IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2016-485-781
[2016] NZHC 3162

UNDER	the Judicature Amendment Act 1972 and s 27(2) of the New Zealand Bill of Rights Act 1990
IN THE MATTER OF	an application for judicial review under s 16 of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004
BETWEEN	MALCOLM EDWARD RABSON Applicant
AND	THE JUDICIAL CONDUCT COMMISSIONER Respondent

On papers

Judgment: 20 December 2016

JUDGMENT OF DOBSON J
[On respondent's application to strike out]

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[1] In August 2016, Mr Rabson lodged a complaint with the respondent (the JCC). Mr Rabson's allegation was that the Judges of the Supreme Court had conspired with one another to convene secretly and off the record with the purpose and effect of exempting themselves from laws passed by the New Zealand legislature which bind judges, and in so doing, violate their own oaths of office to maintain the rule of law.

[2] The cause of the complaint was the manner in which the Supreme Court Judges had considered the issues reflected in the Court's decision in *Greer v Smith*.[1] That judgment dealt with an application brought by Mr Vince Siemer to review a

1 *Greer v Smith* [2015] NZSC 196.

decision of one of the Supreme Court Judges, O'Regan J, to refuse an application for access to court documents. O'Regan J had dealt with that application by way of a minute on 20 October 2015. The Supreme Court dealt with Mr Siemer's application for discharge or variation of O'Regan J's decision, without convening a hearing. Its judgment concluded that the Court did not have jurisdiction to review the minute of O'Regan J. The Court found that O'Regan J's approach was in accordance with the practice which the Court had adopted, and the Court saw no occasion to review it.

[3] The JCC considered Mr Rabson's complaint and characterised it as one challenging or calling into question the legality or correctness of a judicial decision. On that basis, the JCC considered it did not have jurisdiction to consider the complaint because it was caught by s 8(2) of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (the Act). That section precludes the JCC assessing questions that go to the legality or correctness of a judicial decision. The JCC advised Mr Rabson of that decision on 26 September 2016. The JCC's response noted that it was the second complaint Mr Rabson had lodged concerning the Supreme Court's judgment in *Greer v Smith*, with that first complaint also having been dismissed because it came within s 8(2) of the Act.

[4] On 30 September 2016, Mr Rabson commenced the present proceedings seeking judicial review of the JCC's decision not to consider the merits of his August 2016 complaint. Mr Rabson alleges that the JCC committed errors of law in not considering the merits of his complaint and in concluding that the issues he had identified related to judicial decision-making rather than matters of conduct by judicial officers.

[5] The JCC filed an application for orders striking out Mr Rabson's judicial review, and for an order that he not be required to file a statement of defence pending determination of the strike out application.

[6] The parties have consented to the strike out application being dealt with on the papers, and I have now considered detailed submissions in support of the strike out application, and in opposition to it.

[7] The strike out application is brought on the grounds, first, that the claim for judicial review discloses no reasonable cause of action, and secondly that it is an abuse of the Court's process.

No reasonable cause of action

[8] The gravamen of Mr Rabson's complaint in the judicial review is that the Commissioner should not have come to the view that he lacked jurisdiction to consider the merits of Mr Rabson's complaint. In more detail, Mr Rabson criticises the JCC for not considering the merits of the complaint, and for not recognising that it contained an allegation of procedural impropriety by the Supreme Court Judges prior to issuing the judgment which is separate from any concerns over the content of that judgment.

[9] An affidavit from the manager of the office of the JCC affirms that Mr Rabson has made 58 other complaints to the JCC. It is therefore understandable that the reasons in the JCC's letter to Mr Rabson explaining why he could not entertain the complaint were in relatively brief terms, assuming knowledge on Mr Rabson's part from prior dealings with the JCC.

[10] The Court's approach to strike out applications brought in respect of judicial review applications was addressed in *Siemer v Judicial Conduct Commissioner*, as follows:[2]

> The jurisdiction is exercised sparingly. Causes of action may be struck out only if so untenable that they cannot succeed. Facts pleaded are treated as true unless self-evidently speculative or false. These principles apply to judicial review as much as to general proceedings.

[11] It is argued for the JCC that there can be nothing to Mr Rabson's complaint beyond criticisms about the legality or correctness of the decision issued in *Greer v Smith*. Essentially, Mr Rabson wants the JCC to consider whether the Supreme Court was wrong in finding that it did not have jurisdiction to undertake a review of the minute previously issued by O'Regan J. That is inarguably a matter as to the correctness of that decision.

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2 *Siemer v Judicial Conduct Commissioner* [2013] NZHC 1853 at [13].

[12] Mr Rabson's apparent concerns about the procedure by which the five Supreme Court Judges decided on the outcome as recorded on their behalves by William Young J are inarguably misconceived. Such matters of procedure are entirely within the Judges' discretion and could not be separated from the lawfulness or correctness of the outcome that was produced by the process they elected to adopt.

[13] For instance, the complaint of Judges "convening secretly and off the record" can only proceed from an expectation that a number of judges comprising the coram of an appellate court are unable to embark on any aspect of consideration of an application before the Court without prior notice (presumably to the parties), and without maintaining a record of each step in the process of conferring and deliberating. I am satisfied that such an expectation is untenable.

[14] The well-settled procedure of the Supreme Court includes its entitlement to consider applications for leave to appeal to that Court on the papers, and such decisions may be made without separate consultation with the parties.[3] The matter here was within a substantially more confined compass than a vast majority of applications for leave to the Supreme Court, which are dealt with on the papers.

[15] I therefore accept the submission for the JCC that Mr Rabson's purportedly separate complaint about process cannot stand on its own, and must be subsumed within his concern at the correctness of the decision not to review the earlier minute issued by O'Regan J.

[16] The other aspect of Mr Rabson's criticism of the conduct of the Judges is that they were motivated to exempt themselves from laws passed by the New Zealand legislature. Although expressed as a matter of motive, this point concerns the scope of options available to the Judges of the Supreme Court to deal with applications for access to Court records that are under their control, when a decision on the matter in question had earlier been made by one of their number. That is quintessentially about the correctness of their judgment that they lacked jurisdiction to deal with that matter.

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[3] Supreme Court Act 2003, s 15.

[17] I find that the application for judicial review does not raise any tenable cause of action (and could not be contemplated to, with any reasonable amendment). Accordingly, the JCC is entitled to have it struck out.

Abuse of process

[18] The JCC also argued that Mr Rabson's claim is frivolous, vexatious or otherwise an abuse of process, to an extent that justifies it being struck out. The features said to qualify it as such included that:

- there is no reasonable basis for the serious allegations made by Mr Rabson;
- the limits on the JCC's jurisdiction have been repeatedly explained to Mr Rabson;
- the pattern of his complaints in judicial review proceedings reveal a pattern of conduct sufficient to be labelled vexatious; and
- Mr Rabson's persistent attempts involve pressing the Commissioner to enquire into the correctness of Supreme Court decisions so that the judicial review applications from the JCC's refusal to do so amount to a collateral attack on judgments of the Supreme Court.

[19] There are numerous parallels between these arguments in the present case, and those advanced in the recent judgment of Cull J striking out Mr Rabson's penultimate application for judicial review of the conduct of the JCC.[4] A finding was made in that case that the pattern of repeated challenges did constitute vexatious conduct, so that substantially similar conduct to that criticised here amounted to an abuse of process.

[20] Mr Rabson's submissions do not respond explicitly on this point. I infer that he would argue that the correctness of his cause justifies repeated challenges,

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4 *Rabson v Judicial Conduct Commissioner* [2016] NZHC 2539.

notwithstanding the number and similarity of the grounds on which it has been rejected.

[21] Having reviewed the course of dealings in the immediate complaint, and in the wider context of the history of a significant number of proceedings brought by Mr Rabson, I am satisfied that the present claim does amount to an abuse of process. Accordingly, the JCC is also entitled to an order striking the proceeding out on that ground.

Costs

[22] The JCC has sought costs on an indemnity basis. The jurisdiction to do so arises where the proceedings have been found to be an abuse of process.[5]

[23] Mr Rabson has co-operated in having the tenability of this latest claim against the JCC tested in the most efficient manner available. That is a factor in what the extent of costs might be on his failing. However, it does not undermine the grounds for treating his conduct in pursuing the proceedings as justifying an award of costs on an indemnity basis.

[24] I consider such an order is warranted. I order indemnity costs against Mr Rabson in favour of the JCC. Counsel are to file a memorandum, which I will vet for the reasonableness of the costs claimed. Mr Rabson will have a period of 10 working days after service on him of that memorandum in which to respond on the quantum that is sought.

Dobson J

Solicitors:
Meredith Connell, Wellington for respondent

Copy to:
The applicant

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5 High Court Rules, r 14.6(4).