

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV 2014-485-10920
[2015] NZHC 334**

IN THE MATTER OF an application for judicial review under
the Judicature Amendment Act 1972 and s
27(2) of the New Zealand Bill of Rights
Act 1990

BETWEEN MALCOLM EDWARD RABSON and
RICHARD JOHN CRESER
Plaintiffs

AND TRANSPARENCY INTERNATIONAL
(NEW ZEALAND) INC
Defendant

Hearing: 17 November 2014 (further memorandum on 8 December
2014)

Appearances: M Rabson appearing in person
D Kalderimis and K Yesberg for the Defendant

Judgment: 3 March 2015

JUDGMENT OF MALLON J

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Introduction

[1] Transparency International (New Zealand) Inc (TINZ) applies to strike out Mr Rabson and Mr Creser's statement of claim seeking judicial review. Their claim relates to how an enquiry initially made by Mr Siemer was dealt with by TINZ. TINZ says that the application for judicial review discloses no reasonably arguable cause of action, is frivolous and vexatious and is otherwise an abuse of the Court's process, and it is in the interests of justice to make the strike out order. The strike out application is opposed by Mr Rabson and Mr Creser.

The pleadings

[2] The statement of claim, in summary, pleads that:

- (a) TINZ is an incorporated society, which receives the majority of its funding from the New Zealand Government (the Government), which has been granted charitable status for the purpose of advancing education, and which has educational objectives as stated in its rules;
- (b) Mr Rabson and Mr Creser each paid the \$80 membership fee;
- (c) on 15 November 2013 Mr Siemer made an enquiry of Transparency International (TI), on behalf of Mr Rabson and Mr Creser, concerning the government's control of TINZ and conflicts of interest of its executive director (Ms Snively);
- (d) Mr Rabson and Mr Creser were concerned about Government funding of TINZ, that TINZ partnered with the Government for a survey that found no corruption by the Government and that Ms Snively was trading on a fictitious name to promote her consultancy services;
- (e) on 4 December 2013 TI advised Mr Siemer that national chapters were responsible for their own funding and on 27 February 2014 TI advised that the TINZ Ethics Committee (the Ethics Committee) would be the best place to address the matter;

- (f) on 28 February 2014 Mr Siemer was advised by TINZ (Mr Sheard) that the Ethics Committee was considering the matter and would report back;
- (g) on 1 April 2014, by an email copied to TI Secretariat staff and Mr Siemer, Mr Sheard presented an unauthored, unreasoned, undated and unpublished dismissal of the matter;
- (h) two of the three members of the Ethics Committee had decided to dismiss “out of hand” and “ignore completely” the matter;
- (i) by an email dated 22 April 2014, Mr Rabson and Mr Creser sought review/appeal of the dismissal on the grounds that the process breached fundamental principles of due process and natural justice;
- (j) by an email dated 24 April 2014, TI advised that its Terms of Reference do not allow any review to the Transparency International Board Ethics Committee unless TINZ allowed such an appeal in its Code of Ethics or Conduct;
- (k) the TINZ Code of Ethics or Conduct does not allow such a review.

[3] The statement of claim pleads two causes of action:

- (a) The Ethics Committee breached natural justice because its process lacked transparency or due process (in that two of three members sought to dismiss the complaint out of hand, no one conducted any official inquiry, and the Ethics Committee concealed its process even from its members).
- (b) The Ethics Committee’s approach involved predetermination and was procedurally improper because it did not involve talking to either side officially, did involve talking to the Executive privately and off the record, sought to have Mr Rabson and Mr Creser withdraw the complaint, reported only to the Board which the Executive controlled,

and the chair of the Ethics Committee stated that the accusation of conflict of interest was false even though TI had confirmed that the company being promoted did not in fact exist.

[4] The relief sought is an order quashing TINZ's dismissal of the complaint, a direction that TINZ properly consider it according to the principles of due process and natural justice and a direction "advising the [G]overnment that [TINZ] is in breach of the criteria by which it was granted charitable status".

Affidavit evidence

Approach to the evidence

[5] A strike out application proceeds on the basis that the pleaded facts can be proved. The Court is, however, entitled to receive affidavit evidence on matters which are not in dispute.¹

[6] An affidavit has been filed by Ms Claire Johnstone, the Deputy Chair of TINZ, in support of the strike out application. To some extent the affidavit goes beyond matters that are appropriately considered on a strike out application. This includes the evidence that responds to Mr Siemer's complaint.² However, the affidavit also includes information that is appropriately considered on a strike out application. In this category are the emails and other communications referred to in the statement of claim, together with the TINZ rules. Also in this category is information about the membership status of Mr Rabson, Mr Creser and Mr Siemer: Mr Rabson and Mr Creser were members but rejoined in April 2014; Mr Siemer has never been a member of TINZ.

¹ *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR15.1.06(1)].

² For example, the affidavit explains that Ms Snively made an honest mistake in how she referred to TINZ on her "LinkedIn" page. It comments that it is not uncommon for voluntary community organisations to remunerate Board members for work beyond what can be reasonably expected on a voluntary basis and that TINZ had occasionally, and only where necessary and appropriate, remunerated Ms Snively for certain work she had carried out. It also comments that it is common for TI chapters in developed countries to receive funding from government agencies. It says that TINZ rejects the allegation that funding received from the Government has in some way compromised TINZ's mission and objectives. I have not had regard to any of those matters.

[7] An affidavit was also filed by Stanislas Cutzach, the Governance Manager at TI in support of the strike out application. This affidavit discusses a review that was sought of the Ethics Committee decision. I have not considered it because I understand there is a dispute between the parties as to whether a review was available and/or pursued.

[8] Affidavits from Mr Siemer, Mr Rabson and Mr Creser dated 6 November 2014 were filed in support of the opposition to the strike out application.³ These affidavits provide personal perspectives about various matters that are not appropriately considered on a strike out application. For example, they include matters of submissions or comment and mention further concerns beyond those relied on in the statement of claim.

TINZ

[9] As set out in its rules, TINZ has general and specific objectives. The general objectives are:

- 4.1.1. to promote transparency, good governance and ethical practices in all sectors of society in New Zealand;
- 4.1.2. to promote ethical business practices by New Zealand business offshore, and transparency and good governance in our region;
- 4.1.3. to contribute to the international effort to reduce corruption and promote good governance and ethical business practices[.]

[10] The specific objectives include:

- 4.2.1. to raise public awareness and advance the general education of the public in matters relating to the nature and consequences of corruption in business transactions, including development initiatives and existing legislation and other guidelines which exist to combat corruption;
- 4.2.2. to promote, undertake or commission research for the public benefit in matters relating to the nature and consequences of corruption in business transactions and the cost-effectiveness of development initiatives and to disseminate the useful results of any such research;

³ An affidavit in support of the application for judicial review has been filed by Mr Siemer. This affidavit sets out further details about how his inquiry arose, how it was dealt with, and his concerns. It is not relied on for the purposes of the strike out application.

...

- 4.2.5. to give the legislative and public bodies and others, facilities for conferring with and ascertaining the views of persons and institutions engaged in combating corruption as regards matters directly or indirectly affecting that activity;

...

[11] Its “over-arching principles” are that:

- 4.3.1. the Society is politically non-partisan; and
- 4.3.2. the Society will not be involved in investigating or exposing individual cases.

[12] Under the rules any organisation or individual can apply to be a member of TINZ. The Board considers the application in accordance with any criteria in the rules, or if no such criteria exist, then at its discretion. A member may resign by giving written notice. Membership may also be terminated by the Board in its sole discretion after allowing the member a reasonable opportunity to respond to the Board’s concerns.

[13] The rules provide for the holding of annual and special general meetings. Members of the Board are elected. The Board conducts and manages the affairs of TINZ. Board meetings are chaired by the Chairperson, or the Deputy Chairperson in the Chairperson’s absence, and failing that the directors may appoint a person to act as Chairperson. The Board has the power to (amongst other things) make rules and regulations as it thinks expedient, to approve any work programme and to delegate any of its powers to any member at any time and on such terms as it decides. Except as may be required by the rules, the Board determines its own procedures.

[14] The rules provide that no pecuniary profit may be made by any member of TINZ. This is subject to a number of exceptions.

The inquiry

[15] The inquiry dated 15 November 2013 to TI was written by Mr Siemer who described himself as “Editor”. He said that he had discovered that TINZ receives up to 90 per cent of its funding from the Government. He also said that Ms Snively was

furthering her business interests by trading off a fictitious name and that she was a contractor to the Government. He asked for information about TI guidelines on government funding and restrictions on officers of TI chapters running and promoting companies which trade on the TI name.

[16] On 4 December 2013 TI replied advising that:

Resource Development of TI's National Chapters

All our National Chapters are independent entities that do their own fundraising. For more details on resource development at TI-New Zealand, please contact the Chapter directly. Our oversight of our chapters includes a regular accreditation review every three years. For TI-New Zealand this was last completed in June 2011.

Transparency International Ltd.

Thank you very much for drawing our attention about the question of Transparency International Ltd. This indeed does not exist and Ms. Snively has updated her LinkedIn page.

I hope this information is helpful and answers your questions.

[17] Further correspondence ensued between Mr Siemer and TI, and then between him and TINZ. Mr Siemer continued to describe himself as "Editor". His affidavit annexes an email dated 28 February 2014 referred to in the statement of claim. This annexure contains a series of emails as follows:

- (a) The first email in the series is part of an email from Mr Siemer to a number of parties repeating his concerns.
- (b) The next email is from Mr Siemer (as Editor, Spartan News Limited) to TI dated 26 February 2014 stating "I request one more time for TI's comments on the issues raised in the attached draft article before it goes to press. Please respond as soon as possible."
- (c) The third email is TI's reply dated 27 February 2014, which is referred to in the statement of claim, advising that the Ethics Committee would be the best place to address Mr Siemer's matters.

- (d) The fourth email, which is also referred to in the statement of claim, is from TINZ (Mr Sheard) advising Mr Siemer and TI that the Ethics Committee had been considering the matter since TINZ's February board meeting and would report back the following week.

[18] On 1 April 2014 Mr Sheard, as convenor of the Ethics Committee, sent an email to Mr Siemer, TI staff and others. The email said "Please see below the judgment of the TI-NZ Ethics committee with respect to the complaint by Vince Siemer." The email set out the matters raised by Mr Siemer as Complaint (A), Complaint (B) and Complaint (C). It then set out the reasons why it considered that each of those matters did not give rise to a breach of ethics or conflict of interest. Further correspondence from Mr Siemer ensued.

Amenable to review?

[19] TINZ says there is no reasonably arguable cause of action because TINZ's handling of the complaint is not amenable to judicial review. In support of this submission TINZ relies on the summary of the law concerning the reviewability of incorporated societies as set out in a 2013 report of the Law Commission. That summary is as follows:⁴

Under judicial review the High Court assesses whether people who exercise legal powers have exercised those powers as was intended by the law-maker. Although judicial review is concerned with the principles of public law, and incorporated societies are generally considered to be private entities, the courts have found that the decisions of societies may be amenable to judicial review in certain circumstances such as membership decisions, or disciplinary proceedings, or where the decision may have important public consequences or effects.

[20] TINZ submits that an incorporated society's discharge of purely administrative and management functions, and any questions as to whether such functions have been performed in accordance with the society's rules, are not generally reviewable. TINZ submits that this is especially the case where, as here, the applicants for review are not members of the incorporated society. It says that the process in rejecting the complaint was private in nature, did not affect their membership status and did not affect their livelihood or reputation.

⁴ Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013) at [9.7] (footnotes omitted).

[21] Any decision of a public nature is potentially susceptible to review⁵ including those of a private organisation.⁶ TINZ has stated public objectives, it is registered as a charity and it is said to receive some Government funding. The claim as pleaded is that the concerns that were raised were dismissed without a fair process. The concerns of Mr Rabson and Mr Creser, as raised through Mr Siemer, are at least partly about TINZ's public objectives (that Government funding is contrary to them). That, however, is insufficient to render TINZ's process and dismissal of the concerns amenable to judicial review.⁷ The Courts have been hesitant to permit challenges by way of judicial review of decisions of an incorporated society, which typically concern private rather than public matters and where other avenues of redress are available.⁸

[22] The claim pleads that Mr Siemer's initial enquiry was made on behalf of Mr Creser and Mr Rabson. That, however, was not disclosed in Mr Siemer's email to TI. Mr Siemer was corresponding as editor in respect of a story he intended to publish. How TINZ chose to respond to that enquiry and the process it adopted in doing so is not amenable to review. It is not a decision of a public nature even though the subject of Mr Siemer's enquiries concerned public interest matters. That is so even if Mr Siemer's enquiries were made on behalf of Mr Rabson and Mr Creser, as members of TINZ, as pleaded. The enquiry was nevertheless one made by an editor about issues of concerns to those members. How TINZ chose to respond to Mr Siemer's enquiry was a private internal management matter governed and resolved by TINZ's rules. On this basis I am satisfied that the proceeding has no prospect of success.⁹

⁵ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 881.

⁶ Joseph, above n 5, at 884. See also *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11 and 12.

⁷ See for example, the discussion in *R v Leonard Cheshire Foundation (a charity) and Anor* [2002] EWCA Civ 366 at [35](i) that, for example, state funding does not of itself indicate that a body exercises public functions.

⁸ *Hopper v North Shore Aero Club Inc, Inc* [2007] NZAR 354 (CA) at [5], [9] and [12]; *Stratford Racing Club Inc v Adlam* [2008] NZCA 92, [2008] NZAR 329 at [53] to [55].

⁹ See *Couch v Attorney-General (on appeal from Hobson v Attorney-General)* [2008] NZSC 45, [2008] 3 NZLR 725 at [33], where the Supreme Court noted that "[i]t is inappropriate to strike out a claim summarily unless the Court can be certain that it cannot succeed."

Fair process?

[23] TINZ also submits that there is no reasonable cause of action because TINZ satisfied natural justice requirements. What is required depends on the context. As was said in *Birss v Secretary for Justice*:¹⁰

... the requirements of natural justice depend on the nature of the power being exercised, the effect which the decision may have on persons affected by it, and the circumstances of the particular case; ... and the precise content of the rules of natural justice and standards of fairness have to be tailored in a realistic way to meet the needs of the particular case.

[24] TINZ submits that its process was fair, reasonable and proportionate because:

- (a) the TINZ Ethics Committee received the Siemer Complaint, did not summarily dismiss it as vexatious (though this course of action was reasonably open to it), but resolved to consider and address the substance of the Complaint;
- (b) the Committee determined the initial process and steps to be taken by each Committee member with respect to the Siemer Complaint, and that process was formally minuted;
- (c) the Committee reviewed and synthesised the complaint to identify specific allegations capable of consideration;
- (d) the Committee provided Ms Snively, the person against whom the allegations were made, with an opportunity to respond;
- (e) the Committee considered the material before it against the applicable conflict of interest policies;
- (f) the Committee presented its findings and recommendation to the Board, which accepted its findings and decision;
- (g) Mr Siemer was notified in writing of the decision, and given the opportunity to submit further evidence, but chose not to do so; and
- (h) the plaintiffs, after identifying themselves as complainants, were offered an avenue of review to Transparency International in Berlin, but did not take it.

[25] Given the conclusion I have already reached, it is not necessary to reach a final view on whether the claim should be struck out on this basis. It may be that there are disputed factual matters about some aspects of the process which make it inappropriate to strike out the proceeding. However if the process was as TINZ

¹⁰ *Birss v Secretary for Justice* [1984] 1 NZLR 513 (CA) at 516 per Richardson J.

submits it was, then it seems very unlikely that Mr Rabson and Mr Creser would succeed in that claim even if TINZ's response to the matter was amenable to review.

Frivolous and vexatious?

[26] TINZ submits that the claim is frivolous and vexatious or otherwise an abuse of process. It says that the claim is not a genuine process grievance, that it lacks overall merit, and it seeks relief that is unavailable or highly unlikely to be granted. It also says that the claim was filed immediately following discontinuance of a virtually identical proceeding, that it is brought by two people who have a history of bringing frivolous and vexatious litigation and that they have brought this proceeding on behalf of another person, Mr Siemer, who has been declared vexatious under s 88B of the Judicature Act 1908.¹¹ It is not necessary to consider this ground further given my conclusion that the matter is not amenable to judicial review.

Other matters

[27] The submissions for Mr Rabson and Mr Creser raised other matters. For example, they considered that the strike out application was filed after the time for filing a statement of defence had expired. However, the strike out application was filed pursuant to a timetable direction made by the Court on 6 October 2014.¹² The respondent was not directed to file a statement of defence at that time.

[28] Mr Rabson and Mr Creser were concerned that they had insufficient time to respond to the bundle of authorities relied on by TINZ at the strike out hearing. I granted them an extension of time to respond after the hearing. At the hearing they accepted that this would remove any prejudice to them from only having just received the bundle. In the event they declined that opportunity because they considered it would "open the door" for TINZ to make further submissions after the hearing.¹³

[29] Another matter raised by Mr Rabson and Mr Creser arose out of the TINZ Board Minutes dated 10 February, which recorded:

¹¹ *Attorney-General v Siemer* [2014] NZHC 859 at [198].

¹² Judicature Amendment Act 1972, s 10.

¹³ Any such submissions from TINZ were to be by way of reply.

[TI] has advised that the current complaint is to be dealt with by the Ethics Committee. [TI] has been informed of the informal advice from the Police, SFO and the Judiciary that these current complaints should be ignored.

[30] Mr Rabson and Mr Creser submit that the impartiality of this Court is at issue given this record. I have not provided any such advice. After the hearing Mr Rabson and Mr Creser raised this issue again. They apparently considered that a minute I issued to extend the time period within which they could make submissions in response to TINZ's bundle of authorities raised a "reasonable fear" that the judiciary were advising TINZ to ignore complaints about its chairperson. That submission was rather far fetched. So too was the submission that my statement at the hearing did not "satisfy the potential conflict" because I am a member of the judiciary and "the judiciary is known to move in lock step unanimity in support or opposition of non-judicial affairs of state." Mr Rabson and Mr Creser may not be satisfied that I am independent and impartial, but that is not the test.¹⁴

[31] Mr Rabson and Mr Creser went through some other aspects of the TINZ process about which they had concerns or which they considered supported their case. However none of these matters assisted in showing why the TINZ response to the matters raised by Siemer was amenable to review.

Result

[32] The application to strike out the proceeding is granted. TINZ sought costs on a 2A basis. As the successful party on the application it is appropriate to make an order for costs in its favour. Category 2A is appropriate.

Mallon J

¹⁴ See *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35 at [3].