statement of claim pleads numerous allegations of the Judge acting unlawfully and in a procedurally unfair manner. I do not propose to outline them here. I have considered each of them separately. Even if they were established, these judicial review grounds do not impact on the findings that I have made on the specified acts that I have found established. I am satisfied, therefore, that the procedural flaws alleged in the judicial review proceedings are now moot.

[149] The next question is whether the judicial review and appeal against the mode of evidence ruling have any effect on the distress requirements under s 16(1)(b) that I have found to be made out.

[150] At the hearing on 9 May 2013, Ms M was not cross-examined. Mr R referred to case law to the effect that a failure to cross-examine a witness is not always fatal to a successful challenge to the witness's evidence. My view is that such case law is

the exception to the general requirement that s 92 of the Evidence Act imposes on a party to a judicial proceeding.

[151] The greater concern that I have regarding the failure to cross-examine is that Judge Sharp relied on it as one of the bases for accepting Ms M's evidence in circumstances where no earlier warning was given to Mr R about the consequences of not cross-examining Ms M. *Rawlinson v Rice* HC Rotorua CP 17/94, 3 December 1998 was a civil jury trial where a lay litigant brought misfeasance in public office proceedings against District Court Judge Rice. After Judge Rice gave evidence, Mr Rawlinson declined to cross-examine him. Mr Rawlinson was warned by the trial Judge, Williams J, more than once, that if he did not cross-examine Judge Rice, Mr Rawlinson would be deemed to have accepted Judge Rice's evidence. Apart from the warnings, Williams J later gave Mr Rawlinson the opportunity to have Judge Rice recalled as a witness so as to permit cross-examination of him. Again Mr Rawlinson declined the opportunity. The outcome was that Mr Rawlinson was deemed to have accepted Judge Rice's evidence, which established a defence to the civil claim. Accordingly, the case was withdrawn from the jury and judgment was entered for Judge Rice.

[152] I consider that when a court is dealing with a lay litigant who decides not to cross-examine the evidence of a witness who is pivotal to the case against the lay litigant, the court should, as did Williams J in *Rawlinson v Rice*, give a full and explicit warning of the legal consequences that flow from a failure to cross-examine the witness. Without that being done, it is difficult to hold the consequences of not cross-examining against Mr R.

[153] I have found that a reasonable person in Ms M's circumstances would have been distressed by the specified acts that I have found. This finding supports the view that Ms M's evidence on this topic was credible and reliable. Her evidence, coupled with the objectively based finding that I have reached is sufficient in my view to satisfy the civil standard of proof that s 16(1)(b) requires. It is unsatisfactory that Ms M's evidence was unchallenged without Mr R being warned of the consequences of that. However, remedies in judicial review are discretionary. I consider that there would be no point in sending this matter back to the

District Court for reconsideration simply because of the failure to warn Mr R of the consequences of not cross-examining Ms M. Particularly when, as is the case here, I consider that the restraining order can now be set aside for being too long in duration.

[154] I am satisfied, therefore, that the findings that I have reached on the distress requirements are unaffected by the judicial review grounds and the appeal against the mode of evidence ruling.

[155] When it comes to the decision on whether a restraining order was required, I consider that the evidence that I relied on to reach that view is unaffected by the judicial review grounds and the appeal against the mode of evidence ruling.

[156] It follows that there is no utility now in the judicial review proceedings and the appeal against the mode of evidence ruling. Mr R has sought orders relating to whether Judge Sharp should hear and determine any future proceedings that involve him. Those remedies fall outside the scope of his judicial review proceedings.

Appeal against, and judicial review of the award of indemnity costs

[157] A costs order involves the exercise of a discretion and so any appeal against it must be decided in accordance with the principles in *May v May* (1982) 1 NZFLR 165 (CA). This means that an appellate court can only interfere with the decision if satisfied that the Judge at first instance acted on a wrong principle, took into account irrelevant considerations, failed to take into account relevant considerations or was plainly wrong. Another basis for interfering with the exercise of the discretion is where there has been a material change of circumstance since the making of the decision. Mr R's appeal falls into the latter category of circumstances.

[158] Mr R has enjoyed some success with his appeal. The established specified acts are fewer than was found to be the case by Judge Sharp and the duration of the restraining order has been reduced to 12 months, which has led to it being set aside. Thus, his opposition to the making of the restraining order was not entirely hopeless. In *Deliu v Chief Executive of the Ministry of Social Development* [2012] NZCA 406,

(2012) 21 PRNZ 294, an indemnity costs order that was made against counsel personally was set aside as a result of the appeal being partially successful. The Court of Appeal found that this outcome meant that the indemnity costs order could not survive. I consider that the same reasoning applies to the present case.

[159] Secondly, in the costs judgment, Judge Sharp accepted criticisms of Mr R's conduct at the interlocutory stage of the proceeding that were made by Ms M's counsel in circumstances where Judge Sharp was not the Judge who dealt with the those interlocutory matters. The Judges who did, made no awards of costs against Mr R. Yet they were the persons best placed to deal with costs awards relating to those applications. Judge Sharp had no personal knowledge of how matters had proceeded at the interlocutory hearings. Ms M did not file evidence to inform Judge Sharp of what had transpired. Ms M's criticism of Mr R's conduct, regarding interlocutory matters, was made in her submissions on costs. In *Harley v McDonald* [2002] 1 NZLR 1 at [65], the Privy Council was critical of Giles J for taking into account matters relating to the conduct of the proceedings that occurred before events that he observed at the trial. This was said in the context of an award of indemnity costs against counsel. However, I think the principle is relevant here as well.

[160] Thirdly, the procedural points that were taken by Mr R were not all without some merit. The Judge was wrong to think otherwise. Regarding the decision on 6 November 2012, in principle Mr R is correct when he argues that the proper way for Ms M to file a notice of opposition out of time was for her to make a formal application to do so, supported by an affidavit and that an explanation from counsel from the bar was not good enough. That is the approach taken in this Court: see *Day v Ost (No 2)* [1974] 1 NZLR 714 (SC); *Spicers Paper (NZ) Ltd v BPK & GA Buckley Ltd* (1993) 6 PRNZ 16 (HC); and *Hayes v Parlane* [2014] NZHC 1306.

[161] However, part 7 of the DCR creates a specific procedural framework for harassment proceedings. Rule 7.3 provides that:

> **7.3 Construction**
>
> This Part must be construed so as to—

(a) ensure that the object of the Act (as set out in section 6) is attained; and

(b) secure the just, speedy, simple, and inexpensive determination of proceedings under the Act.

[162] The combined effect of s 6 of the Act and r 7.3 works to provide a procedurally simple framework for seeking a restraining order in the civil context. It does not allow for an adversarial and legalistic approach, such as might be found in the rules of this Court. This is confirmed by r 7.4, which gives precedence to the rules in part 7 over other rules of procedure in other parts of the DCR, and by r 7.5, which expressly excludes the application of certain procedural rules under other parts of the District Court and High Court Rules to proceedings under the Act.

[163] The relevant rules provide:

7.4 Procedure and practice

7.4.1 This Part prevails over any inconsistent practice in any proceeding under the Act.

7.4.2 When a Judge hears or determines a proceeding under the Act, the Judge may from time to time give directions that are not inconsistent with the Act or this Part and that the Judge thinks proper for regulating the business of the court over which he or she presides.

7.5 Application of rules in other Parts

7.5.1 The following rules do not apply to proceedings under the Act:

(a) the following provisions of these rules:

(i) rule1.4(b) (courts to apply objective):

(ii) rule 1.7 (mediation or other alternative dispute resolution):

(iii) rule 1.11 (directions in case of doubt):

(iv) rule 1.13 (cases not provided for):

(v) rules 1.33 to 1.35 (headings on documents):

(vi) rules 2.3 to 2.17 (procedure for starting claims under Part 2):

(vii) rules 2.40 and 2.41 (allocation of mode of trial):

(viii) rules 2.47 and 2.48 (conferences):

(ix) rules 3.1 to 3.3 (proper court and transfers):

(b) the following High Court Rules:

(i) HCR 4.34 (court may set aside step in proceeding):

(ii) HCR 4.48 (procedure when minor attains full age):

(iii) HCR 4.56 (striking out and adding parties):

(iv) HCR 5.21 to 5.24 (further particulars, notice of proceeding):

(v) HCR 5.70 and 5.71 (service):

(vi) HCR 7.7 (admissions and agreements):

(vii) HCR 7.53 (application for injunction):

(viii) HCR 8.1 to 8.42 (interrogatories, notice to admit facts, discovery):

(ix) HCR 9.34 and 9.35 (inspection and testing):

(x) HCR 10.1 (venue and changing it):

(xi) HCR 11.6 (form of judgment):

(xii) HCR 11.11 (judgment to be sealed, dated, and served):

(xiii) HCR Part 12 (summary judgment).

7.5.2 Unless excluded by rule 7.5.1, the provisions of a rule in another Part apply to proceedings under the Act so far as they are applicable and with the necessary modifications.

7.5.3 The court must apply rule 7.5.2 and the provisions of a rule to which rule 7.5.2 applies in the manner the court thinks best calculated to—

(a) ensure that the object of the Act (as set out in section 6) is attained; and

(b) promote the ends of justice.

[164] Accordingly, it was open to the District Court Judge who heard the matter on 6 November 2012 to take a less formal approach and to accept the explanation for the late filed notice of opposition from Ms M's counsel. Her solicitors had overlooked the need to file a notice of opposition. It was hardly likely that the District Court would preclude Ms M's opposition to the strike-out application when the error was not her personal fault. On the other hand, the general principles

regarding how a party in default is to seek the court's indulgence are of value. It is hard to see how a court can be critical of someone in Mr R's position for doing no more than to rely upon well established principles.

[165] The application to strike out, which was dealt with on 12 November 2012, came about in part because Mr R considered that the application and affidavit in support did not disclose a case for the making of a restraining order. One of the problems that Mr R faced here was that rr 7.11 and 7.12 set out the procedure for making an application for a restraining order. They provide:

> **7.11 Documents accompanying main applications**
>
> 7.11.1 A main application must be accompanied by—
>
> (a) a notice of proceeding in form 23, which must be signed by the applicant or the applicant's solicitor or counsel; and
>
> (b) an affidavit by or on behalf of the applicant, and containing (where applicable) the matters specified in rule 7.12.
>
> 7.11.2 A copy of a restraining order that is to be used in support of a main application filed in another court, or a copy of a copy of the restraining order, must be filed with the main application unless the Registrar otherwise directs.
>
> **7.12 Supporting affidavits**
>
> 7.12.1 An affidavit accompanying a main application must set out the matters on which the application is based.
>
> 7.12.2 An affidavit accompanying an application for a restraining order must contain sufficient particulars to—
>
> (a) show the grounds on which the applicant claims to be entitled to the order; and
>
> (b) inform the court of the facts relied on in support of the application.
>
> 7.12.3 An affidavit to which rule 7.12.2 relates must, in particular,—
>
> (a) indicate the nature and history of the harassment that the applicant alleges the respondent has engaged in, including—
>
> (i) an outline of the current situation or most recent incident; and
>
> (ii) an outline of the behaviour that forms part of a pattern of behaviour from which protection is needed; and

(iii) details of any contact with Police about the behaviour from which protection is needed; and

(b) show why special conditions are regarded as necessary to protect the applicant from further harassment (if applicable); and

(c) show why a direction that the restraining order apply against an associated respondent is sought (if applicable), including—

(i) details of the way in which the respondent is encouraging or has encouraged the associated respondent's behaviour; and

(ii) an outline, similar to that required by paragraph (a), of the nature and history of the harassment that the applicant alleges the associated respondent has engaged in.

7.12.4 If an application is made under section 13 of the Act by a representative, an affidavit containing the matters specified in rules 7.12.2 and 7.12.3 may be made by any person who has knowledge of the relevant facts.

[166] Rule 7.5.1(b)(iv) expressly excludes applications for further particulars. The procedural regime for applications for restraining orders contemplates that sufficient information of the basis for making the application will be provided in the applicant's affidavits: see r 7.12.

[167] The difficulty is that affidavits are evidence and so they can only provide a factual narrative of why a restraining order is needed. Affidavits cannot be used to outline the legal grounds for a restraining order. In the present case, the numerous specified acts that Ms M relied upon were often legally complicated. Some involved a combination of s 4 and s 3(2)(b). Unless the legal framework for them was spelt out, it was difficult to apprehend the basis for Ms M's arguing those acts as specified acts. Further, some of the allegedly specified acts did not qualify under s 4, which would have added to the difficulty of someone trying to glean from the narrative in the affidavits the basis for them being specified acts under s 4.

[168] It was Ms M's decision to base her application on numerous and often legally complex specified acts that gave rise to the need for further particulars. Whilst

r 7.5.1(b)(iv) excludes particulars, I consider that r 7.4.2 authorises directions for further particulars in particular cases. This was one of them.

[169] So, whilst Judge Sharp was right to state at [4] of her costs judgment that Ms M had used the prescribed form and application, I consider that she was wrong to be critical of Mr R for "repeatedly arguing a lack of specificity of allegations in the substantive harassment application". The fact is that Ms M's affidavit quite properly did not refer to the statutory provisions that related to the various specified acts that she outlined in her evidence. For example, she referred to her belief that Mr R had engaged a private detective. She did not expressly say this amounted to a specified act under s 4(f). Nor could she do so without offending against s 23 of the Evidence Act and the general principle precluding opinion evidence on questions of domestic law. But it meant that her originating papers gave Mr R no idea that this event was relied upon by her as a specified act under s 4(f). Much the same can be said for a number of the specified acts that she relied upon. Therefore, I have some sympathy with Mr R's complaints about a lack of specificity.

[170] The difficulties that Mr R faced were compounded by his belief that at a pre-trial hearing on 12 November 2012, Judge Cunningham had directed Ms M to give more details of the specified acts. It seems that Judge Cunningham made comments in that regard without actually ordering further particulars pursuant to the power available to her in r 7.4.2. When at the hearing of 9 May 2013 Mr R found himself facing a case that included additional specified acts to those that he knew of in November 2012, he complained. He sought an adjournment to give himself time to prepare. This was understandable. No one would want to deal with arguing on the spot against legally complex specified acts.

[171] At [7] of the costs judgment, Judge Sharp accepted the criticism of Mr R's conduct as set out in the costs memorandum of Ms M's counsel. A key criticism was his decision not to cross-examine Ms M, having earlier given a notice to cross-examine. The Court had appointed an amicus curiae to carry out the cross-examination and Judge Sharp had ordered that Ms M give evidence behind a screen. I have already commented on the need for a warning before criticism of a failure to cross-examine is made of a lay litigant.

[172] Mr R complained that there was no evidential basis to support the mode of evidence relying on the use of screens. Some evidence to support evidence being given in an alternative mode is usual. Ms M relied on *Connelly v R* [2012] NZCA 41. However, I do not read that decision to encourage mode of evidence rulings that are unsupported by evidence as to their need.

[173] There was no evidence to support the application for Ms M to give her evidence in an alternative way. Ms M did not depose to being troubled by, or distressed at the thought of giving evidence in the usual way. Nor did anyone else depose to her having any such distress. There was an amicus curiae appointed to conduct the cross-examination. The screen was arranged in a way that Mr R would have seen her but she could not see him. I have difficulty seeing why that was necessary, given the absence of any evidence on this topic. Mr R should not be criticised for objecting to the way in which the mode of evidence ruling was reached.

[174] The case that Mr R faced was difficult and legally complex. His resistance to it was not always soundly based, but it was not as hopeless as Judge Sharp found. That plus the measure of partial success that he has achieved in the appeal as against the main application is enough to lead me to conclude that there is no basis for an award of indemnity costs. Instead, it should be replaced with costs for a category 2 proceeding in the District Court. Ms M obtained the order that she sought. The general principle is that costs follow the event. Accordingly, she is entitled to scale costs.

[175] The outcome of this appeal against the costs order now makes any assessment of the same subject matter in a judicial review proceeding moot.

Result

[176] The appeal is allowed in part.

[177] The restraining order made in the District Court is set aside.

[178] The relief sought in the judicial review proceedings is declined on the ground those proceedings are moot.

[179] I order that the names and addresses of the parties are suppressed.

Duffy J