IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2015-485-000060
[2015] NZHC 709

UNDER	the Judicature Act 1908, the Supreme Court Act 2003 and the proposed Court Modernisation Act
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 Applicant
	NEW ZEALAND ATTORNEY-GENERAL Proposed Co-Applicant
AND	REGISTRAR OF THE SUPREME COURT First Respondent
	MINISTRY OF JUSTICE Second Respondent

Hearing: 13 April 2015

Counsel: No appearance for Applicant
H M Carrad for First and Second Respondents

Judgment: 15 April 2015

JUDGMENT OF COLLINS J

Summary of judgment

[1] I am striking out Mr Rabson's application for judicial review because his proceeding discloses no reasonably arguable cause of action.

Context

[2] On 21 January 2015 Mr Rabson, who describes himself as a "New Zealand citizen researching the workings of the New Zealand Supreme Court", sent an email to the Registrar of the Supreme Court (the Registrar). In his email Mr Rabson asked:

> Could you advise me by return email how I can most expeditiously obtain copies of the actual applications (not mine) for leave which were filed in the Supreme Court last year (calendar 2014)?

[3] On 21 January 2015 the Registrar responded to Mr Rabson saying:

> There are no regulations which permit a search of this courts files. This is unlike the other Higher Courts which have a specific enabling regulation – see Court of Appeal (Access to Court Documents) Rules 2009, by way of example.
>
> Because of this I am unable to make available copies of applications for leave to appeal.
>
> You will find a list of all applications accepted for filing and a brief summary of the applications for leave on the courts website.
>
> see: http://www.courtsofnz.govt.nz/about/supreme/case-summaries/case-summaries-2014

[4] On 27 January 2015 Mr Rabson commenced judicial review proceedings challenging the lawfulness of the response he received from the Registrar.

[5] On 3 March 2015 the Registrar, and his employer the Ministry of Justice, applied to strike out Mr Rabson's proceeding on the grounds that judicial review was not available because the Registrar was acting under the supervision of the Judges of the Supreme Court and that when the Registrars of the Higher Courts act under the supervision of the Judges of those Courts, their decisions are not amenable to judicial review.

Strike-out principles

[6] Rule 15.1(1)(a) of the High Court Rules provides the High Court with jurisdiction to strike out all or part of a proceeding if it discloses no reasonably arguable cause of action.

[7] The principles governing strike-out applications are well settled:[1]

(1) pleaded facts, whether or not admitted, are assumed to be true;

(2) the cause of action must be so clearly untenable that it cannot possibly succeed;

(3) the jurisdiction is to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material;

(4) the jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument; and

(5) the Court should be particularly slow to strike out a claim in any developing area of the law.

Basis of the strike-out application

[8] The strike-out application is based in part on passages of the Supreme Court's judgment in *Mafart v Television New Zealand Ltd*.[2] That case concerned an application by Television New Zealand Ltd to access a criminal file. The issue was whether the application to access the High Court file was a criminal proceeding or a civil proceeding. In concluding the application was a civil proceeding the Supreme Court said:[3]

> A Court of record is under an obligation to maintain the record of its proceedings... While the maintenance of the record is as a matter of practice carried out by the Registrars of the Court, they are acting for the Court in this ministerial work and under the supervision of the Judges who comprise the Court.
>
> ...

---

1 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

2 *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18.

3 At [18] and [20].

> Once created, the records remain under the control of the Court by reason of its inherent power to control its processes and practices, until disposed of either according to the practice of the Court or under legislation…
>
> (Footnotes omitted).

[9] The submissions of Ms Carrad, counsel for the Registrar and Ministry of Justice can be distilled to two key points.

[10] First, the Registrar administers the Supreme Court's records subject to the supervision of the Judges of that Court who have inherent powers to review decisions of the Registrar.[4]

[11] Second, because judicial review is not available to challenge the actions of the Higher Courts, Mr Rabson's proceeding must be struck out as he is in effect seeking to have the High Court review the actions of the Registrar which can only be reviewed by the Judges of the Supreme Court.

[12] Ms Carrad drew support from the decision of Clifford J in *Siemer v Registrar, Supreme Court*.[5] Mr Siemer sought from the Registrar "copies of legal submissions including applications for leave". That application was declined by the Registrar. In striking out Mr Siemer's application for judicial review Clifford J held:

(1) the Registrar "… act[s] for the [Supreme] Court in maintaining the record of the Court's proceedings… when [he] respond[s] to requests for access to that record";[6] and

(2) judicial review is not available to challenge the actions of the Higher Courts.

[13] Clifford J explained:[7]

> As a matter of principle, therefore, the exercise by the Registrar of such a power, being under the supervision of the Judges who comprise the Court, is

---

4 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [113]; *Siemer v Registrar, Supreme Court* [2014] NZHC 1179 at [27].
5 *Siemer v Registrar, Supreme Court* [2014] NZHC 1179.
6 At [26].
7 At [27].

> to be reviewed by those Judges. In my view, that form of review is best understood as being part of the Supreme Court's inherent supervisory powers relating to matters, such as Mr Siemer's application for access to Court records, properly before it. The Registrar's decision to decline Mr Siemer's request will be reviewable by a Supreme Court Judge in like manner as, for example, the way in which decisions by the Registrar refusing to accept applications for leave to appeal are reviewed.

[14] Mr Rabson's submissions rely in part upon ss 6 and 27(2) of the New Zealand Bill of Rights Act 1990 (NZBORA).

[15] Section 27(2) of the NZBORA states:

> **27 Right to justice**
>
> ...
>
> (2) 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.
>
> ...

[16] Section 6 requires enactments to be interpreted in a way which is consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 in preference to any other meaning.

[17] Mr Rabson also calls in aid the "fundamental maxim … where there is a right there must be a remedy".[8]

Analysis

[18] The outcome of the strike-out application hinges upon the answers to two questions:

> (1) First, when the Registrar declined Mr Rabson's request was he acting under the supervision of the Judges of the Supreme Court?

---

8 Second Memorandum of M E Rabson "Seeking Directed Judgment" at [14].

(2) Second, if so, was the Registrar's decision amenable to judicial review? The answer to this question requires consideration of the effect of s 27(2) of the NZBORA.

[19] At one level it is possible to describe the Registrar's response to Mr Rabson as being a purely administrative decision that is not subject to oversight by the Judges of the Supreme Court. This line of reasoning relies on two strands.

[20] First, there was nothing "judicial" about the Registrar's email to Mr Rabson. The Registrar's response to Mr Rabson could not be compared for example, to a Registrar's decision concerning security for costs on appeal,[9] or in refusing to accept an application for leave to appeal.[10]

[21] Second, the Supreme Court has itself questioned whether the Judges of that Court have the power to review a decision of the Registrar where the applicant does not have a substantive proceeding before the Court. In another of Mr Siemer's many cases before the Supreme Court,[11] the Registrar declined to accept an application for leave to appeal a decision by the Deputy Registrar of the Court of Appeal. The Registrar's decision was made on the basis the Court had no jurisdiction to hear the proposed appeal. The Registrar's decision was reviewed and confirmed, first by a single Judge,[12] and then by five Judges of the Supreme Court.[13] In conducting their review of the Registrar's decision the Judges of the Supreme Court were acting pursuant to s 28(2) and (3) of the Supreme Court Act 2003 which provides:

> **28 Interlocutory orders and directions may be made and given by one Judge**
>
> …
>
> (2) Any permanent Judge of the Supreme Court may review a decision of the Registrar made within the civil jurisdiction of the Court under a power conferred on the Registrar by a rule of Court, and may confirm, modify, or revoke that decision as the Judge thinks fit.

---

9 See for example *Rafiq v MediaWorks TV Ltd* [2014] NZCA 499.

10 See for example *O'Neill v Accident Compensation Corporation* [2012] NZSC 53, (2012) 21 PRNZ 90; *Koyama v New Zealand Law Society* [2014] NZSC 30, (2014) 21 PRNZ 751.

11 *Siemer v Registrar of the Supreme Court* [2015] NZSC 21.

12 *Siemer v Registrar of the Supreme Court* [2015] NZSC 1.

13 *Siemer v Registrar of the Supreme Court* [2015] NZSC 21.

> (3) The Judges of the Supreme Court who together have jurisdiction to hear and determine a proceeding may—
>
> (a) discharge or vary an order or direction made or given under subsection (1); or
>
> (b) confirm, modify, or revoke a decision confirmed or modified under subsection (2).

[22] In the second of its decisions the Supreme Court stated:[14]

> It is doubtful whether s 28 (2) and (3) reviews are available in circumstances where an applicant does not have a substantive proceeding before this Court.
>
> However, even assuming a s 28(3) application for review is available in the present circumstances, the application must be dismissed. Glazebrook J was correct to uphold the Registrar's decision not to accept Mr Siemer's application for filing on the basis of lack of jurisdiction.
>
> (Footnotes omitted).

[23] There are two reasons why I have concluded the Registrar was acting under the supervision of the Judges of the Supreme Court when he declined Mr Rabson's request.

[24] First, the statements of the Supreme Court in *Mafart* which I have set out in paragraph [8] of this judgment apply to the circumstances of this case. The records which Mr Rabson wishes to access are maintained by the Registrar who acts for the Supreme Court "under the supervision of the Judges who comprise the Court".

[25] Second, the possible limits to ss 28(2) and (3) of the Supreme Court Act 2003 which I have referred to in paragraph [22] of this judgment are not determinative. The Supreme Court, although it is a court of record,[15] has "inherent powers which are incidental to or ancillary to its jurisdiction…".[16] Those inherent powers may encompass the Judges of the Supreme Court supervising and reviewing the decision of the Registrar which Mr Rabson seeks to challenge.

[26] The reasons why I have also concluded the Registrar's decision was not amenable to judicial review can be stated briefly.

---

14 *Siemer v Registrar of the Supreme Court* [2015] NZSC 21 at [5] and [6].
15 Supreme Court Act 2003, s 6.
16 *Siemer v Solicitor-General* [2013] NZSC 68 at [113].

[27] First, decisions of Judges of the Higher Courts cannot be judicially reviewed. This statement of the law was clearly articulated by Lord Diplock when he said:[17]

> Judicial review is available as a remedy for mistakes of law made 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 …

[28] The reasons for the Higher Courts' immunity from judicial review lies in the fact the High Court of New Zealand has inherited the jurisdiction that was once vested in the superior courts of record of England and Wales.[18] The superior courts of record could not be controlled by prerogative writ or order.[19]

[29] The natural corollary of decisions of the Higher Courts being immune from judicial review is that decisions of the Registrars of those Courts made under the supervision of the Judges of the Higher Courts must also be immune from judicial review in order to avoid judicial review proceedings being used to launch corollary attacks upon decisions of the Judges of the Higher Courts.

[30] Section 27(2) of the NZBORA does not assist Mr Rabson because, as the Court of Appeal made clear in *Nicholls v Registrar of the Court of Appeal*,[20] the Registrar was not acting as a "tribunal or other public authority" when he made the decision which Mr Rabson wishes to challenge. He made his decision on behalf of a Court namely, the Supreme Court.

[31] In addition, Mr Rabson has not been able to point to any right, obligation or interest that is actually protected by law which he seeks to uphold through his application for judicial review. There is no common law right of access to Court documents[21] and, as the Registrar made clear in his email to Mr Rabson on 21 January 2015, there are no statutory instruments which permit a search of the files of

---

17 *In re Racal Communications Ltd* [1981] AC 374 (HL) at 384. See also *Bulmer v Attorney-General* (1998) 12 PRNZ 316 (CA); *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA); H Woolf and others *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, London, 2013) at [19-020].

18 Supreme Court Ordinance 1841 (4 Vic. No. 1), cl 2; Supreme Court Procedure Act (No 24 of 19 Vic, 1855-6), Preamble; Supreme Court Act 1882, s 16; Judicature Act 1908, s 16.

19 *In re Racal Communications Ltd*, above n 17, at 392 per Lord Scarman.

20 *Nicholls v Registrar of the Court of Appeal*, above n 17.

21 *R v Mahanga* [2001] 1 NZLR 641 (CA) at [35].

the Supreme Court. Mr Rabson has no "right" and is therefore unable to pursue a "remedy". This may be a matter for Parliament or the Executive to visit. It is not a matter that is within my power to address.

Conclusion

[32] Mr Rabson's claim for judicial review discloses no reasonably arguable cause of action. It must be struck out.

[33] The Registrar is entitled to costs on a scale 2B basis.

D B Collins J

Solicitors:
Crown Law Office, Wellington for First and Second Respondents