IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2016-485-238
[2016] NZHC 2539

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 Applicant
AND	JUDICIAL CONDUCT COMMISSIONER Respondent

Hearing	On the papers
Counsel:	M E Rabson (in person) L Theron and C Cross for respondent
Judgment:	25 October 2016

JUDGMENT OF CULL J

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[1] The Judicial Conduct Commissioner (the Commissioner) has filed an application to strike out Mr Rabson's proceedings in judicial review. Mr Rabson seeks to judicially review the decision of the Commissioner, who dismissed Mr Rabson's complaints against decisions of various Supreme Court Judges. The Commissioner found that the complaints were outside his jurisdiction, because they were each directed at the accuracy or lawfulness of judicial decisions. Mr Rabson says that was an error of law and he challenges the Commissioner's decision on that basis and further alleged procedural improprieties.

[2] The Judges of the Supreme Court were initially joined as parties by Mr Rabson to the proceedings, but have since been struck out as second respondents.[1]

[3] The Commissioner has applied to strike out the proceedings on the grounds that they disclose no reasonable cause of action and are frivolous, vexatious or otherwise an abuse of process, in that Mr Rabson's claim is a collateral attack on Court decisions and involves extreme allegations, which have no reasonable basis. The Commissioner also seeks indemnity costs.

Mr Rabson's complaints to the Commissioner

[4] Mr Rabson made four separate complaints to the Commissioner.

First complaint

[5] The first, dated 17 February 2016, concerns the Supreme Court decision in *Rabson v Transparency International New Zealand Inc*.[2] In that judgment, the Supreme Court declined leave for Mr Rabson to appeal the Court of Appeal's decision to strike out his appeal. Mr Rabson argued that, as the appeal was deemed abandoned, the strike out should not have been decided. The Supreme Court rejected his argument, noting that it was arguable the appeal was not abandoned because of a live application for an extension of time. Further, Mr Rabson did not treat the appeal as having been abandoned. An order of costs was made against him.

[6] Mr Rabson's complaint to the Commissioner was that the Judges abused their discretion and were motivated by illegal acts of the judiciary, in advising the board of Transparency International New Zealand Inc that it could ignore Mr Rabson's complaint. Mr Rabson claimed that the Judges failed to disclose their personal involvement in the issue. He challenged the costs order made against him, and said it was unreasonable for the Court to rely on him as a lay litigant to advise the Court that his appeal had been abandoned.

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1 *Rabson v Judicial Conduct Commissioner* [2016] NZHC 884.
2 *Rabson v Transparency International New Zealand Inc* [2016] NZSC 9.

Second complaint

[7] Mr Rabson's second complaint was sent on 26 February 2016 and concerned the judgment of the Supreme Court in *Rabson v Chapman*.[3] In that judgment the Supreme Court declined a second application for leave to appeal against the Court of Appeal's decision striking out his appeal. Mr Rabson sought to appeal the strike out decision in 2014 but it was refused on the basis that he could apply to recall the Court of Appeal's judgment. Mr Rabson did so, but the application was still not determined when the second application for leave was filed.

[8] The substance of the appeal concerned the same issue as in *Rabson v Transparency International New Zealand Inc* discussed above. The Supreme Court dismissed the application for leave on the grounds that it did not raise a point of law of general or public importance and there was no miscarriage of justice. It was relevant that costs can be awarded on an abandoned appeal as well as a strike out.

[9] Mr Rabson's complaint in this regard was directed primarily against Glazebrook J's minute and subsequent judgment, indicating that Mr Rabson could seek to recall the Court of Appeal's judgment. Mr Rabson viewed this direction as dishonest, because the application had not yet been determined. Concerning all three Judges sitting on the leave application, Mr Rabson said that it was an abuse of their office to order costs against him. Mr Rabson interpreted the indication from Justice Glazebrook that Mr Rabson could seek to recall a judgment of the Court of Appeal as an order to the Court of Appeal that the judgment should in fact be recalled. O'Regan J, who sat on the Court of Appeal at that time but had since moved to the Supreme Court, was accused of being "transparently retaliatory" in this regard.

Third complaint

[10] The third complaint was sent the following day on 27 February 2016. It complained about the decision of the Supreme Court in *Rabson v Chapman*.[4] In that decision, the Court dismissed Mr Rabson's application to recall the judgment in

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3 *Rabson v Chapman* [2016] NZSC 14.
4 *Rabson v Chapman* [2016] NZSC 17.

Rabson v Chapman,[5] which dismissed his application for leave to appeal. Mr Rabson argued that the judgment was a nullity because the underlying Court of Appeal judgment had been deemed abandoned. The Supreme Court rejected this argument on the basis that the application for leave had been filed and not withdrawn, and therefore it had to be determined.

[11] Mr Rabson's third complaint was that the Supreme Court misstated his ground of appeal. He says that his application for leave quoted an earlier judgment of the Supreme Court, which was mistakenly taken as being his submission. Mr Rabson argued this is relevant because the Court then did not accept the submission (which was its own ruling).

Fourth complaint

[12] The fourth complaint dated 3 March 2016 concerns the Supreme Court's ruling of 26 February 2016 in the matter of *Rabson v Chapman*. The ruling was in the form of a handwritten note on the front page of Mr Rabson's application. Mr Rabson sought to recall a judgment that he thought inaccurately stated his ground of recall. The Court's ruling read:

> The Court has understood Mr Rabson's submission. No new matters are raised. Application for recall dismissed.

[13] Mr Rabson's complaint alleged that the phrase "The Court has understood Mr Rabson's submission" meant that the Court agreed with him that there was an error. That being the case, the Court refused to correct an accepted inaccuracy, which is deceptive.

Fifth complaint

[14] The fifth and final complaint that is the subject of these proceedings concerns the Supreme Court's judgment in *Rabson v Transparency International New Zealand Inc*.[6] That judgment dismissed Mr Rabson's application for recall of the Supreme Court's earlier judgment, which dismissed his application for leave to appeal a

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5 *Rabson v Chapman* [2014] NZSC 112.
6 *Rabson v Transparency International New Zealand Inc* [2016] NZSC 22.

judgment striking out his appeal in the Court of Appeal. The Court simply recorded: "There is nothing in the submissions he has made in support of his application to warrant recall. The application is accordingly dismissed."

[15] Mr Rabson says this was a false statement because he did in fact make submissions in support of his application.

The Commissioner's decision

[16] The Commissioner issued a decision on 13 April 2016, having completed an examination of the five complaints. The Commissioner isolated from those complaints the following allegations of judicial misconduct:

(a) aberrant personal interest and improper personal motivation;

(b) deliberate misrepresentation of material fact;

(c) dishonesty; factual fabrication; failure to disclose conflict;

(d) ignoring law, facts and clear evidence;

(e) ineptitude;

(f) misfeasance;

(g) outrageous abuse of office;

(h) perversion of the course of justice;

(i) profound corruption;

(j) protection of judicial colleagues;

(k) reprehensible deception; and

(l) transparent retaliatory and retributive behaviour.

[17] The Commissioner noted that he had previously taken painstaking efforts to explain the limits on his jurisdiction. However, the Commissioner also explained that he had "been at equal pains in the examination of what [Mr Rabson] had to say".

[18] The Commissioner found that, when dwelling on any particular point, he was drawn inexorably to challenging or calling into question judicial decisions, which is outside his jurisdiction. All complaints were therefore dismissed as being beyond the Commissioner's jurisdiction, as required by s 16(1)(a) of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (the Act).

[19] Section 8 of the Act sets out the functions and powers of the Commissioner. Section 8(2) explicitly states:

> (2) It is not a function of the Commissioner to challenge or call into question the legality or correctness of any instruction, direction, order, judgment or other decision given or made by a Judge in relation to any legal proceeding.

[20] After dismissing the complaints, the Commissioner went on to make a series of observations under the heading "Footnotes". There, the Commissioner acknowledged that Mr Rabson was free to take his complaints to the Police, seeing as they involved allegations of criminal acts on the part of the Judges. He noted that Mr Rabson had been in the habit of sharing each complaint (by copying others into emails) with the Attorney-General, the Minister of Justice, various people at Crown Law, the Registrar of the Supreme Court and the Law Society. The Commissioner commented that involving these people was likely to further drain precious resources including those of taxpayers. While acknowledging that it is Mr Rabson's right to do so, he ventured to suggest that this right has a corresponding duty and Mr Rabson might like to reflect on that before "you share your further indignation."

Grounds of Review

[21] Mr Rabson applies to judicially review the Commissioner's decision on the following grounds:

(a) his decision was based upon an error of law;

(b) procedural impropriety on the part of the Commissioner, and

(c) the Commissioner took into account irrelevant considerations; and

(d) the Commissioner failed to take into account relevant considerations.

[22] Mr Rabson claims, first, that in dismissing his complaints for lack of jurisdiction, the Commissioner made an error of law. He cites that one of the issues of concern listed by the Commissioner was his allegation of a Judge's failure to disclose conflict and submits this is an example of serious misconduct, which has previously been the subject of a hearing before the Judicial Conduct Panel.[7] The third ground of review, namely interpreting his jurisdiction differently to Parliament's intention, is also a pleading in error of law. The first and third grounds of review are essentially the same, namely that the Commissioner's interpretation of ss 8(2) and 16(1) of the Act is not what Parliament intended.

[23] The second ground of review is procedural impropriety. Mr Rabson alleges that it was inappropriate for the Commissioner to mention the drain on taxpayer resources. He further alleges that the decision demonstrates the Commissioner's reticence to deal with serious criminal conduct by Judges.

[24] The fourth ground of review is that the Commissioner took into account irrelevant considerations in contemplating his fear of uncovering criminal conduct by the Judges and the potential drain on taxpayer resources.

[25] Finally, the fifth ground of review is that the Commissioner failed to consider the merits of the complaints, which is characterised as a failure to take into account a relevant consideration.

Strike out principles

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

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7 Three complaints against Justice Wilson upheld by Judicial Conduct Commissioner in 2010.

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.

[27] Instances where a claim may be struck out include where proceedings are frivolous, vexatious, or where the proceeding has been brought in an attempt to obtain a collateral advantage or are so untenable that they cannot succeed.

[28] In *Siemer v Judicial Conduct Commissioner*, Kós J focused on causes of action that are untenable, including in judicial review proceedings, and said:[8]

> 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.

[29] A frivolous proceeding is one that trifles with the court's processes and lacks seriousness.[9] 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. In *Reekie v Attorney-General* the Supreme Court noted:[10]

> 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.

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

9 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53 at [89].

10 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [39].

[30] An abuse of process can take various forms. Lord Diplock in *Hunter v Chief Constable of the West Midlands Police*, referred to the power to strike out as:[11]

> … 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.

[31] An abuse of process includes a proceeding brought for an improper purpose,[12] a proceeding that attempts to relitigate matters that are already determined,[13] and a proceeding brought where it is inevitable that a remedy will be refused even if one or more grounds of review are made out.[14]

No reasonable cause of action

[32] The first ground of review, namely an alleged error of law, is not reasonably arguable. The Commissioner is precluded by s 8(2) of the Act from considering the legality or the correctness of any judgment and is required by s 16(1)(a) to dismiss complaints that are not within the Commissioner's jurisdiction.

[33] The function of the Commissioner was described in *Siemer v Judicial Conduct Commissioner* in the following way:[15]

> [11] Secondly, the Commissioner's statutory jurisdiction is a limited one. The Commissioner does not make "merit determinations on judicial misconduct", as the plaintiff was wont to suggest. Rather, as Ms Theron put it, he operates as a clearing house for complaints. Section 15(1) of the Act provides the Commissioner must conduct a preliminary examination. If he forms the opinion that the complaint calls in question the legality or correctness of the judgment, he must dismiss it. If the complaint is about a judicial decision that is subject to a right of appeal, again he must dismiss it. If the complaint is frivolous, vexatious, not in good faith or about a matter that is trivial, he may dismiss it. On the other hand he may form the opinion that there are grounds to warrant referral of the complaint to the Head of Bench or to recommend that a Judicial Conduct Panel be appointed by the Attorney-General to inquire into any matter concerning the conduct of a

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11 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 541, [1981] 3 All ER 727 (HL) at 729 and relied on by Brown J in *Rabson v Judicial Conduct Commissioner* [2015] NZHC 714, [2015] NZAR 831 at [11].

12 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*, above n 9, at [89].

13 *Hunter v Chief Constable of the West Midlands Police*, above n 11, at 733; *Colman v Attorney-General* [2013] NZCA 92; *Rabson v Judicial Conduct* Commissioner, above n 11, at [14].

14 *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478 (HC) at 502.

15 *Siemer v Judicial Conduct Commissioner*, above n 8, at [11].

> Judge. That is as far as the Commissioner's substantive statutory jurisdiction goes. It follows that any "merit determinations on judicial misconduct" are ones for the Panel to make. The Commissioner's role is simply to determine whether there is sufficient basis for the matter to be dealt with by a Panel (although the decision then rests with the Attorney-General) or whether the complaint is better dealt with in another way.

[34] The authorities are clear that if complaints to the Commissioner involve his consideration of the merits of judicial determinations, they are outside the Commissioner's jurisdiction and the review challenge must fail.

[35] Mr Rabson has framed his complaints to the Commissioner about judicial conduct as being outside their judicial determinations. He points out that complaints of "dishonesty", "improper motivation" and "failure to disclose judicial conflict of interest" are grounds on which the Commissioner has previously upheld complaints. However, as the Commissioner found:

> … it is simply the case that when I dwell on any particular point, I am drawn inexorably to challenging or calling into question judicial decisions.

[36] The only evidence given for the alleged misconduct in each complaint is the giving of decisions, the issuing of minutes or rulings and the substance of those decisions. Mr Rabson deduces various facts about the Judge's motivations for their decisions, but he provides no evidence to support his conclusions. Each complaint is substantially about the judicial decisions of the Judges. Therefore the grounds of review alleging an error of law are not reasonably arguable.

[37] The procedural impropriety complained of, did not form part of the Commissioner's decision and was not part of his reasoning. He commented, clearly as a footnote to the decision, that Mr Rabson was in the practice of notifying various public officials of his complaints and suggested that Mr Rabson might consider refraining from this practice. The Commissioner's comments were not about Mr Rabson's complaints to him, and nor were they intended to dissuade Mr Rabson from making further complaints. It did not form part of his decision.

[38] I accept the Commissioner's submission that even if those comments did form part of his decision, the Commissioner was required to dismiss the complaints for want of jurisdiction. There can therefore be no remedy.[16]

[39] Mr Rabson's allegation that the Commissioner irrelevantly took into account his fear of uncovering criminal conduct by the Judges is misconceived. As with his comments about Mr Rabson notifying public officials of his complaints, the comment about Mr Rabson contacting the police did not form part of the Commissioner's decision. The decision was made solely on the basis that he lacked jurisdiction. Further, nothing in the decision indicates that the Commissioner held any such fear. His comment to Mr Rabson was simply confirming that Mr Rabson's complaints alleged criminal conduct, without accepting the allegation to be true. Mr Rabson's claim on this ground is also bound to be unsuccessful.

[40] Finally, judicial review on the ground that the Commissioner failed to consider the merits of Mr Rabson's complaints, and therefore failed to take into account a relevant consideration, is premised on Mr Rabson's erroneous view of the law. As discussed at [32] to [36] above, the Commissioner is precluded from considering the merits of Mr Rabson's complaints where they concern the substance of judicial determinations. The Commissioner evidently read and considered Mr Rabson's complaints but concluded he did not have the jurisdiction to take the complaints further. There was no failure to take into account a relevant factor and therefore the fifth ground of review is also not reasonably arguable.

[41] For these reasons, Mr Rabson's claim in judicial review discloses no reasonable cause of action.

Abuse of process

[42] The Commissioner also relies on an argument that the claim is frivolous, vexatious or otherwise an abuse of process and should therefore be struck out. He relies on the following features of the claim:

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[16] The same conclusion was reached in *Siemer v Judicial Conduct Commissioner*, above n 8, at [16] where Mr Siemer argued that the Commissioner breached natural justice.

(a) there is no reasonable basis for the extreme claims made by Mr Rabson;

(b) the pattern of Mr Rabson's complaints to the Commissioner and the proceedings taken by Mr Rabson that led to his complaints to the Commissioner indicate that these proceedings are not a proper use of the court's time;

(c) the claim is a collateral attack on the decisions about which Mr Rabson complains; and

(d) Mr Rabson's conduct in relation to this case, if unchecked, would strike at the public confidence in the court's processes and so diminish its ability to fulfil its function as a court of law.

[43] In his decision, the Commissioner concluded that Mr Rabson made extreme claims, without any reasonable basis. Mr Rabson has made extreme allegations against the Judges of the Supreme Court but provides no evidence or reasonable basis for these allegations beyond his own speculation. Comparing Mr Rabson's complaints with the decision in issue, reveals that at times Mr Rabson has misinterpreted the Court's words in a number of respects and his interpretation forms the basis of Mr Rabson's allegations in a number of cases. As one example, Mr Rabson's allegations of the Commissioner's "fear of uncovering criminal conduct by Supreme Court judges" is based on a comment from the Commissioner that Mr Rabson has alleged criminal conduct and is free to take these allegations to the police. The Commissioner was not accepting that there has in fact been criminal conduct and it did not influence his decision to dismiss the complaints. It was merely an observation about the next step Mr Rabson might take.

[44] The Commissioner points out that Mr Rabson has persistently pursued remedies from the courts in relation to various costs decisions since 2011. The Supreme Court judgments in issue in this proceeding relate to the same underlying dispute. He has made at least 28 applications to the Supreme Court, 18 applications to the Court of Appeal, six applications to the High Court and 52 complaints to the

Commissioner. The Commissioner has previously dismissed complaints for want of jurisdiction and has sought to explain this limitation to Mr Rabson. In this context, I accept the Commissioner's submission that this reveals a pattern that is vexatious.

[45] Apart from the speculative allegations mentioned above, the majority of Mr Rabson's complaints to the Commissioner are attempts to reopen litigation in the Supreme Court. His judicial review of the Commissioner's process seeks to have the Commissioner enquire into the correctness of court decisions. This is a collateral attack on the decisions in question. It is perhaps because Mr Rabson has no avenue of appeal from the Supreme Court that he challenges its decisions before the Commissioner.

[46] The Court of Appeal's decision in *Bradbury v Judicial Conduct Commissioner* is relevant here:[17]

> This proceeding is part of an extended course of conduct directed at reopening the earlier litigation. This conduct is unfair and oppressive to the Judge. This is not consistent with the purpose of the complaints process.

[47] In these circumstances I would also accept that the proceedings are an abuse of process and, on that basis, should be struck out.

Is the strike out application itself an abuse of process?

[48] Mr Rabson contends that the Commissioner's application to strike out the proceedings is an abuse of process and that the Commissioner should abide the decision of the court in the matter.

[49] This argument was made in *Siemer v Judicial Conduct Commissioner*.[18] Toogood J addressed the argument in the following way:

> [64] … Mr Siemer relied upon observations of McCarthy P in *NZ Engineering Industrial Union of Workers v Court of Arbitration*, in which the President noted that "when judicial bodies or judicial officers are … [joined as parties to a proceeding] they take no part in the argument and abide the judgment of the court". The Judge pointed "to the well established

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17 *Bradbury v Judicial Conduct Commissioner* [2014] NZCA 441 at [108].
18 *Siemer v Judicial Conduct Commissioner* [2012] NZHC 1481.

> principle that judicial bodies should strive not to enter into the fray in a way which might appear to favour the interests of one of the parties".
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> [65] I explained to Mr Siemer that the Commissioner would not properly be described as a judicial officer and that, in any event, the principles referred to by McCarthy P did not apply where a person exercising a statutory power of decision was a defendant in an application for judicial review.

[50] In another proceeding, where Mr Siemer argued that the Commissioner breached natural justice and erred in law, because he was conflicted in determining a complaint about Peters J, Kós J found that the complaint would have been dismissed, because it concerned the correctness of Peters J judgment.[19] Kós J said:

> [21] Is the Commissioner, when the subject of a judicial review proceeding, to take no part in it whatever? To take a wholly quiescent attitude to that proceeding, regardless of its merits? Or is he permitted to take up arms and seek from the Court an early summary determination of those proceedings on the basis that they are devoid of merit because the jurisdictional constraints in his statute gave him no leeway anyway? On the plaintiff's theory, the Commissioner is hoist whichever way he moves. He must "avoid conflict" and do nothing when the subject of a review application, no matter how unmeritorious. If instead he takes up arms, he is conflicted in the event of further related complaints. A fair-minded lay observer would be astonished at this theory.
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> [22] The Commissioner was bound to respond reasonably to review proceedings brought against him, which he regarded as devoid of merit. That opinion was then confirmed by the decision of Peters J striking out all causes of action in the review application. The Commissioner had a duty to respond, in a reasonable manner, when his office was alleged to have acted unlawfully. Likewise he had a duty to process complaints according to his governing statute. Both are matters of duty. A tension between public duties does not constitute apparent bias for present purposes

[51] Where proceedings disclose no reasonable cause of action and are in themselves an abuse of process, the Commissioner is entitled to apply to strike-out the proceedings, which will incur further cost and time. The strike-out application is not an abuse of process in these circumstances and the Commissioner has appropriately commenced the application, which is successful.

[52] Mr Rabson also submits that the Commissioner's application ignores his right to judicial review under s 27(2) of the New Zealand Bill of Rights Act 1990. That submission must be taken seriously. The right to access the courts should not be

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[19] *Siemer v Judicial Conduct Commissioner*, above n 8.

declined lightly. That is the reason for the high threshold that must be reached before a claim is struck out. However the right is not an unlimited one, and there are cases where strike out principles prevent a judicial review application from proceeding. For the reasons discussed above, Mr Rabson's application meets that high threshold that justifies it being struck out. The decision is not one that is made lightly.

Costs and related orders

[53] The Commissioner has applied for an order that a statement of defence need not be filed, on the basis that he is not required to respond to proceedings that are an abuse of process.

[54] In light of my finding that Mr Rabson's proceedings are an abuse of process and should be struck out, it follows that the Commissioner is not required to respond and no statement of defence need be filed.

[55] The Commissioner also seeks costs on an indemnity basis. That submission relies on a finding that the proceedings are an abuse of process.[20]

[56] Pursuant to r 14.6(1)(b) of the High Court Rules, the Court can order that the costs payable are the actual costs incurred by a party, or indemnity costs. Rule 14.6(4) sets out the circumstances in which indemnity costs may be ordered, including where:

> (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
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> (b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; or
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> (c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or

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[20] *Siemer v Judicial Conduct Commissioner*, above n 18; *Siemer v Stiassny* HC Auckland CIV-2008-404-0104, 20 March 2008; *Bradbury v Judicial Conduct Commissioner* above n 17; *Haden v Wells* [2013] NZHC 2946 at [5]-[7]; *Siemer v Stiassny* [2011] NZCA 466 at [8].

(d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it; or

(e) the party claiming costs is entitled to indemnity costs under a contract or deed; or

(f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[57] Most relevant to the present proceedings is para (a), under which indemnity costs are justified if the party has acted vexatiously, frivolously, improperly or unnecessarily. The Court of Appeal in *Bradbury v Westpac Banking Corporation* approved the following list of circumstances in which indemnity costs have been ordered:[21]

(i) The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud.

(ii) Particular misconduct causing loss of time to the Court and to other parties.

(iii) Commencing or continuing a proceeding for some ulterior motive.

(iv) Doing so in willful disregard of known facts or clearly established law.

(v) Making allegations which ought never to have been made or unduly prolonging a case by groundless contentions.[22]

[58] The Courts have awarded indemnity costs against a lay litigant following the successful application for strike-out on the grounds of abuse of process, including indemnity costs against Mr Rabson, in a previous judicial review of a decision of the Commissioner.[23] In the previous decision, indemnity costs were awarded against Mr Rabson because the proceedings were an abuse of process.[24] The Courts have also awarded indemnity costs, where it was "obvious the proceeding was hopeless from the inception".[25]

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21 *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 (CA) at [29].

22 This was noted to be essentially the same as the "hopeless case" test endorsed in Australian jurisprudence by French J in *J-Corp Pty Ltd v Australian Builders Labourers' Federation Union of Workers (WA Branch) (No 2)* (1993) 46 IR 301.

23 *Rabson v Judicial Conduct Commissioner*, above n 11.

24 Above n 11 at [19]-[20].

25 *Siemer v Stiassny* [2011] NZCA 466 at [8].

[59] There appears to be a pattern of complaints and applications by Mr Rabson, which have been unsuccessful and despite his earlier failure in making his complaint against the Commissioner, Mr Rabson has chosen to seek a further judicial review of the Commissioner, with the same issues identified in this judgment as in the former. In this matter, the Commissioner made a concerted effort to advise Mr Rabson of the limits to his jurisdiction, but to no avail. The proceeding was hopeless from the outset. For these reasons, I am of the view that indemnity costs should be awarded in favour of the Commissioner.

Conclusion

[60] Mr Rabson's proceedings in judicial review is struck out.

[61] The Commissioner is not required to file a Statement of Defence.

[62] The Commissioner is entitled to indemnity costs from the plaintiff.

[63] Counsel for the Commissioner is to file a memorandum detailing the costs of this proceeding.

Cull J

Solicitors:
Meredith Connell, Wellington for respondent

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