IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2016-485-761
[2017] NZHC 365

UNDER	the Judicature Amendment Act 1972
AND	Part 30 of the High Court Rules
BETWEEN	JEREMY JAMES MCGUIRE Plaintiff
AND	THE SECRETARY FOR JUSTICE First Defendant
AND	NEW ZEALAND LAW SOCIETY Second Defendant

Hearing:	2 February 2017 28 February 2017 (on the papers)
Appearances:	J McGuire plaintiff by himself G Melvin and M McKillop for first defendant P Collins for second defendant
Judgment:	7 March 2017

JUDGMENT OF CULL J

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[1] The first defendant applies to strike out Mr McGuire's claim for judicial review of a 2013 decision of the Secretary for Justice (the Secretary), on the basis that there is no reasonably arguable cause of action and/or that is frivolous or vexatious.[1] This application is opposed by Mr McGuire.

Relevant facts

[2] In May 2013, Mr McGuire applied for a lead provider family legal aid contract. A selection committee recommended to the Secretary that the application

[1] Pursuant to grounds (a) and (c) respectively of Rule 15.1(1) of the High Court Rules 2016.

be declined. The Secretary then declined the application in a written decision on 7 November 2013 (the 2013 decision).

[3] The reasons the Secretary declined Mr McGuire's application were that he did not meet the criteria for approval as a lead provider for family legal aid services in that:

(1) He did not meet the Professional Entry Requirements.

(2) He does not have the Service Delivery Systems that support him to provide and account for legal aid services or specified legal aid services in an effective, efficient and ethical manner.

(3) He did not provide references that support his experience and knowledge in the area of law and category of proceedings to which the application relates.

(4) He has not demonstrated experience and competence in family matters.

[4] The reason that is most relevant to this strike-out application is the finding that Mr McGuire did not meet the Professional Entry Requirements. Of particular concern to the Secretary were the outstanding client complaint determinations that were before the Lawyers and Conveyancers Disciplinary Tribunal and the absence of any notation of a complaint, to which Mr McGuire had disclosed, on his Certificate of Standing from the Law Society.

[5] Mr McGuire was in the process of challenging his Certificate of Standing from the Law Society and was in communication with the Ministry of Justice, to ascertain whether a further application from him, with a revised Certificate of Standing, would be likely to be successful.

[6] On 15 September 2016, the Ministry of Justice advised Mr McGuire by email that he was not prevented from applying, but until the two open complaints currently before the Standards Committees and the complaint on review with the Legal

Complaints Review Officer (LCRO) are unresolved, the Secretary will not be able to make an assessment of whether Mr McGuire meets the criteria for approval. Ms Davis advised Mr McGuire:

> My advice is that any application from you, with that certificate of standing, will be premature and will likely be declined for the same reasons your first application was declined. As I have stated before, it is impossible for the Secretary for Justice to assess whether or not anyone meets the fit and proper person requirements when complaint determinations are outstanding.

[7] This email was attached as Exhibit E to Mr McGuire's affidavit dated 19 September 2016. It is relevant to Mr McGuire's failure to review the 2013 decision to the Review Tribunal, which is discussed more fully below.

[8] Following the resolution of the outstanding client complaints, Mr McGuire raised his concerns about the complaint process with the Law Society. This resulted in an apology from the Law Society, which is contained in a letter dated 31 August 2016. It states:

> The Law Society apologises for the stress, inconvenience and embarrassment caused to you by the errors which resulted in three censure orders for unsatisfactory conduct in 2012 and 2014. The Law Society also regrets the deep distress the disciplinary prosecution in 2008-2011 caused him.

[9] The Law Society issued a revised Certificate of Standing following its letter of apology. In the revised Certificate of Standing dated 22 December 2016, the Law Society records that on 20 October 2011 Mr McGuire pleaded guilty to a charge of unsatisfactory conduct; on 13 December 2016 a Standards Committee made a finding of unsatisfactory conduct against him and ordered that he be censured and that fees be reduced in relation to one matter and cancelled in another matter.

[10] Mr McGuire has applied separately to the High Court for judicial review of the Standards Committee determination. The revised Certificate of Standing also records that there was one complaint where there was a finding of no further action by a Standards Committee, which is currently on review with the LCRO. Again, the Law Society considers that Mr McGuire is of good standing.

[11] Mr McGuire applied for a lead provider criminal legal aid contract and duty solicitor approval on 8 July 2015. Following this decision, on 17 November 2015 (the 2015 decision), Mr McGuire applied for a review of the 2015 decision to the Review Authority, pursuant to s 82 of the Legal Services Act 2011 (the Act). His review application was also declined.

[12] Mr McGuire issued judicial review proceedings, seeking to challenge both the 2013 and 2015 decisions with a claim for relief that the decisions were unlawful and invalid and an order that one or both of the decisions be set aside.

Strike-out application

[13] The Secretary has filed an application to partially strike-out Mr McGuire's amended statement of claim, to the extent that it challenges the 7 November 2013 decision of the Secretary, to decline Mr McGuire's application for approval. The judicial review challenge of the 2015 decision is not in issue in this strike-out application.

[14] The grounds for the Secretary's partial strike-out of the review of the 2013 decision are that Mr McGuire:

(1) discloses no reasonably arguable cause of action against the first defendant; and

(2) his application is frivolous and vexatious.

[15] The strike-out application relies on Rule 15.1 of the High Court Rules 2016 and ss 82 and 83 of the Act.

The applicable law

[16] Rule 15.1 of the High Court Rules provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

(2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.

(3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.

(4) This rule does not affect the court's inherent jurisdiction.

[17] The well-settled principles that apply on a strike out application were summarised by Kós J in *Siemer v Judicial Conduct Commissioner*:[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.

[18] The established criteria for striking out a cause of action where there is no reasonably arguable cause of action or defence were summarised by the Court of Appeal in *Attorney-General v Prince*[3] and endorsed by the Supreme Court in *Couch v Attorney-General*.[4] The cause of action or defence must be clearly untenable,[5] being "so certainly or clearly bad" that it should be precluded from going forward and the court can be certain that it cannot succeed.[6] These same principles were confirmed as applying to strike out judicial review proceedings.[7]

[19] A frivolous proceeding is one that trifles with the court's processes and lacks seriousness.[8] A vexatious proceeding is one that vexes the defendant beyond what is usual in most proceedings. There must be some element of impropriety in the claim, which is often procedural. In *Reekie v Attorney-General* the Supreme Court noted:[9]

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2 *Siemer v Judicial Conduct Commissioner* [2013] NZHC 1853 at [13].
3 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.
4 *Couch v Attorney-General* [2008] NZSC 45 at [33].
5 *Prince*, above n 3.
6 *Couch*, above n 4.
7 *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA) at 63.
8 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89].
9 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [39].

> Vexatiousness might be manifested, for instance, by the unreasonable and tendentious conduct of litigation, extreme claims made against other people involved in the case or perhaps a history of unsuccessful proceedings and unmet costs orders.

[20] In this particular case, ss 82 and 83 of the Act also apply. Section 82 provides:[10]

> **82 Review of decisions of Secretary regarding approvals**
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> (1) A person may apply to the Review Authority for a review of a decision of the Secretary in respect of that person—
>
> (a) declining the person's application for approval to provide 1 or more legal aid services or specified legal services:
>
> (b) imposing any condition on the person's approval to provide 1 or more legal aid services or specified legal services:
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> (c) imposing any interim restriction on the person under section 101:
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> (d) imposing any sanction on the person under section 102:
>
> (e) cancelling the person's approval under section 103.
>
> (2) An application for review must be lodged with the Review Authority within 20 working days from the date of notice of the Secretary's decision.
>
> (3) The Review Authority may accept a late application no later than 3 months after the date on which notice of the relevant decision was given to the person, if the Review Authority is satisfied that exceptional circumstances prevented the application from being made within 20 working days after the date on which notice is given.

[21] Section 83 consequently provides:[11]

> A person **may not apply for judicial review** of any decision made under this subpart **until the person has sought and obtained a review** of the Secretary's decision **under section 82**.

The Secretary's position

[22] The principal submission for the Secretary is that Mr McGuire did not follow the statutory procedure for reviewing the Secretary's 2013 decision. He failed to seek a review to the Review Authority within the specified timeframe, prescribed in

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[10] "Secretary" here means "Secretary for Justice"; see the Legal Services Act 2011, s 4.

[11] Emphasis added.

s 82 of the Act. Under s 82(2), an application for review must be lodged with the Review Authority within 20 working days from the date of notice of the Secretary's decision. If that timeframe is missed, the Review Authority may accept a late application no later than three months after the date the decision was received, provided that the Review Authority is satisfied "that exceptional circumstances prevented the application from being made within 20 working days".[12]

[23] The Secretary relies on s 83 of the Act which provides that a person "may not apply for judicial review" of the Secretary's decision, until the person has sought and obtained a review under s 82 from the Review Authority. The Secretary points to the fact that Mr McGuire took the step of seeking review of the 2015 decision to the Review Authority but did not make such an application for review of the 2013 decision. The Secretary submits therefore that Mr McGuire is barred from seeking judicial review of his 2013 decision and seeks to strike-out that part of the statement of claim.

[24] Mr McKillop for the Secretary, submits that legal aid provider approval is not unlimited, but is approved for a duration of time. Thus, if an applicant is declined approval, a fresh application can be made. The objective of the legislation, he submits, is finality and that the provisions of ss 82 and 83 are designed to ensure the use of the specialised review mechanism, to promote that finality.

[25] He submits further that the statutory wording "may not" in s 83 of the Act should be read as "a person is not entitled to reply" or "shall not" apply for judicial review, when review has not been sought from the Review Authority.

[26] The review of the 2013 decision sought by Mr McGuire is outside the statutory framework; has no prospect of success; is frivolous or vexatious; and should be struck out.

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12 Legal Services Act 2011, s 82(3).

Mr McGuire's position

[27] Mr McGuire opposes the Secretary's strike-out application. In doing so, he acknowledges that under s 82 of the Act he is time-barred from submitting the 2013 decision to review by the Review Authority.

[28] However, Mr McGuire makes the following points:

(1) The statutory language in s 83 is "facilitative" or "permissive", not mandatory, in that a person "may not apply for judicial review" of the Secretary's decision. Mr McGuire submits that the statutory language is not mandatory, otherwise the provision should read "shall not" and therefore, allows for the possibility that a person may apply for a judicial review, even though there has not been a review of the Secretary's decision under s 82.

(2) Mr McGuire relies on s 27(2) of the New Zealand Bill of Rights Act 1990 (NZBORA), submitting that this provision makes it clear that decisions made by any tribunal or other public authority may be judicially reviewed. Mr McGuire submits that the only recourse available to him is judicial review of the 2013 decision and that his failure to apply for a s 82 review is not a bar to his claim for judicial review.

(3) In light of the email response of 19 September 2016 from the Ministry of Justice, that any application from him will be premature and will likely be declined, when complaint determinations are still outstanding, meant that if Mr McGuire had reapplied for legal aid approval in 2013, such application would have been futile. It also would have meant that his review application would similarly be a waste of the Authority's time.

(4) The Secretary's strike-out application should not be upheld, because in judicially reviewing the 2015 decision, reference is made in that decision to Mr McGuire's 2013 application and the reasons for its

refusal. The evidence surrounding the 2013 decision is therefore relevant to review of the 2015 decision.

The New Zealand Law Society's position

[29] The Law Society filed a memorandum outlining its position in relation to these proceedings. The Law Society is not a party to either of the first defendant's applications for a strike out or for costs. However, its position remains that since the relief that Mr McGuire seeks against it cannot reasonably be expected to result in Mr McGuire being able to provide legal aid services, the proceedings against the Law Society should be discontinued, with costs.

[30] If the judicial review application does proceed, the Law Society seeks that Mr McGuire's applications against the Secretary and the Law Society be heard together.

Analysis

[31] There are two issues which arise for determination from Counsels' arguments:

(1) Does the statutory language in s 83 of the Act oust the right to judicial review in breach of s 27(2) NZBORA?

(2) Is the 2013 evidence surrounding the Secretary's 2013 decision, relevant to the determination of the judicial review of the 2015 decision?

Does s 83 of the Act oust s 2(2) NZBORA judicial review?

[32] The Secretary's ground for striking out, that Mr McGuire's cause of action is untenable and cannot succeed, relies on the statutory interpretation of s 83 of the Act. The Secretary says that because Mr McGuire did not seek and obtain a review of the Secretary's decision to the Review Authority, then s 83 prohibits Mr McGuire from seeking judicial review of the decision. Thus, the wording in s 83 that "a person may not apply for judicial review" must be read as a person **shall not** apply for judicial

review. In other words, the statutory wording imposes a mandatory requirement on Mr McGuire to review the Secretary's decision through the Review Authority.

[33] The Secretary relied on the Court's approach in *Wang v Minister of Immigration*,[13] where the Court considered a provision of the Immigration Act 2009, that required a person to exercise an appeal right to the Immigration and Protection Tribunal, before judicial review proceedings could be considered. There the Minister emphasised in submissions to the Court that s 249 of the Immigration Act did not operate as a privative clause that ousts judicial review in breach of s 27(2) NZBORA but that it simply delayed judicial review.[14] Brown J upheld the Minister's submission, finding that the statutory provisions in *Wang* were not privative clauses and do not oust judicial review but simply delay judicial review until after the determination of the related statutory appeals.[15]

[34] In contrast to s 83 of relevance to this decision, s 247(1) of the Immigration Act empowers the High Court to extend time. It provides:

> Any review proceedings in respect of a statutory power of decision arising out of or under this Act must be commenced not later than 28 days after the date on which the person concerned is notified of the decision, unless—
>
> (a) the High Court decides that, by reason of special circumstances, further time should be allowed; or
>
> …

[35] Thus, the Immigration Act preserves the High Court's jurisdiction to exercise its discretion in special circumstances to extend time in the event the 28 day time limit is missed. By contrast, s 83 of the Act, if read as the Secretary contends, operates to deprive a person from applying for judicial review, if there is not strict compliance with the time limits in s 82, regardless of the reasons. There is no provision for the High Court to extend the time.

[36] By contrast, there is no "delaying effect" of judicial review under the Act in these proceedings. If the words "may not" in s 83 are to be interpreted as a

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13 *Wang v Minister of Immigration* [2013] NZHC 2059.
14 At [19].
15 *Wang*, above n 13, at [44]; relying on New Zealand Bill of Rights Act 1990, s 27(2).

mandatory requirement before judicial review can be sought, s 83 would operate as a privative clause, ousting the jurisdiction of the High Court to judicially review a decision.

[37] To determine the interpretation of the words in s 83 of the Act, s 27(2) of the NZBORA needs to be considered. Section 27(2) provides:

> Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

[38] The right to justice has been enshrined in the NZBORA. The interpretation of s 83 of the Act that is consistent with the rights and freedoms of the NZBORA must be the preferred interpretation, as s 6 NZBORA provides. [16] For this reason, I accept Mr McGuire's argument that the words in s 83 "a person **may** not apply for judicial review" is permissible in circumstances where a person has not met the strict time limits within the Act. If s 83 is interpreted as a mandatory requirement, the statutory provision operates as a privative clause, which purports to oust this Court from its judicial review function. Such an interpretation is inconsistent with the NZBORA.

[39] I turn then to the Secretary's submissions on the statutory context of the Act, namely that finality is a key driver of the legislation and that ss 82 and 83 operate to ensure the use of a specialised review mechanism, before judicial review is undertaken.

[40] I accept that in the majority of cases, those objectives should be met. However, in the circumstances of this case, the futility of Mr McGuire seeking a review from the Review Authority, was clearly indicated by the exchange of email correspondence between Mr McGuire and the Ministry of Justice. Ms Davis' email on 15 September 2016, Exhibit E, to which I have already referred,[17] made it plain to Mr McGuire that there was no point reapplying or seeking a review, until the outstanding client complaints against him were determined.

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[16] This approach to interpretation is well-established, see for example *Re Application by AMM and KJO to adopt a child* [2010] NZFLR 629 (HC) at [49]; *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [179]; *R v Poumako* [2000] 2 NZLR 695 (CA) at [37]; and *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 272.

[17] At [6] and [7] of this judgment.

[41] I accept Mr McGuire's submission that in the face of that clear indication, seeking a review before the Review Authority would have been a waste of its and his time. For that reason, I am unable to accept the Secretary's submission that the operation of the Act provisions, restricting or ousting judicial review rights, could be ameliorated by Mr McGuire making a fresh application, if he had failed to meet the time limits under s 82.

[42] On these facts and in these circumstances, I am not prepared to read s 83 as a mandatory requirement that a person must apply for a review to the Review Authority, before taking the only other step available to him, to challenge the 2013 decision, being judicial review.

Is the 2013 evidence relevant?

[43] In the course of argument, the Secretary submitted that this Court was not precluded from considering the effects of the 2013 Selection Committee advice to the Secretary, the Secretary's decision of 2013 or any of the correspondence raised by Mr McGuire, if that was relevant to the Secretary's 2015 decision. Thus it must be determined whether the 2013 evidence can be put before the Court to assist in the review of the 2015 decision.

[44] The 2015 decision contains specific reference to Mr McGuire's application in 2013 and the email correspondence surrounding his 2013 application. Mr McGuire seeks to review both decisions in 2013 and 2015, putting in issue the way in which his previous experience and standing in the law profession was dealt with.

[45] It appears from the 2015 decision, that the previous correspondence in respect of Mr McGuire's 2013 application and the reasons for decline in November 2013 may be relevant and of assistance to this Court in the substantive judicial review proceedings. The Secretary, through his Counsel, has acknowledged that this Court is not precluded from considering the effects of the 2013 Selection Committee advice or the correspondence, if that is relevant to the 2015 decision.

[46] If the 2013 evidence is placed before the Court, then it should be placed within the context of Mr McGuire's application for judicial review of the 2013

decision. The evidence accompanied the application and should be considered in its entirety. For completeness, I do not accept the proposition, that the Court could still consider the 2013 evidence in the event of partial strike-out, is an answer to the ouster of the Court's jurisdiction by s 83 of the Act.

Subsequent memoranda

[47] Following the hearing, Mr McGuire filed a memorandum seeking further time to make a late application to the Review Authority. He then filed a case management memorandum and an affidavit dated 23 February 2017, annexing the responses from the Review Authority.

[48] The Secretary filed a memorandum in response, objecting to Mr McGuire's approach, in breach of the Practice Note,[18] where an application must first be made to the Judge for leave, to make further submissions, after the hearing of a matter is concluded, but before delivery of judgment. The Practice Note emphasises that it is only in exceptional circumstances that leave will be granted and if such an application is to be made, an appointment should be sought with the Judge in Chambers through the registrar. No submissions or memoranda filed without leave will be considered.

[49] Mr McGuire has not followed the Practice Note and there are no exceptional circumstances requiring that such leave should be granted. It was self-evident that the Review Authority would decline any application for review of the Secretary's 2013 decision at the time of the interlocutory hearing. Any such application by Mr McGuire was well out of time at the date of this hearing. Leave is declined.

Timetable

[50] The Secretary has filed an application for security for costs and Mr McGuire had filed a response to that application. At the commencement of the hearing, I indicated to both Mr McGuire and counsel for the Secretary that I considered Mr

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[18] Practice Note [1968] NZLR 608.

McGuire's response showed he did not appreciate the significance of the application for security for costs. For that reason, I declined to hear the application.

[51] Subsequent to the hearing, both parties have suggested a timetable for the next steps in the proceeding.

[52] In light of my decision regarding the Secretary's application for partial strike out, I consider that the Secretary should file his statement of defence within 14 days and this matter should be set down for a substantive hearing.

[53] If it assists the parties, r 5.45 of the High Court Rules and the relevant principles applicable have been well settled. The factors referred to by the Court of Appeal in *McLachlan v MEL Network Ltd* emphasise that an order for security for costs, having the effect that the plaintiff will be unable to pursue the claim, should be made only after careful consideration and in a case in which the claim has little chance of success. [19] Access to the courts for a genuine plaintiff is not likely to be denied.[20]

[54] There has been no review of the Secretary's 2013 decision, and Mr McGuire seeks judicial review in this Court of both of the Secretary's decisions in 2013 and 2015. Access to justice, particularly in judicial review proceedings, should not be lightly denied. Mr McGuire has provided the Secretary with an indication that he is not impecunious but seeks that the substantive matter is proceeded with promptly.

[55] If however, the Secretary wishes to pursue his application for costs, following the filing of his statement of defence, Counsel for the Secretary can file a memorandum, indicating whether he wishes to pursue the application for security of costs and a telephone conference should be arranged to enable an interlocutory hearing.

Result

[56] The Secretary's application for partial strike-out is dismissed.

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19 *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA), at [15].
20 At [15].

[57] The Secretary is to pay Mr McGuire's reasonable disbursements for attending this hearing.

[58] The Secretary is to file his statement of defence within 14 days of the date of this judgment.

Cull J

Solicitors:
Jeremy McGuire, plaintiff by himself
Crown Law, Wellington for first defendant
Paul Collins, Auckland for second defendant