IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2014-485-11155
[2015] NZHC 403

BETWEEN	MALCOLM EDWARD RABSON Plaintiff
AND	REGISTRAR OF THE SUPREME COURT First Defendant
	MINISTRY OF JUSTICE Second Defendant
	THE ATTORNEY-GENERAL Third Defendant

Hearing: 17 November 2014

Appearances: M Rabson appearing in person
K Laurenson for the Defendants

Judgment: 9 March 2015

JUDGMENT OF MALLON J

Introduction

[1] Mr Rabson seeks judicial review of a decision to dismiss a recall application which he made to the Supreme Court. The defendants have applied to strike out the proceeding on the basis that it discloses no reasonable cause of action and is frivolous and vexatious.

The pleading

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

(a) In two decisions the Supreme Court refused Mr Rabson leave to appeal a Court of Appeal decision.

(b) In those decisions the Supreme Court accepted that his appeal had merit but held that there was no miscarriage of justice because Mr Rabson could seek a recall of that judgment from the Court of Appeal.

(c) On 13 August 2014 Mr Rabson applied to the Supreme Court for recall of its two decisions.

(d) A "private and unauthored email from an anonymous Supreme Court email address on 14 August 2014 purported to dismiss the recall application" (the Recall Refusal).

(e) The Recall Refusal was not in proper form, nor transparent and publicly recorded, did not identify any judicial officers involved, and was made or directed by the Registrar of the Supreme Court.

(f) The Registrar of the Supreme Court had an official duty to publicly record the Recall Refusal, including to identify the judges behind the determinations, but failed to do so and this failure is part of a pattern.

(g) The Recall Refusal was based on an error of law and was procedurally improper because it did not comply with the Supreme Court's obligation generally, and the Registrar's obligation specifically, under the common law and under the Public Records Act 2005, to maintain a public record of the Supreme Court's determinations (which includes divulging the identity of the judges who directed the dismissal of the recall application).

[3] Mr Rabson seeks an order directing that the Registrar publicly record the Supreme Court's disposal of the recall application and a direction "advising the New Zealand government of the breaches by the [Registrar] in not publicly recording decisions which disposed of application[s] to the Supreme Court."

The background

[4] The Court of Appeal and Supreme Court decisions referred to in the statement of claim began in the High Court. As reported in the High Court decision, Mr Rabson had been involved in lengthy property-related litigation against his former partner. Arising out of that litigation, Mr Chapman was appointed by court order as a trustee of the Gallagher Rabson Family Trust, and a residential property was vested in him. Also by court order, Mr Chapman was required to offer the property to Mr Rabson at current market value. A dispute then arose between Mr Chapman and Mr Rabson which led to Mr Chapman applying, by way of summary judgment, for an order for vacant possession. The High Court granted Mr Chapman summary judgment.[1]

[5] Mr Rabson lodged an appeal from the High Court decision to the Court of Appeal. Mr Chapman applied to strike out the appeal on the ground that security for costs in respect of the appeal had not been paid. Mr Rabson did not file a notice of opposition nor appear at the hearing of the strike out application. As recorded by the Court of Appeal which heard the strike out application, he had instead filed a document suggesting that he had not been served with the application. The Court of Appeal struck out the appeal. Its reasons were that Mr Rabson had not paid security for costs and that strike out of the appeal was therefore an inevitable consequence; there was affidavit evidence before the Court of Appeal that Mr Rabson had been served with the strike out application and that he was aware of the hearing date; and that as Mr Rabson had since been adjudicated bankrupt and the Official Assignee had abandoned his appeal, he no longer had standing to pursue the appeal.[2]

[6] Mr Rabson then applied to the Supreme Court for leave to appeal against the Court of Appeal's decision. One of Mr Rabson's grounds was that an order striking out the appeal could not be made because the appeal had already been deemed abandoned.[3] Glazebrook J issued a minute adjourning Mr Rabson's leave application. She indicated that, in striking out the appeal, the Court of Appeal may

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1 *Chapman v Rabson* [2012] NZHC 3322, [2013] NZFLR 222.

2 *Rabson v Chapman* [2014] NZCA 158.

3 Mr Rabson had not applied for a hearing date nor filed a case on appeal within the required timeframe. The time for applying for an extension had also passed: Court of Appeal (Civil) Rules 2005, r 43.

have overlooked that Mr Rabson's appeal was already deemed abandoned. The minute suggested that a better course was for Mr Rabson to apply for a recall of the Court of Appeal's judgment.

[7] Mr Rabson then applied for review of Glazebrook J's decision to adjourn his leave application. The Supreme Court declined that application on 14 July 2014, stating that the course suggested to Mr Rabson (that is, to apply to the Court of Appeal for recall) was the sensible course and likely to be the most expeditious.[4] This decision is one of the two Supreme Court decisions referred to in Mr Rabson's statement of claim.[5]

[8] Mr Rabson then applied for recall of the Supreme Court's 14 July 2014 decision. The Supreme Court dismissed that application on 6 August 2014.[6] In doing so the Supreme Court explained why the grounds for recall relied on by Mr Rabson were not a basis for recalling the 14 July 2014 decision. The Court directed that Mr Rabson inform the Registrar by 14 August 2014 whether he intended to apply to the Court of Appeal for recall of its decision striking out his appeal. If he did not do so, the Court advised that it would proceed to make a decision on his application for leave to appeal from the Court of Appeal decision. The 6 August 2014 decision is the second of the two Supreme Court decisions referred to in Mr Rabson's statement of claim.[7]

[9] Mr Rabson then applied to the Supreme Court for recall of its 14 July 2014 and 6 August 2014 decisions. He received an email from the Supreme Court dated 14 August 2014 as follows:[8]

> Dear Mr Rabson
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> The Court has issued the following direction, in response to your application for recall (no.2), filed on 13 August 2014:
>
> "*The application raises no new matters and is dismissed."*
>
> -14 August 2014.

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4 *Rabson v Chapman* [2014] NZSC 90.
5 Referred to at [2](a) and (b) above.
6 *Rabson v Chapman* [2014] NZSC 103.
7 Referred to at [2](a) and (b) above.
8 Referred to at [2](d) above.

Supreme Court
(04) 918 8222

No reasonable cause of action

[10] The claim does not seek to review the Supreme Court's decision to decline to recall their judgments.[9] Rather the claim is directed at the Registrar's actions in failing to record the Supreme Court's decision in accordance with legal requirements. Those requirements are said to arise under the Public Records Act 2005 and the common law.[10]

[11] The immediate difficulty with the claim is that the Registrar acts for the Supreme Court in maintaining the record of that Court's proceedings. In doing so the Registrar acts under the supervision of the Judges who comprise the Supreme Court. If the Registrar's actions can be reviewed, any such review is by that Court and not this one.[11] Mr Rabson's claim must be struck out on this basis as there is no jurisdiction to entertain it.[12]

[12] In any event, to the extent that Mr Rabson is concerned that the decision was conveyed by email (rather than, for example, via a formal minute or judgment) his claim cannot succeed.[13] To the extent that Mr Rabson is concerned to know which judges of the Court made the decision, it is unclear why he regards that information as relevant nor whether he has even made that enquiry of the Registrar. To the extent

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9 This Court has no jurisdiction to review that decision. Judicial review is available against inferior courts but it is not available against the superior courts. Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [22.6.1(1)] citing *Re Racal Communications Limited* [1981] AC 374 (HL) at 384 per Lord Diplock and at 392 per Lord Scarman; *Bulmer v Attorney-General* (1998) 12 PRNZ 316 (CA); Philip A Joseph "Constitutional Law" [2003] NZ Law Review 387 at 420-428. See also *Siemer v Registrar, Supreme Court* [2014] NZHC 1179. See also *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, London 2013) at [3-008].

10 Mr Rabson's submissions do not refer to on any particular provision of the Public Records Act 2005. The most relevant section is s 17. Under that section the judicial branch of Government is required to keep "full and accurate records of its affairs, in accordance with normal, prudent business practice". Mr Rabson does not refer to any specific case law that supports this requirement but relies more generally on the rule of law and the principle of open and transparent justice.

11 See *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18 at [18], applied in *Siemer v Registrar, Supreme Court*, above n 9, at [26] to [28]. Mr Rabson submits that *Mafart* cannot be relied upon because the sole issue for determination in that case was about something else. However that misunderstands the reliance that this Court can place upon the Chief Justice's comments at [18].

12 *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149.

13 *Siemer v New Zealand Court of Appeal* [2014] NZSC 69.

that he is concerned that public accessibility to Supreme Court decisions may be impeded by decisions recorded in this way, I note that this too is a matter for that Court.[14]

[13] For these reasons I am satisfied that Mr Rabson's claim cannot succeed and must be struck out. Given this, it is unnecessary to consider further whether the claim should be struck out as an abuse of process.[15]

Result

[14] The application to strike out the statement of claim is granted. The claim is struck out. Costs should follow the event. Category 2A is appropriate.

Mallon J

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[14] Even without these difficulties, Mr Rabson's claim would be problematic. As to the general right of public access to material constituting the formal record see *Marfart v Television New Zealand Ltd*, above n 11, at [22]. Public accessibility and the principle of open justice do not require that all decisions of a Court are published, nor, if they are to be published, that the form of publication must always take the same form. The Judicature Modernisation Bill proposes to set out requirements as to the publication of judgments. However, even then, publication would not be required where there is "good reason" not to do so. It is proposed that there will be "good reason" where a judgment falls into a category of judgments that are of "limited public value". Mr Rabson has not suggested that there is any particular public value in the decision to dismiss his second application for recall. His concerns are pitched at the more general level of an apparent practice to dismiss some applications by email conveyed by the Registrar.

[15] It was submitted that Mr Rabson was endeavouring to keep the *Chapman v Rabson* litigation on foot when he could have applied to the Court of Appeal to recall its decision. It was also submitted that the issue raised in this proceeding is the same as that raised in another proceeding brought by Mr Rabson.