IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2016-485-149
[2016] NZHC 2876

UNDER	the Judicature Amendment Act 1972, the New Zealand Bill of Rights Act 1990, and the Declaratory Judgments Act 1908
IN THE MATTER OF	a Judicial Review or Declaratory Relief
BETWEEN	MALCOLM EDWARD RABSON Applicant
AND	ATTORNEY-GENERAL Respondent

On papers

Judgment: 30 November 2016

JUDGMENT OF ELLIS J

I direct that the delivery time of this judgment is
3 pm on the 30th day of November 2016

[1] Mr Rabson has filed judicial review proceedings in relation to an alleged failure by the Attorney-General to notify Cabinet of "the non-compliance with existing law by Supreme Court of New Zealand judges". He says that there was an obligation to do this by virtue of para 4.3 of the Cabinet Manual, which states that the Attorney-General has a responsibility to notify Cabinet of proposals or government actions that do not comply with existing law and to propose how such non-compliance should be remedied. Mr Rabson is concerned in particular with the Supreme Court's decision in *Greer v Smith* which he considers to be in breach of s 28(3) of the Supreme Court Act 2003 (the SCA).[1]

[2] The Attorney-General has applied to strike out the claim on the grounds that it does not disclose any reasonably arguable cause of action. In particular, he says that:

(a) cl 4.3 imposes no obligation on him in relation to the actions of the judiciary;

(b) cl 4.3 does not involve any statutory power or statutory power of decision;

(c) this Court has no jurisdiction to do what Mr Rabson seeks which is, in effect, to review or scrutinise a decision of the Supreme Court and to find that it is wrongly decided; and

(d) the Supreme Court was, in any event, exercising an internal and administrative function which fell within its inherent powers to control its own processes and practices.

[3] In addition, the Attorney-General says that the claim is frivolous and vexatious and an abuse of process.

[4] Mr Rabson agreed that the application could be dealt with on the papers.

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1 *Greer v Smith* [2015] NZSC 196, (2015) 22 PRNZ 785.

Greer v Smith

[5] The Supreme Court's decision in *Greer v Smith* related to a request by Mr Vince Siemer for a review of O'Regan J's refusal to allow him access to certain documents on the Supreme Court record. The Court held that Mr Siemer had no statutory right to seek review of that decision and that s 28 of the SCA did not confer upon the Court a statutory jurisdiction in that regard. It is this aspect of the decision with which Mr Rabson disagrees.

[6] As I have said, the decision prompted Mr Rabson to ask the Attorney-General to notify Cabinet of the alleged "non-compliance" by the Court with s 28. The Attorney-General did not do so. These proceedings followed.

Strike out

[7] High Court Rule 15.1(1) provides that the court may strike out all or part of a proceeding if it discloses no reasonably arguable cause of action, is frivolous, vexatious or an abuse of process. The relevant principles are well settled. I do not propose to set them out here.[2]

Discussion

[8] In my view the claim must be struck out, for the reasons which follow.

[9] First, the Cabinet Manual is a guide to central government decision making for Ministers, their offices, and those working within government. Its focus is, by definition, on the executive branch of government. Although the Manual is undoubtedly authoritative, its function is informative, rather than directive. In other words it merely records pre-existing constitutional arrangements (and may be amended as these develop). It is not a primary source of constitutional law or convention. For that reason it is not, and never could be, independently justiciable.[3]

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2 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 264; confirmed in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

3 Whether or not some of the conventions recorded in it might be justiciable is a different (and no doubt difficult) question.

[10] But even if I am wrong in that, para 4.3 does not mean what Mr Rabson says it does. It forms part of a wider chapter entitled "Ministers and the Law", the first part of which is concerned with outlining the role of the Attorney-General within Cabinet. Thus the paragraph is, quite explicitly, concerned with the Attorney-General's relationship with the executive branch of government, and his responsibility (as the senior law officer of the Crown) for ensuring that executive action is within the law.

[11] As chapter 4 goes on to make clear, the relationship between the Attorney-General and the judiciary is quite different. It is founded on, and inherently respectful of, the separation of powers. So while executive action may potentially be subject to judicial control (through the mechanism of judicial review) judicial action is not subject to control by the executive. Thus, the Manual goes on to say:

> The Attorney-General is the link between the judiciary and executive government. The Attorney-General recommends the appointment of judges and has an important role in defending the judiciary by answering improper and unfair public criticism, and discouraging ministerial colleagues from criticising judges and their decisions.

[12] Accordingly Mr Rabson's interpretation of para 4.3 is neither borne out by the wording of the paragraph itself nor the constitutional principles underlying it. The alleged obligation upon which his claim is based does not and, for so long as our current constitutional arrangements continue to pertain, could not, exist.

[13] Next, it is clear beyond doubt that Mr Rabson's claim is squarely concerned with the merits of the Supreme Court's decision in *Greer*. I consider that the Attorney-General is correct when he says that the High Court lacks jurisdiction to do what Mr Rabson seeks, which is effectively to find that that decision is wrong in law.[4]

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[4] In *Rabson v Registrar of the Supreme* Court [2015] NZHC 709 this Court said at [27] (citing the statement of Lord Diplock *In Re Racal Communications Ltd* [1981] AC 374 (HL) at 384): "Judicial review is available as a remedy for mistakes of law by inferior courts and tribunals only. Mistakes of law made by Judges of the High Court acting in their capacity as such can be corrected only by means of appeal to an appellate court." See also *Siemer v Registrar of the Supreme Court* [2014] NZHC 1179 at [11].

[14] Lastly, the reality is that these proceedings are seeking by a side-wind to re-litigate a matter that has already been determined against Mr Siemer. The decision in *Rabson v Judicial Conduct Commissioner* is on point. There, Brown J struck out proceedings brought by Mr Rabson against the Judicial Conduct Commissioner finding they were an attempt to get around the effect of another Court decision (also involving Mr Siemer) which had effectively determined the same issue.[5] His Honour stated:[6]

> Although the standard of proof on an applicant is high, where a Court can be certain that a cause of action cannot succeed or is being used as a method to get around the effect of other Court determinations which have effectively settled the same issue, the [abuse of process] jurisdiction may be invoked.
>
> In my view the present proceeding is a clear example of the latter category of cases. In this proceeding the plaintiff seeks to advance the same contentions that were ruled upon by Ellis J in relation to a proposed proceeding in terms almost identical to the plaintiff's statement of claim.
>
> The only difference of any consequence is the second prayer for relief where, instead of an order quashing the dismissal of Mr Siemer's complaint, the plaintiff seeks a referral to the Attorney-General with a recommendation that the First Defendant receive remedial training concerning his statutory obligations of office. I agree with the first defendant's submission that such an order is not a recognised or available remedy in judicial review proceedings and is itself frivolous and vexatious in nature.

[15] For similar reasons, these proceedings, too, constitute an abuse of process.

Conclusion

[16] The application for judicial review or declaratory relief is both legally untenable and an abuse of process. It is struck out accordingly.

[17] The respondent is entitled to costs. A memorandum may be filed.

"Rebecca Ellis J"

Solicitors: Crown Law, Wellington, for Respondent

Copy to: Mr Rabson

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5 *Rabson v Judicial Conduct Commissioner* [2015] NZHC 714, [2015] NZAR 831.

6 At [14]-[16], footnotes omitted.