IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2018-485-919
[2019] NZHC 2279

UNDER	the Judicial Review Procedure Act 2016, s 27(2) of the New Zealand Bill of Rights Act 1990 and the Declaratory Judgments Act 1908
IN THE MATTER	of a judicial review and declaratory relief
BETWEEN	MALCOLM RABSON Applicant
AND	JUDICIAL CONDUCT COMMISSIONER Respondent

Hearing: On the papers

Appearances: M E Rabson in person
N Whittington, M Hori Te Pa for Respondent

Judgment: 11 September 2019

JUDGMENT OF COOKE J

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[1] By application dated 28 January 2019 the respondent, the Judicial Conduct Commissioner (the Commissioner), applies to strike out the claim for judicial review dated 29 November 2018 brought by the applicant, Mr Rabson.

[2] When the proceedings were first called on 4 February 2019, the parties agreed that this application could be dealt with on the papers. Directions were given for the filing of submissions. A hearing date on 6 September 2019 was nevertheless offered to Mr Rabson. He indicated he did not want there to be a hearing unless there was prior agreement by the Court that a transcript of the hearing would be prepared, and if not, he was content for the matter to be determined on the papers. I indicated in my

minute of 4 September 2019 that I would not direct that a transcript be prepared, and that I would proceed to deal with the application on the papers accordingly.

Background

[3] These proceedings are a further iteration of Mr Rabson's complaints about the judiciary and the Commissioner. It would be very difficult to record all of the proceedings and applications Mr Rabson has commenced in that connection, even in summary form. The submissions for the Commissioner advise that since 2011 Mr Rabson has made at least 46 applications to the Supreme Court, 28 applications to the Court of Appeal, and 17 applications to the High Court.[1] I will nevertheless try to summarise the more immediate background.

[4] On 1 December 2016 Mr Rabson lodged a complaint with the Commissioner. He alleged that Ellen France J had a conflict of interest when dismissing a review of a decision of the Supreme Court Registrar declining to waive the payment of filing fees.[2] Mr Rabson said Ellen France J had acted in her own cause given that her own decision was ultimately in issue in the proceedings. He also alleged that the other Supreme Court Justices were "complicit" in the violation of a fundamental doctrine that no Judge can act in their own cause.[3]

[5] By decision dated 1 March 2017 the Commissioner dismissed the complaint pursuant to s 16(1)(a) of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (the JCC Act). The Commissioner found the complaint was about the correctness of a judicial decision. Section 8(2) of the JCC Act provides that it is not the function of the Commissioner to challenge or call into question the correctness of any decision made by a Judge in any legal proceedings. On that basis he concluded he had no jurisdiction.

[6] On 7 March 2017 Mr Rabson commenced judicial review proceedings against the Commissioner in relation to that decision. In it he named five Supreme Court Judges as second respondents — William Young, Arnold, Glazebrook, France and

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1 Mr Rabson did not take issue with that in his submissions.
2 *Rabson v Shephard* [2016] NZSC 152.
3 See *Rabson v Judicial Conduct Commissioner* [2017] NZHC 1249 at [11].

O'Regan JJ. On the application of the Crown Law Office acting as counsel for the five Judges, Ellis J removed them as respondents in the proceeding. Faire J subsequently ordered Mr Rabson to pay costs in relation to this step in the amount of $777.50.[4]

[7] On 22 June 2017 Mr Rabson sought to appeal the costs decision to the Court of Appeal. He applied for dispensation for security for costs in relation to that appeal, but the Registrar declined. On 16 August 2017 Mr Rabson applied for a review of that decision by a Judge, but French J upheld the Registrar's decision.[5]

[8] On 29 August 2017 Mr Rabson then applied to the Supreme Court for leave to appeal French J's decision. On 28 September 2017 the Supreme Court dismissed the application for leave as an abuse of process.[6] The three Supreme Court Justices who reached that decision were Elias CJ, William Young and O'Regan JJ. The Court held that Mr Rabson had previously named the Judges in judicial review challenges to the Commissioner, and that Mr Rabson knew that this was improper.[7] They held:

> [4] We are satisfied that the applicant's conduct constitutes an abuse of process, exemplified by circularity, repetitiveness, and general vexatiousness. It is accordingly dismissed. A copy of this judgment is to be provided to the Solicitor-General.

[9] In a continuation of the circularity identified by the Court, however, Mr Rabson made yet another complaint to the Commissioner on 6 October 2017. He complained that William Young and O'Regan JJ were two of the five Judges who he had initially named as respondents, and that they were accordingly the beneficiaries of the costs award of $777.50 and should not have considered his application.

[10] The Commissioner dismissed the application under ss 16(1)(a) and (d) of the JCC Act by decision dated 29 June 2018.

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4 *Rabson v Judicial Conduct Commissioner* HC Wellington CIV-2017-485-133, 8 June 2017. Faire J subsequently struck out the underlying judicial review proceeding as an abuse of process. *Rabson v Judicial Conduct Commissioner* [2017] NZHC 1249.

5 *Rabson v Judicial Conduct Commissioner* [2017] NZCA 349.

6 *Rabson v Young* [2017] NZSC 146.

7 *Rabson v Judicial Conduct Commissioner*, above n 3.

[11] Mr Rabson still persisted, however. On 8 August 2018 he sought to file judicial review proceedings again, challenging this further decision of the Commissioner. Those proceedings were not accepted for filing, rather they were referred to me as the Duty Judge under r 5.35A of the High Court Rules 2016. Having considered the proposed challenge I then exercised the power under r 5.35B to dismiss the proceeding as an abuse of process. I held:[8]

> [7] When striking out the earlier judicial review challenge to the Judicial Conduct Commissioner Faire J held:[9]
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> > [31] The respondent relies on further or additional grounds to strike out the statement of claim. It is submitted that it is an abuse of process.
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> > [32] In support counsel has noted that the applicant has made 64 complaints to the Commissioner as at 30 March 2017. He has brought four judicial reviews of the Commissioner, all of which were struck out. He has had indemnity costs awarded against him in each case.
> >
> > [33] The statement of claim involves a further complaint by the applicant about a decision of a Court. It relied solely on that decision as the basis for serious allegations in circumstances where he was aware that the Commissioner did not have jurisdiction to call into question the correctness or legality of the decision. In addition, as I have recorded he expressly stated that he would judicially review the Commissioner if his complaint was dismissed on this basis.
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> [8] In my view the proceedings are plainly abusive for essentially the same reasons. They are attempting to again relitigate a matter that has already been addressed by the Courts, including in a judicial review challenge to a decision of the Commissioner which was struck out as an abuse. In my view the Commissioner was plainly right to dismiss the complaint, and the judicial review challenge to his decision is also plainly an abuse of process.

[12] Mr Rabson's response on this occasion has been simply to file yet another set of judicial review proceedings, namely these proceedings. The complaint made in the present proceedings is effectively the same that made in the proceedings I earlier struck out as an abuse. Unfortunately, the Registrar has accepted the proceedings for filing without considering the powers under r 5.35A, leading to the proceedings being filed and served, with the Commissioner being required to make a formal application to strike out the proceedings, being the application now before me.

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8 *Rabson v Judicial Conduct Commissioner* [2018] NZHC 2053.

9 *Rabson v Judicial Conduct Commissioner* [2017] NZHC 1249 at [31]–[33].

Analysis

[13] There is no dispute that judicial review proceedings can be struck out as an abuse of process. The applicability of r 15.1 of the High Court Rules 2016 to a judicial review proceeding is subject to judicial control, and in some circumstances there may be good reason not to address a strike out application rather than proceeding to a substantive hearing.[10] There are nevertheless circumstances where the exercise of such powers are appropriate. This is one such case.

[14] It is unnecessary to recount the submissions advanced by the Commissioner, and all the grounds he advances for striking out the proceeding. In my view the central consideration is that Mr Rabson is seeking to relitigate in this proceeding what has already been finally determined against him in other proceedings on more than one occasion. The relevant principle preventing Mr Rabson doing this has been described in the following terms by the Supreme Court:[11]

> [28] The principle of finality in litigation gives rise to a rule of law that makes conclusive final determinations reached in the judicial process:
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> > Unless a judgment of a Court is set aside on further appeal or otherwise set aside or amended according to law, it is conclusive as to the legal consequences it decides.
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> The rule reflects both the public interest in there being an end to litigation and the private interest of parties to court processes in not being subjected by their opponents to vexatious relitigation…

[15] That principle applies here. On 13 August 2018 I struck out Mr Rabson's judicial review proceedings under r 5.35B on the basis it was an abuse of process.[12] That finally resolved the issues raised in that proceeding. As required by r 5.35B I recorded that Mr Rabson had a right to appeal against that decision.

[16] That decision applied the earlier decision of Faire J striking out the earlier judicial review proceedings on similar grounds. The issue has been considered and

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10 See *Ngati Tama Ki Te Waipoumanu Trust v Tasman District Council* [2018] NZHC 2166 at [16]–[19]; and *Wilson v Department of Corrections* [2018] NZHC 2977 at [4]–[5].

11 *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 at [28] (footnotes omitted).

12 *Rabson v Judicial Conduct Commissioner*, above n 8.

determined against Mr Rabson. For those reasons the current proceeding is an abuse of process and should be struck out.

[17] In his submissions opposing the strike out application, Mr Rabson contends that both the Commissioner, and my earlier decision, are misconceived. As a matter of substance he says that his complaint to the Commissioner does not seek to challenge the correctness of a decision made by Elias CJ, William Young and O'Regan JJ within the meaning of s 8(2) of the JCC Act. Their decision was to dismiss an application for leave to appeal to that Court against the decision of French J upholding the decision of the Registrar not to dispense with security for costs.[13] Mr Rabson says his complaint was that William Young and O'Regan JJ should never have sat to consider his application because they had been the parties to the underlying proceeding in question, and they had benefited from the costs award ultimately in issue. So the complaint is about them sitting, not the decision they reached when they sat. Mr Rabson also says that the Commissioner's approach is inconsistent with the previous decision of the Commissioner dated 7 May 2010 concerning the complaints made about Justice Wilson, which raised an issue about judicial conduct in relation to a decision to sit. Mr Rabson says he is not inviting the Commissioner to revisit any judgment of the Court, as there is no judgment of the Court ruling that Judges can act in cases in which they are self-interested.

[18] I see some merit in Mr Rabson's argument. For myself, I do not read s 8(2) of the JCC Act as excluding the jurisdiction of the Commissioner simply because the alleged judicial misconduct may have manifested itself in the result of the underlying litigation. It seems to me that s 8(2) does no more than reiterate that it is not the function of the Commissioner to in any way seek to alter the litigation result itself, or call it into question. The consequences of any judicial misconduct for the result of litigation is a matter entirely for the Courts. That was the case with the complaint concerning Justice Wilson, where the Court set aside the decision of the Court of Appeal on which he sat, and ordered a rehearing.[14] I recognise, however, that there is potentially room for other views on the reach of s 8(2), and the issues may become

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13 *Rabson v Judicial Conduct Commissioner*, above n 3.

14 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76.

more complex.[15] But to the extent that Mr Rabson argues that a strict jurisdiction exclusion does not exist because of s 8(2), I accept that the argument has substance.

[19] But that argument cannot prevent this strike out application succeeding. The first, and decisive reason for that is that Mr Rabson is seeking to relitigate a proceeding which has already been finally determined. The final outcome of a proceeding is binding on the parties, subject only to appeal and the other recognised exceptions. That is so whether or not the parties wish to later say that the Court was erroneous. If it were not for that principle, parties could continuously relitigate the same matter, which is essentially what Mr Rabson is seeking to do here.

[20] Secondly, and in any event, the decision of the Commissioner here was not solely, or even principally, based on a jurisdictional exclusion arising from s 8(2). His reasons were expressed in the following way:

> 10. For the following reasons, I consider the complaints are misconceived, vexatious and fall outside my jurisdiction.
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> (a) Judges who consider they have been unnecessarily named as respondents have the same right as other litigants to apply for removal and seek costs;
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> (b) The High Court's decision to award costs in this case was subject to appeal to the Court of Appeal;
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> (c) It was open to Mr Rabson to use that appeal so long as he provided security for costs;
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> (d) The outcome of proceedings in the High Court and Court of Appeal should have come as no surprise to Mr Rabson in light of earlier, similar proceedings where he had cited Judges as respondents;
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> (e) If he did not accept Justice French's decision and sought leave to appeal to the Supreme Court, it was inevitable that the application would fall to be determined by a panel of Judges including one or more those originally named as parties to the judicial review proceedings;
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> (f) The Supreme Court found that Mr Rabson's conduct constituted an abuse of process. A litigant cannot expect, by such conduct, to obtain the disqualification of the Judges who are bound to determine the proceedings before them;

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15 See *Siemer v Judicial Conduct Commissioner* [2012] NZHC 1481 at [41]–[46].

(g) In any event, the merits of the costs order were not in issue in the Supreme Court and nothing in the Court's judgment prevented Mr Rabson using his appeal to the Court of Appeal;

(h) In effect, the complaints dispute the procedural correctness of the Court's decision, which, as both complainants know, I have no jurisdiction to question;[16]

(i) To complain to me about the Supreme Court Judges in these circumstances amounts, in my view, to further, unjustified relitigation of the decisions of the courts and is an abuse of the judicial conduct complaint process.

[21] Those reasons extend well beyond jurisdictional exclusion by s 8(2). As the Commissioner held, there was not a proper basis to join the individual Judges to the judicial review proceedings in the first place. Contrary to what Mr Rabson says in his statement of claim, that was not mandated by s 9(4) of the Judicature Amendment Act 1972,[17] not only because the inclusion of such parties is subject to judicial direction, but also because s 9(4) only applies when there have been "proceedings" which naturally refers to formal proceedings in a Court or Tribunal, rather than complaints to the Commissioner. The joinder of parties to a judicial review proceeding involving decisions of the Commissioner is a matter for judicial determination.[18]

[22] In any event, the joinder of the Judges as parties to the proceeding did no more than reflect that their conduct was challenged as part of the underlying subject matter. So the suggested conflict of interest arose whether or not they were named as parties. But to the extent that this issue is properly described as a conflict of interest, it was an inevitable ramification of Mr Rabson making complaints about the Supreme Court Justices, and then seeking to have his judicial review proceeding about those complaints addressed by the Supreme Court. As the Commissioner held, it was inevitable that Mr Rabson's application would fall to be determined by a panel of Judges including one or more of the Judges he originally named. And given that Mr Rabson had originally complained that all of the Judges of the Supreme Court were complicit in the alleged improper conduct, none of the Judges were free from the alleged conflict. It was not something that could be avoided. Under s 66 of the Senior

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16 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 8(2).

17 Now s 19(1)(a) of the Judicial Review Procedure Act 2016.

18 See *Wilson v Attorney-General (Judicial Conduct) (No 2)* [2010] NZAR 509, (2010) 19 PRNZ 943 (HC).

Courts Act 2016 the Supreme Court consists of the Chief Justice and the other Judges that have been appointed by the Governor-General. In some circumstances temporary appointments can be made, but under s 110 only one Court of Appeal Judge may be appointed an acting Judge of the Supreme Court, and otherwise under s 111 only retired Supreme Court Judges under the age of 75 years may be appointed an acting Judge.

[23] Whether it is necessary to utilise the power to appoint temporary judges for particular cases will be heavily dependent on the circumstances. No such circumstances arose here. This was an interlocutory application for leave to appeal. As the Commissioner said, the merits of the costs award in the amount of $777.50 was not itself in issue. All that was in issue was whether the Supreme Court should grant leave to appeal to that Court on the question whether French J was right not to overturn the decision of the Registrar of the Court of Appeal confirming Mr Rabson needed to pay security for costs for appealing to that Court. Even if it had not been dismissed as an abuse, the application would not have met the statutory criteria for leave to appeal on any view of it.

[24] Mr Rabson was seeking leave to appeal to the very Judges he said were disqualified. As the Commissioner said, Mr Rabson could not properly seek disqualification of the Judges who were bound to determine the proceedings before them. It was Mr Rabson who filed the application requiring the Judges of that Court to make a decision. To complain to the Commissioner about the Supreme Court Judges in these circumstances amounted to a further unjustified relitigation of the decisions of the Courts, and was an abuse of the judicial conduct process. That was what the Commissioner concluded, and I agree.

[25] For these reasons the proceedings are struck out as an abuse of process.

Further memoranda filed

[26] Subsequent to my preparing a draft of this judgment I received two further documents from Mr Rabson raising particular issues which it would be appropriate for me to address.

Recusal

[27] First, by application dated 6 September 2019 Mr Rabson has sought orders that I recuse myself from dealing with the strike-out application. One of the grounds stated is:

> 2. Cooke J has a personal conflict of interest, in that His Honour is being called upon to reach a reasoned decision which conflicts with an impetuous, unsupported and biased belief that judicial review of the Judicial Conduct Commissioner's irregular refusal to exercise his jurisdiction on complaints of judicial conflicts of interest cannot succeed.

[28] In support of that ground Mr Rabson says:

> 8. Judges understandably, like everyone else, do not like to be wrong. And it is difficult to conceive of a judge coming in to a proceeding being more wrong than on the very issue now before him than Cooke J.

[29] I put to one side the inappropriate language used by Mr Rabson to raise his point. The argument he is advancing is that Judges who have earlier heard and determined an application against a party should recuse themselves from considering a second application raising the same issue.

[30] I do not accept that argument. When a litigant has not been successful before this Court, but seeks to raise the same point again in a newly filed proceeding, that does not disqualify the Judge who heard the first application. Were it otherwise, an unsuccessful applicant could continually raise the same matter in consecutive proceedings hoping to eventually find a Judge who did not dismiss them. In most circumstances it is more appropriate for the same Judge to hear the further application given that Judge's familiarity with the subject matter. The two applications here were inherently interrelated. If the litigant wishes to argue that the Judge was wrong, the appropriate remedy is to pursue an appeal. Re-filing the same application, and saying a different Judge should hear it, is not appropriate.

Joining the Supreme Court

[31] By further memorandum dated 10 September 2019 Mr Rabson contends that both my minute of 4 September 2019, and Clark J's earlier minute of 4 February 2019

were in error as the Supreme Court should have been added as a party to these proceedings as a consequence of s 9(1)(b) and (3) of the Judicial Review Procedure Act 2016.

[32] For reasons that I have already addressed in relation to the legislative predecessor, s 9 of the Judicature Amendment Act 1972 at [21] above I do not agree with this suggestion. In *Wilson v Attorney-General (Judicial Conduct) (No 2)*[19] the High Court confirmed the involvement of parties in judicial review challenges to decisions of the Judicial Conduct Commissioner is a matter of assessment and decision — it does not apply automatically under this section. That is because the processes followed by the Commissioner are not "proceedings" in the manner contemplated by s 9(1)(b). What is contemplated is proceedings before a Court or Tribunal where there are formal parties, rather than an inquisitorial process by statutory bodies.

[33] I note that Mr Rabson has adapted his previous stance by now contending that it is the Supreme Court as an institution that should be added as a party to his proceeding, rather than the individual Judges. This demonstrates the artificiality of his arguments that the individual Judges are disqualified for being Judges in their own cause, and the difficulty involved in Mr Rabson contending that the Judges are disqualified when he makes an application to that very Court.

Costs

[34] The Commissioner seeks indemnity costs. He has sought, and been awarded, such indemnity costs on previous occasions. Mr Rabson has not addressed that claim in the submissions that he filed.

[35] I have considered whether the fact that I have recognised that Mr Rabson's argument summarised at [18] above is arguable should mean that I should not award indemnity costs. I have concluded that it does not. That is because the ultimate characterisation of Mr Rabson's repeated complaints as an abuse of process still applies irrespective of that argument. Indeed in the present case the current proceeding is even more clearly an abuse as it involved a further judicial review challenge

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19 *Wilson v Attorney-General (Judicial Conduct) (No 2)*, above n 18

advanced notwithstanding that a previous challenge had already been struck out as an abuse.

[36] Accordingly I award the respondent costs on an indemnity basis, to be fixed by the Registrar if necessary.

Cooke J

Solicitors:
Meredith Connell, Wellington for Respondent