IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2014-485-11404
[2015] NZHC 714

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 Panel Act 2004
BETWEEN	MALCOLM EDWARD RABSON Plaintiff
AND	JUDICIAL CONDUCT COMMISSIONER First Defendant
AND	AILSA DUFFY Second Defendant

Hearing: 13 March 2015

Counsel: L Theron for First Defendant
No Appearance for Plaintiff
No Appearance for Second Defendant (abiding outcome)

Judgment: 15 April 2015

JUDGMENT OF BROWN J

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[1] The plaintiff seeks judicial review of the failure by the first defendant to notify the second defendant, in accordance with s 14(1) of the Judicial Conduct Commissioner and Judicial Panel Act 2004 (the Act), of a complaint alleging judicial misconduct by the second defendant. The first defendant applies to strike out the proceeding on the grounds that it is frivolous, vexatious or otherwise an abuse of the Court's process. The second defendant abides the decision of the Court.

[2] There was no appearance for the plaintiff at the hearing. However the plaintiff sent to the Court in advance of the hearing written submissions in opposition to the strike out application which were stated to be "In Lieu of Appearance".

Factual background

[3] The context to the proceeding and the strike out application is an application made by Mr V R Siemer in the High Court at Auckland for leave to commence a proceeding against the first and second defendants. That application was declined by Ellis J in a judgment dated 31 October 2014 in which the substantive parts of the proposed statement of claim are recited.[1]

[4] It is convenient for the purposes of this judgment to juxtapose various allegations in Mr Siemer's proposed claim with the claim now brought by the plaintiff:

By letter dated 13 December 2013 (the complaint), the plaintiff lodged a complaint with the first defendant alleging the second defendant committed judicial misconduct in covering up counsel misfeasance, then issued a "reserved decision" which did not provide reasons.	By letter dated 13 December 2013 ("**the complaint**"), the First defendant received a complaint alleging the Second defendant committed judicial misconduct in covering up counsel misfeasance, then issued a "reserved decision" which did not provide reasons.
Under s 14(1) of the Judicial Conduct Commissioner and Judicial Panel Act 2004 (the Act), the first defendant was legally required to send a written acknowledgement to the plaintiff AND a written notification of the complaint to the second defendant.	Under section 14(1) of the *Judicial Conduct Commissioner and Judicial Panel Act 2004* ("**the Act**"), the First defendant was legally required to send a written acknowledgement to the complainant AND a written notification of the complaint to the Second Defendant.
The first defendant sent an acknowledgement to the plaintiff as required by the Act.	The First Defendant sent an acknowledgement to the complainant as required by the Act.
The first defendant failed his obligation under the Act to notify the second defendant.	The First Defendant failed his obligation under the Act to notify the Second Defendant.

[1] *Re Judicial Conduct Commissioner* [2014] NZHC 2712.

The complaint related to proceedings which were at an end. There were no provisions in law which might exempt the first defendant from his statutory obligation to notify the second defendant concerning the complaint and none were claimed by him.	The complaint related to proceedings which were at an end. There were no provisions in law which might exempt the First defendant from his statutory obligation to notify the Second defendant concerning the Complaint and none were claimed by him.
By letter dated 4 September 2014, almost nine months after the complaint was lodged with the first defendant, the first defendant dismissed the complaint (the dismissal) without ever notifying the second defendant of its existence.	By letter dated 4 September 2014, *almost 9 months after the Complaint was lodged with the First defendant*, the First defendant dismissed the Complaint ("**the Dismissal**") without ever notifying the Second defendant of its existence.
In a minute dated 15 September 2014, the second defendant expressed consternation at not being notified of the complaint in accordance with the first defendant's statutory obligations, and copied the first defendant in on this minute notwithstanding the first defendant not being a party in the proceeding to which this minute related.	In a Minute dated 15 September 2014, the Second defendant expressed consternation at not being notified of the complaint in accordance with the First defendant's statutory obligations, and copied the First defendant in on this Minute notwithstanding the First defendant not being a party in the proceeding in which this Minute related.
Had the second defendant been properly notified of the complaint, she may have provided information which warranted a different outcome than the dismissal.	The Minute of the Second defendant establishes to the necessary evidential standard that the straightforward, simple and mandatory requirement of s 14(1) of the Act was unlawfully breached by the First defendant.
The first defendant failed to follow statutory procedures which bind him under the Act.	The First defendant failed to follow statutory procedures under the Act which bond (sic) him.
Under s 14(1)(b) of the Act, the first defendant had an explicit statutory obligation to notify the second defendant of the complaint and he failed this explicit statutory obligation.	Under section 14(1)(b) of the Act, the First defendant had an explicit statutory obligation to notify the Second defendant of the Complaint and he failed this explicit statutory obligation.
The second defendant will confirm in evidence, if required to do so, her minute of 15 September 2014 which asserts the first defendant failed to notify her of the complaint over almost nine months – and not until the dismissal was sent her.	The Second defendant will confirm, if required to do so, her Minute of 15 September 2014 which asserts the First defendant failed to notify her of the complaint as required by s 14(1)(b) of the Act over almost nine months – and not until the Dismissal was issued.

A declaration the first defendant breached his statutory obligation under s 14(1)(b) of the Act. An order by the Court quashing the dismissal on grounds it was the result of a procedurally improper approach. Such other relief as the Court deems fit.	A declaration from the High Court the First defendant breached his statutory obligation under s 14(1)(b) of the Act. The declaration accompanied by a referral to the New Zealand Attorney General with the recommendation the First defendant receive remedial training concerning his statutory obligations of office. Such other relief as the Court deems fit.

Mr Siemer's complaint

[5] As the first paragraph of Mr Siemer's proposed claim reveals, the complaint in respect of which the first defendant failed to give notification had been made by Mr Siemer. The nature of that complaint was explained in a Minute of Duffy J dated 15 September 2014 in CIV-2013-404-3869 which stated in material part:

> [1] On 9 December 2013, there were two applications before me in this proceeding. One was an application by Mr Siemer to have the defendant's solicitors, Lee Salmon Long, removed and restrained from continuing to act for the defendant. The application was opposed. The second was an application by the defendant to strike out Mr Siemer's statement of claim. Mr Siemer opposed that application.
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> [2] Although Mr Siemer was bringing one application and opposing another, he did not appear at the hearing. The decisions I made on the applications are recorded in two judgments, each of which was delivered on 11 December 2013: (see *Siemer v Official Assignee* [2013] NZHC 3315 and *Siemer v Official Assignee* [2013] NZHC 3316). The judgment in which I struck out Mr Siemer's statement of claim in the proceeding was a result judgment. At [2] of that judgment, I stated that I proposed to issue a result judgment with full reasons to follow.
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> [3] Two days later, on 13 December 2013, Mr Siemer made a formal complaint to the Judicial Conduct Commissioner regarding me issuing a decision without providing reasons. I was unaware of Mr Siemer's complaint until 4 September 2014 when the Judicial Conduct Commissioner wrote to me advising that he had reached a decision "on the basis of the materials available to me" without first requiring a specific response from me. Accordingly, he had decided not to refer the complaint to me. The first time that I read Mr Siemer's complaint was when I received a copy enclosed with the Commissioner's letter of 4 September 2014.
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> [4] Mr Siemer's complaint reveals that he wanted reasons for my decision to strike out his statement of claim. My decision of 11 December 2013 had stated that reasons would be provided. On 28 February 2014, I provided a reasons judgment (see *Siemer v Official*

> *Assignee* [2014] NZHC 322) for the striking out of Mr Siemer's statement of claim…

The judgment of Ellis J

[6] Because Mr Siemer had been declared to be a vexatious litigant under s 88B of the Judicature Act 1908[2] it was necessary for him to obtain leave to file his proposed proceeding. In order to grant leave Ellis J was required to be satisfied that:

> (a) there were prima facie grounds for the claim; and
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> (b) the proceeding was not an abuse of process of the Court.

[7] In the course of discussing that second issue, the Judge said:

> [28] In my view, in determining whether the proposed claim is an abuse of process the Court is entitled to interrogate the pleading on the basis of the background contained in Duffy J's minute. Indeed, it would be counter-intuitive for it not to do so.
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> [29] Duffy J's minute makes clear that Mr Siemer's 13 December 2013 complaint about her related to her alleged failure to give reasons in relation to a "results judgment" that she had issued two days earlier, on 11 December 2013. In that judgment she said:
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> > [1] This is an application by the Official Assignee to strike out Mr Siemer's claim. Although Mr Siemer opposes the application, he is not present to advance argument in opposition to the application. I have decided that the claim should be struck out.
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> > [2] Because Mr Siemer is not here, and because he is representing himself, *I intend to give full reasons as to why I am striking out this claim. I propose now to issue a result judgment recording that the claim is struck out for want of proper form, both in relation to the named defendant and the elements of the tort alleged. Full reasons will follow.*
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> > (emphasis added)
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> [30] It is also a matter of public record that in February 2014, Duffy J then issued a separate decision in which she did exactly what she had promised to do, namely setting out her reasons for the "results" earlier advised. The giving of separate results and reasons judgments in this way is a matter of longstanding practice that is (for example) expressly recognised in r 11.4(1) of the High Court Rules.

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2 *Attorney-General v Siemer* [2014] NZHC 859.

[31] Had Duffy J been notified by Mr Siemer's complaint in December 2013, any response or comment by her (in itself probably unlikely in the circumstances) would inevitably have merely involved drawing to the Commissioner's attention the fact that her reasons would, as advised to Mr Siemer by way of the results judgment, be issued in due course. Once those reasons had been given there could be no possible basis for upholding Mr Siemer's complaint.

[32] When the above, entirely ordinary, circumstances are understood it seems inconceivable that the Commissioner might have reached a different result had Duffy J been advised of the complaint at the time that it was made. I have little doubt that Mr Siemer is well aware of that. His pleading that "Had the second defendant been properly notified of the complaint, she may have provided information which warranted a different outcome than the dismissal" is therefore disingenuous, at best.

[33] I necessarily accept that there is a wider public interest in the High Court exercising its supervisory function to ensure that those holding office comply with the law that governs the exercise of their functions. But even taking the approach most favourable to Mr Siemer, the breach alleged here is truly *de minimis* in the particular circumstances of this case. Moreover the fact that the Commissioner did not comply with s 14(1)(b) has already been brought to his attention by Duffy J (when she copied her minute to him).

[34] As well, the point of s 14(1)(b) is plainly to afford natural justice rights to the judicial officer who is the subject of a complaint made under the Act. Clearly, for example, if a complaint was upheld without such prior notification, then failure to comply with the section could be a serious matter. It is difficult to see how a breach of that requirement could ever have a prejudicial effect on the complainant.

[35] Even if I am wrong in that, there is certainly nothing that Mr Siemer personally could hope to gain by pursuing the present proceeding. There is no other reasonable conclusion that the Commissioner could have reached. The proposed application for review can serve no substantive purpose; there is nothing that could be achieved by them other than a waste of the Court's time and resources. It is therefore impossible not to conclude that Mr Siemer's only object in bringing the proceeding is to harry the Judicial Conduct Commissioner simply for the sake of doing so.

The parties' arguments

[8] In summary the first defendant contends that the proceeding is not a proper use of the Court's process in circumstances where:

(a) the Commissioner's decision was inevitable and the application for review can serve no substantive purpose;

(b) the plaintiff has no discernible interest in the breach;

(c) the breach of s 14(1)(b) of the Act is de minimis;

(d) the proceeding would inevitably involve re-litigation of Ellis J's findings.

[9] The plaintiff's written submissions first took issue with the proposition in ground (b) that he had no discernible interest in the statutory breach. He stated that the first defendant was personally aware that he has not only a vested interest but also a known financial interest and that the belated false claim was both disingenuous and "stealthy". He did not elaborate upon that asserted interest but proceeded to refer to the dismissal by the first defendant of a complaint made by the plaintiff about a judgment of the Court of Appeal.

[10] The plaintiff then submitted that ground (a) could be a rallying cry of every tyrannical regime throughout history and in respect of ground (c) that it was not the role of the Court to rewrite legislation in a judicial review which seeks to enforce an unequivocal Act of Parliament. The general tone of the submission was reflected in the final paragraph:

> 9. From the First Defendant's application and submissions for strike out, it is clear to the Plaintiff, if not this Court, that the First Defendant's strike out application cannot succeed as a matter of law unless the Court proves disinterested in the prevailing law. The only way the First Defendant's Strike Out application can succeed is if this Court decides the plain words of Parliament do not matter. The Plaintiff therefore relies on his Notice of Opposition and these submissions (the Papers) in lieu of appearance so as to avoid the spectacle of a kangaroo court.

Analysis

[11] Recognising that the circumstances in which abuse of process can arise are very varied, Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* referred to the power to strike out as:[3]

> … the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.

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[3] *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, [1981] 3 All ER 727 (HL) at 729.

[12] In *Lai v Chamberlains* the Supreme Court noted that, although cause of action and issue estoppel apply only in proceedings between the same parties, the Courts have been prepared to find abuse of process in cases entailing collated challenge by a party to an earlier determination in fresh proceedings with a different party.[4]

[13] The Court went on to say:

> [62] The development of the inherent power to prevent further litigation where it would amount to abuse in civil proceedings was reviewed by Lord Bingham in *Johnson v Gore Wood & Co (a Firm) (No 1)*. There, the power was invoked to overcome the technical objection to res judicata that previous litigation was resolved by settlement, not Court determination. Lord Bingham considered that what constitutes abuse is a "broad, merits-based judgment", incapable of capture in hard and fast rules of determination and not limited to further litigation between the same parties or their privies. Lord Millett in the same case thought it "primarily an ancillary and salutary principle" which prevents res judicata and issue estoppel being "deliberately or inadvertently circumvented".
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> [63] In New Zealand abuse of process has been recognised as an independent duty of the Court to prevent abuse, not limited to fixed categories. In *New Zealand Social Credit Political League Inc v O'Brien* a claim was struck out as abuse of process even though the defendant was not a party to the previous litigation brought by the plaintiff. His conduct had been in issue in the earlier proceedings and the claim for "malicious civil proceedings" was "no more than the first defamation suit in a different garb":
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> > Estoppel per rem judicatam, issue estoppel, and abuse of process in at least one of its manifestations, may be seen as exemplifying similar concepts – that a matter once determined may not be again litigated, that a matter which could and should have been raised in proceedings which have been determined should not be allowed to be raised subsequently, and that a collateral attack upon a final decision in other proceedings will not be permitted. The dual objects are finality of litigation and fair use of curial procedures.

[14] Although the standard of proof on an applicant is high, where a Court can be certain that a cause of action cannot succeed or is being used as a method to get around the effect of other Court determinations which have effectively settled the same issue, the jurisdiction may be invoked.[5]

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4 *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [59].

5 *Simpson v Whakatane District Court* [2006] NZAR 247 (HC) at [21].

[15] In my view the present proceeding is a clear example of the latter category of cases. In this proceeding the plaintiff seeks to advance the same contentions that were ruled upon by Ellis J[6] in relation to a proposed proceeding in terms almost identical to the plaintiff's statement of claim.[7]

[16] The only difference of any consequence is the second prayer for relief where, instead of an order quashing the dismissal of Mr Siemer's complaint, the plaintiff seeks a referral to the Attorney-General with a recommendation that the first defendant receive remedial training concerning his statutory obligations of office. I agree with the first defendant's submission that such an order is not a recognised or available remedy in judicial review proceedings and is of itself frivolous and vexatious in nature.

[17] The fact of that different relief sought serves to underscore in my view the fact that, unlike Mr Siemer, the plaintiff has no connection with the original complaint and no legitimate interest in obtaining an order of the nature which Mr Siemer sought. The plaintiff cannot be said to be affected by the breach of s 14(1)(b) and I consider that he has no discernible interest in seeking to bring a review proceeding in respect of such breach.

[18] Against the background of Mr Siemer's proposed proceeding and Ellis J's judgment in relation to it, I consider that to allow this proceeding to continue would be manifestly unfair to the first and second defendants and, as stated in *Hunter*,[8] would bring the administration of justice into disrepute among right-thinking people. Consequently I make an order striking out the proceeding as an abuse of process.

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6 At [7] above.
7 At [4] above.
8 At [11] above.

Costs

[19] The first respondent sought an order for costs on an indemnity basis. The plaintiff's written submissions did not address the issue of costs notwithstanding that the intention to seek indemnity costs was signalled in the first defendant's interlocutory application dated 26 November 2014 in response to which a notice of opposition was filed on 27 November 2014.

[20] At the hearing I requested counsel for the first respondent to provide a memorandum reviewing relevant authorities on indemnity costs. That memorandum was filed on 17 March 2015 together with a case book. Having considered the authorities referred to, for the reasons stated at [15] to [18] above I consider that the present case is one which warrants an order for indemnity costs.

Disposition

[21] The proceeding is struck out. The first respondent is entitled to indemnity costs from the plaintiff.

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Brown J

Solicitors:
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