

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2011-404-3055

BETWEEN FRANCISC CATALIN DELIU
 Plaintiff

AND THE OFFICE OF THE JUDICIAL
 CONDUCT COMMISSIONER
 First Defendant

AND THE DISTRICT COURT OF NEW
 ZEALAND, AT AUCKLAND
 Second Defendant

Hearing: 15 November 2011

Appearances: Plaintiff in person
 G M Illingworth QC - Amicus Curiae
 No appearance by First or Second Defendants (who abide the
 decision)

Judgment: 22 December 2011

JUDGMENT OF BREWER J

*This judgment was delivered by me on 22 December 2011 at 12 noon
pursuant to Rule 11.5 High Court Rules.*

Registrar/Deputy Registrar

SOLICITORS

Amicus Lawyers (Auckland) for Plaintiff
Crown Law (Wellington) for Defendants

COUNSEL

GM Illingworth QC

Introduction

[1] The plaintiff is a barrister and solicitor of this Court.

[2] The first defendant is sued in his office of Judicial Conduct Commissioner pursuant to the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (“the Act”). The functions of the first defendant under the Act are:¹

- (a) to receive complaints about Judges and to deal with the complaints in the manner required by this Act;
- (b) to conduct preliminary examinations of complaints;
- (c) in appropriate cases, to recommend that a Judicial Conduct Panel be appointed to inquire into any matter or matters concerning the conduct of a Judge.

[3] On 14 May 2010, the plaintiff lodged a complaint with the first defendant against a Judge of the District Court. The plaintiff took exception to the way in which the District Court Judge adjourned an application for variation of bail. The complaint has yet to be determined.

[4] The plaintiff claims against the first defendant:

- (i) A writ of mandamus compelling the first defendant to process the plaintiff’s complaints against the District Court Judge in a timely manner; and
- (ii) A declaration that the first defendant has acted unlawfully in failing to process the plaintiff’s complaints against the District Court Judge in a timely manner.

[5] Each defendant has filed an affidavit in the proceeding and each abides the decision of the Court.

[6] Mr Illingworth QC was, on 5 September 2011, appointed amicus curiae to assist the Court.

¹ Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 8.

[7] The case was argued before me on 15 November 2011. In the course of argument the plaintiff withdrew his action against the second defendant.² Accordingly, I can put that matter aside.

The facts

[8] As previously stated, the plaintiff lodged the complaint with the first defendant on 14 May 2010. By email dated 25 May 2010, the first defendant (through C Wren) acknowledged receipt of the complaint and advised:

This matter will be considered by the Commissioner as soon as possible, and he will be in touch with you in due course.

[9] Having heard nothing in the interim, the plaintiff sent the first defendant an email on 24 August 2010:

I have not had any communications from this office to indicate it is doing anything about this file. Indeed, my complaint against [the District Court Judge] has already been languishing for three months – have you even asked his Honour to respond? I have asked the District Court for a copy of the transcript of that day’s events where the Judge would not let me even open my mouth and to date the Registry has also ignored my request (attached). I therefore urge your office to acquire the transcript, if you intend on actually conducting a serious investigation of my complaint in furtherance of your statutory obligations. It appears that complaints against judges in New Zealand are really just for show in that the Court does not give a complainant the evidence he needs and then your office will likely conclude there is insufficient evidence to take a matter further and the beat goes on. The process appears to really be just window dressing to give the pretence of judicial accountability when in reality the government wants no such thing – I hope you prove me wrong.

[10] On 1 September 2010, having had no reply from the first defendant, the plaintiff sent this email to the first defendant:

Dear Sir,

I intend to judicially review all decisions made by your office, inter alia, non-performance of statutory duties and therefore under the Official Information Act 1992, Privacy Act 1993 and s 27 of the New Zealand Bill of Rights Act 1990 I want copies of all files relating to complaints lodged by me against [four named Judges including the District Court Judge complained about on 14 May 2010].

² Which related to the late provision of a transcript of hearings before the District Court Judge upon which the complaint and an amended complaint against the Judge was founded.

[11] Receipt of this email was acknowledged by C Wren who wrote that she had forwarded it to the first defendant.

[12] The first defendant had no further contact with the plaintiff until 19 October 2010 when the plaintiff again wrote to him by email:

Enclosed you will find an amended complaint against [the District Court Judge]. Please note that if your office continues fails to take any action in progressing my complaints I will judicially review your failure. I trust this will not be necessary.

[13] The amended complaint brought into the picture a second hearing before the District Court Judge which had occurred on 21 May 2010. The final paragraph of the amended complaint reads:

I am concerned that since my original May 2010 complaint your office has failed to take any action whatsoever, including at least requiring [the District Court Judge] to answer the complaint, and so I look forward to hearing from you as to progressing these matters with some expediency as is your duty under the Act which governs you.

[14] On 27 October 2010, the plaintiff again wrote by email to the first defendant:

It has now been over a week and I have not even received confirmation that my amended further complaints are being considered. Have you taken any steps to obtain the audio recordings or transcripts in the District Court? These are very serious allegations which you do not at all appear to be taking seriously and this would indicate you are not fulfilling your statutory duties. I look forward to hearing from you.

[15] Later that day the plaintiff telephoned the first defendant's office and spoke to his secretary. As a result the plaintiff wrote by email to the first defendant on 28 October 2010:

I have been advised by your office that [the District Court Judge] responded to my initial complaint. I was not aware of this and it is unfortunate that I have to call your secretary and this is the process by which information is imparted to me as a complainant. I demand a copy of [the District Court Judge's] response under natural justice principles, e.g., perhaps there are inaccuracies or other matters that I want or need to reply to.

Additionally, you have ignored my repeated queries as to whether or not you received the audio recordings and/or transcripts. This causes me concerns that your office is not having a serious investigation and is instead engaging in a window dressing exercise where you simply have adopted a process whereby you accept the judge's word over any complainant's and thus there

is the appearance of judicial accountability in New Zealand when the reality is that there is none.

Lastly, this is a Judge who in my submission, inter alia, abused his powers by threatening counsel with imprisonment for lodging a complaint against him. This is something that would be expected in a third world country not New Zealand which just yesterday was hailed by Transparency International as being the least corrupt country in the world. Of course, if offices such as yours cover up corruption that would explain those high marks – see no evil, hear no evil. I intend to sue the government for various breaches by the judicial branch and intend to join the JCC in the proceedings because your processes I believe simply protect judicial wrongdoing.

[16] The plaintiff had a number of dealings with the second defendant in an effort to obtain the transcripts he wanted. On 5 November 2010, he forwarded to the first defendant an email from the second defendant. He wrote:

It would appear to me that the District Court is denying me evidence in support of my complaints, but no doubt you as an impartial arbiter of the issues can contact them and get a copy as part of your investigation. I trust you will attend to this as surely a judge who is wrongfully threatening to put individuals in jail because they had the audacity to complain against said judge would be something that is bad for democracy. I look forward to hearing from you.

[17] By letter dated 9 November 2010 the first defendant replied to the email of 5 November 2010. The first defendant interpreted the plaintiff's email as being a request for the first defendant to assist the plaintiff in obtaining the transcripts from the second defendant. He declined to do so:

But it is a different thing for me to act as an agent for a complainant, to obtain and pass on materials, to assist someone in the compilation of a complaint. I do not consider that is within the scope of my authority. Moreover, I think that it is important, as a matter of principle, that the Commissioner stand at some distance from both complainants and Judges, in order to be able to carry out his or her duties in an evidently impartial manner.

[18] The first defendant finished his letter to the plaintiff as follows:

As to the substantive complaint that you lodged on 14 May, as augmented by your letter of 19 October, I am still considering what course I should properly take. I do have a large workload, but I will seek to give your complaint its due measure of priority.

[19] The next time the first defendant corresponded with the plaintiff appears to have been by letter sent on 2 February 2011 (which I infer related principally to other

complaints) in which the first defendant said that he would be writing to the plaintiff about his complaint about the District Court Judge. He did so by letter dated 4 February 2011. The relevant part of that letter reads:

I know that you wish to see the reply that this Office has received from [the District Court Judge] to the complaint that you submitted on 14 May last year. I have considered the terms of the Judge's letter, and I think you should see the whole of the text. A copy of the letter is attached.

My Office is also following up on the question of the availability of the transcripts of hearings in which you were involved – with, separately, [the District Court Judge and another District Court Judge]. Of particular interest is the question whether there has been any restriction placed upon the access that third parties may have to those transcripts. I hope to be in touch with you about that shortly.

Reverting to the attached letter from [the District Court Judge], please let me know whether its terms affect your approach to the complaint in any way. I would, in any case, like to have your comments on its contents.

[20] The attached letter from the District Court Judge was dated 15 June 2010. In other words, one month after the complaint was made and nearly eight months prior to it being sent to the plaintiff by the first defendant.

[21] The plaintiff did not respond to the invitation contained in the last paragraph of the first defendant's letter of 4 February 2011.

[22] On 25 May 2011, having heard nothing further from the first defendant, the plaintiff filed these proceedings.

[23] By email dated 5 July 2011 the plaintiff, having by then received from the second defendant the transcripts of the relevant hearings, wrote to the first defendant finalising his complaint against the District Court Judge.

Explanations by the first defendant

[24] Following the issuing of proceedings by the plaintiff, the first defendant wrote to the plaintiff by letter dated 12 July 2011. Relevant passages are:

3. The delay is one for which I must apologise. I am keenly aware that the Act under which I operate says (in s 14(4)) that "the Commissioner must deal with a complaint as soon as practicable

after receiving it". The problem in this case, and many other instances, arises over the use of the word "practicable". It is my own wish to give proper effect to the statutory mandate, but I am hampered by two things – the volume and complexity of complaints, and the comparative paucity of resources with which to deal with them.

4. Volume and complexity: As you may see from the Commissioner's annual report to the Attorney-General for the year ended 31 July 2010, there were some 286 complaints to be considered during the course of the past year (including 63 complaints in prior years). This year the number of complaints will be somewhat lower, but it will include 138 carried over from that past year. The workload is thus heavy. Some complaints may be dealt with comparatively readily, but others are complex and take weeks, if not months, of work.
5. Resources: The resources at my disposal are slender. There are two part-time employees provided by the Ministry of Justice. I have some limited resources to engage young solicitors for research purposes. But only I can conclude and issue decisions, as required by the Act. Last week a Deputy Judicial Conduct Commissioner was appointed, Mr Alan Ritchie. He may act in the Commissioner's name, but only when he has a conflict of interest, is absent or is incapacitated. In that latter regard, I have, earlier this year (well before Mr Ritchie's appointment), undergone major surgery. My recovery has been taxing.
6. This may give some background to the delay in dealing with some of your complaints. I regret the delays greatly. I do seek to overcome the backlog, but that task is difficult, given the combination of factors I have mentioned in the two preceding paragraphs.
- ...
8. I am now working at the task of giving you a substantive response to the complaint that is referred to in the proceedings.

[25] A copy of that letter was attached by the first defendant as exhibit "A" to his affidavit filed in these proceedings and dated 6 October 2011. A copy of his annual report for 2010/2011 is exhibit "B". It was presented to Parliament on 23 September 2011. The first defendant deposes in his affidavit:

8. When seeking to overhaul the backlog of complaints, my practice is to attempt to deal with those complaints in the order in which they were received. But that can be displaced by special factors. Such factors can include the urgency of particular cases (most evident, for example, in cases before the Family Court, where a mother or father, in real distress, believes that she or he has lost their children, perhaps forever, through a process that is perceived as wholly unfair). Other cases are inherently significant and require a degree of urgency, by their nature. An example of this arose from the three complaints

concerning the conduct of Justice Wilson. Those complaints took up a disproportionate amount of my time last year.

9. Factors such as these have meant that I have not accorded as much priority to the plaintiff's complaint as he, or I, would have wished. I do regret that that is so.
10. **It is true that in the letter which I wrote to the plaintiff on 12 July, I said that I was working on the task of giving him a substantive response to the complaint concerned here. But at that stage, the shape that the proceedings would take was not clear. And, having taken advice, it seemed appropriate not to produce a hurried decision, under the shadow of litigation, where the allegations to be made were not yet clearly defined. I have now read the plaintiff's affidavit, however, and can see no impediment (apart from the general pressure of work to which I have referred) to my proceeding to conclude my investigation and to complete and issue my decision.**
11. **If the Court considers that I should act in that way, then I am in its hands. I would prefer not to have to observe a fixed time limit – as this complaint is one of many which have strong claims on my time. But I will give it due priority, and will make every effort to comply with any requirements which the Court may consider appropriate.**
- ...
13. I conduct most of my work as Judicial Conduct Commissioner from my office at Minter Ellison Rudd Watts.³ That is because there is no space for me at the Commission's offices. There is one part-time manager and one part-time assistant who work there. There is no space for anyone else.

[My emphasis]

[26] The following matters appear in the first defendant's annual report for 2010/2011 annexed to his affidavit:

7. The Commissioner's role under the Act is to receive, assess and categorise complaints about the conduct of Judges.
8. The procedure generally adopted by the Commissioner, following the receipt of a complaint about the conduct of a Judge, is to notify the Judge of the complaint, and to seek any comment which the Judge may wish to make. The Commissioner can obtain any Court documents, including transcripts of hearings, and can listen to any sound recordings. The Commissioner may also make such other enquiries as the Commissioner considers appropriate.

...

³ Earlier, the first defendant deposed that he has an unpaid mentor role at that firm.

18. During the year from 1 August 2010 to 31 July 2011, the Commissioner has taken the following decisions:

- (a) *No further action:* The Commissioner decided to take no further action in respect of 20 complaints. This was done using the power conferred by a recent amendment to the Act: Section 15A.
- (b) *Dismissal:* The Commissioner dismissed 140 complaints during the year upon one or more of the grounds set out in section 16(1) of the Act.

The most common ground for the dismissal of complaints occurred where, essentially, the complainant called into question the validity of a decision made by a Judge. Section 8(2) of the Act provides that it is not a function of the Commissioner to challenge or call into question the legality or correctness of any judgment or other decision made by a Judge in relation to any legal proceedings. The proper avenue for that is by way of appeal or application for judicial review. The Commissioner's jurisdiction extends to issues of judicial conduct and not to judicial decisions as such.

Other grounds for the dismissal of complaints were varied and included these: that they were frivolous, vexatious or not in good faith; that the complaint had no bearing on judicial functions; that the subject-matter of the complaint was trivial; that the person who was the subject of the complaint was no longer a Judge.

- (c) *Reference to Head of Bench:* 4 complaints were referred by the Commissioner to the relevant Heads of Bench, pursuant to section 17(1) of the Act. It is then for the Head of Bench then to determine how best to deal with matters, so far as the Judge complained of is concerned.
- (d) *Recommendation as to a judicial conduct panel:* No recommendation was made in the past year, pursuant to section 18(1) of the Act, that a judicial conduct panel be appointed to enquire into matters concerning the alleged conduct of a Judge.
- (e) *Withdrawal:* 9 complaints were withdrawn by the respective complainants, following consideration of material provided by the Commissioner during the course of the preliminary examination.

...

20. Of the 146 unfinalised complaints in 2010/2011, 5 remain deferred pending the conclusion of relevant Court proceedings. The Act authorises the Commissioner, following consultation with the Head of Bench, to defer dealing with a complaint pending the outcome of the relevant proceedings or the conclusion of an appeal.

...

26. ... The number of complaints dealt with and determined during the past year, 173, is higher than in any previous year. But that consideration is outweighed in significance by the increased number of complaints, 146, which had not been finalised by 31 July this year. On any basis, that latter figure is much too high.
27. The overall number of complaints facing this office thus continues to increase. There is also a significant increase in the complexity of many complaints, and thus in the time required to deal with them. Some complaints are comparatively easy to analyse and respond to. But an increasing number require the Commissioner to spend a large amount of time in investigating, considering, and evolving a decision. And while those more complex cases are being dealt with, other complaints keep building up.
28. The position is due to, and is exacerbated by, a continuing paucity of resources. The present level of resources – especially people, but also premises and equipment – is increasingly inadequate for the task in hand. This is a serious issue, detrimentally affecting the effectiveness of the office.
29. I referred to this issue in last year’s annual report, and said that it needed to be addressed and resolved during the course of the reporting year that has now ended.
30. In fact, the issue has not been resolved. But productive discussions are being held with the administering authority, the Ministry of Justice. I am hopeful that these will result, soon, in the provision of suitably qualified people to assist, along with related facilities such as further office space. And if that hope is realised, then it should result in an effective reduction in the troublesome accumulation of complaints.

[27] The date of this report is 15 September 2011.

Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004

[28] The Act came into force on 19 May 2004. It is the first statute of its kind to be enacted in New Zealand. For centuries, complaints about Judges were dealt with by the Heads of the Benches concerned. It is common ground that when the Act was passed and the first Commissioner appointed, it was not expected that he would have to deal with other than a very small number of complaints. However, “if you build it [they] will come”.⁴

⁴ From the movie “Field of Dreams”.

[29] Section 4 of the Act provides:

The purpose of this Act is to enhance public confidence in, and to protect the impartiality and integrity of, the judicial system by—

- (a) providing a robust investigation process to enable informed decisions to be made about the removal of Judges from office;
- (b) establishing an office for the receipt and assessment of complaints about the conduct of Judges;
- (c) providing a fair process that recognises and protects the requirements of judicial independence and natural justice.

[30] The functions of the Commissioner have been set out at [2] above.

[31] The heart of this case is the interpretation of s 14:

14 Commissioner must acknowledge complaint and deal with it promptly

- (1) Without delay after receiving a complaint, the Commissioner must—
 - (a) send a written acknowledgement to the complainant (if any); and
 - (b) send to the Judge who is the subject of the complaint a written notification of the complaint.
- (2) The Commissioner may send a copy of the complaint to the Judge.
- (3) The Judge is entitled to request and receive a copy of the complaint.
- (4) *The Commissioner must deal with a complaint as soon as practicable after receiving it.*

[My emphasis]

[32] Section 15 of the Act requires the Commissioner to conduct a preliminary examination of each complaint and form an opinion as to whether:

- (a) there are any grounds for exercising his or her power under section 15A to take no further action in respect of the complaint; or
- (b) there are any grounds for dismissing the complaint under section 16; or
- (c) the subject matter of the complaint, if substantiated, could warrant referral of the complaint to the Head of Bench under section 17; or

- (d) the subject matter of the complaint, if substantiated, could warrant consideration of the removal of the Judge from office by way of a recommendation under section 18.

[33] Having completed the preliminary examination and reached his opinion, the Commissioner must give effect to that opinion.

Mandamus and declaration

[34] Mandamus is a remedy for wrongful public inaction. An applicant may apply to the Court to compel a person, inferior court or tribunal to perform a public duty where there has been a wrongful failure to discharge the duty. The learned authors of *Sim's Court Practice* provide a useful summary of the principles that guide the exercise of the Court's discretion when considering the prerogative remedy of mandamus:⁵

- (1) The applicant must have the legal right to the performance of some duty of a public and not merely a private character ...
- (2) There must be no other effective lawful method of enforcing the right ... However the Crown Proceedings Act 1950 [per s 35(5)] does not limit the discretion of the court to grant mandamus, notwithstanding that by reason of the Act some further or other remedy is available ...
- (3) The court must be satisfied that the remedy by mandamus will be practically effective to secure the object aimed at ...
- (4) There must have been a demand made upon the person or body on whom the duty sought to be performed is incumbent, and a neglect and refusal by such person or body to perform it ...
- (5) The application must be to compel the performance of some duty which has not been done; it must not be to order the undoing of an act which has been done ...
- (6) The application must be made in the proper time; it must not have been delayed too long; neither on the other hand must it be made prematurely ...
- (7) The Court must be satisfied as to the propriety of the motives of the applicant.

⁵ *Sim's Court Practice* (online looseleaf ed, LexisNexis) at [HCRPart30.6] (citations omitted).

[35] A declaration, or declaratory order, is a formal statement by a Court of the existence or non-existence of a legal state of affairs or rights of the parties. It is to be contrasted with a coercive remedy, which can be enforced by the Courts. It is a standalone remedy but can be supplemented by other remedies also. The non-coercive nature of a declaratory order means that, in appropriate cases, there is jurisdiction for such an order to be made against the Crown.⁶

[36] Pursuant to ss 6 and 7 of the Judicature Amendment Act 1972, I treat the plaintiff's application as though it were an application for review, with the consequences which follow from that.⁷

The plaintiff's submissions

[37] The plaintiff submits that the first defendant operates within a clear statutory framework and has clear statutory duties. In particular, he points to s 14 which is entitled "Commissioner must acknowledge complaint and deal with it promptly". Subsection (4) provides specifically that the first defendant "must deal with a complaint as soon as practicable after receiving it".

[38] The plaintiff makes four submissions in regard to the first defendant's delay in processing his complaint against the District Court Judge:

- A. The first defendant has unduly delayed the processing of the complaint which requires minimal investigation since everything is documented and itself concerns literally issues that arose in the course of a few minutes so thus is not extravagantly complex in nature.
- B. Further, he for many months, refused to provide the plaintiff with a copy of the judge's reply and this is juxtaposed with his immediately providing the judge with a copy of the complaint, this tends to show preferential treatment (indeed, no response from the Judge of the further heads of complaint has ever been provided).
- C. Furthermore, he has refused to obtain a copy of the transcript even though the statute clearly provides that as an appropriate course and in so neglecting to do he used the clearly untenable excuse that it would somehow make him appear partial.

⁶ See s 17(1)(a) of the Crown Proceedings Act 1950.

⁷ See *Brigham's Creek Farms Ltd v New Zealand Milk Board* [1974] 1 NZLR 147 (SC) at 150.

- D. Moreover, it was only after being served with the present proceedings that the first defendant bothered to at all try and explain the inexorable delay. Though he points to health and limited resources that is, with respect, not the plaintiff's problem. If the first defendant feels he is unable for any reason to fulfil his duties under the statute then he needs to resign, transfer files to his Deputy, petition Parliament for better funding or such other actions as necessary to fulfil his statutory mandate. If he is unable, or unwilling, to do so then this is a case that cries out for an appropriate declaration from this Court with its inherent supervisory jurisdiction.

[39] The plaintiff points to the recent Supreme Court decision in *Attorney-General v Chapman*⁸ in which the liability of the Crown for actions of the judiciary is discussed. The Court's finding that there was no liability in the particular circumstances was based partly on the existence of alternative remedies to redress judicial misconduct, which of course includes the regime contained in the Act.

[40] In response to the affidavit of the first defendant, the plaintiff submits:

39. Even now, a-year-and-a-half on into what is really a complaint where the facts are not in dispute and all the required evidence could have been obtained in one day from the second defendant, the first defendant still asks not to be bound by any timeframe this Court might impose. With due respect, at what point do the terms "promptly" and "as soon as practicable" become devoid of meaning and purpose?

[41] The plaintiff concludes that, regardless of fault, the first defendant has not handled the plaintiff's complaint in a fair and just manner. Justification for an extraordinary remedy or such other remedies as deemed fit on judicial review is made out.

The first defendant's position

[42] The first defendant's explanation for his failure to deal with the plaintiff's complaints centres around a lack of resources. He has made his views on resourcing apparent in his annual report. I am not in a position to assess whether or not he is properly resourced for his task or whether he might make better use of the resources he has. But I am left with the image of an official who is willing to carry out his

⁸ *Attorney-General v Chapman* [2011] NZSC 110 at [193]–[195].

functions, who regrets not having answered the plaintiff's complaints, but who feels that he has been unable to do so because of the resourcing situation.

[43] The plaintiff submits that this is not his problem. Parliament has enacted a statute, it provides him with an avenue for making complaints, and there is an official with the function of dealing with it as soon as practicable after receiving it. He submits that the first defendant has failed in his duty to the plaintiff and he seeks a remedy from this Court accordingly.

Decision

[44] It is clear to me that the Act is not working as Parliament intended. Indeed, it could be having the opposite effect. The purpose of the Act is, in part, to enhance public confidence in the judicial system by establishing an office for the receipt and assessment of complaints about the conduct of Judges. Parliament recognised that this purpose would not be achieved unless complaints were assessed promptly.

[45] Section 14 has as its heading that the Commissioner must acknowledge a complaint and deal with it promptly. The meaning of an enactment must be ascertained from its text and in the light of its purpose. The headings to sections may be considered.⁹ The specific requirement in s 14(4), that "the Commissioner must deal with a complaint as soon as practicable after receiving it", should not, in my view, be read as meaning that the Commissioner must deal with a complaint whenever he can get to it.

[46] "Practicable" means "able to be done" and so it is not entirely divorced from the availability of resources. However, the delays in dealing with the plaintiff's complaint and amended complaint can be justified only if "as soon as practicable" is divorced from any flavour of promptness. In my view that is not what Parliament intended.

[47] I find that the delay in dealing with the plaintiff's complaint of 14 May 2010 is a failure by the first defendant to carry out his functions under the Act. He has not

⁹ Interpretation Act 1999, s 5(3).

dealt with the plaintiff's complaint as soon as practicable after receiving it. I accept, of course, that the plaintiff amended the complaint on 19 October 2010 (but that was really an additional complaint) and "finalised" it on 5 July 2011. But it is clear from the first defendant's letter of 12 July 2011 and from his affidavit that the plaintiff's complaint of 14 May 2010 has simply not yet got to the top of the pile; in other words, the first defendant has not yet begun to deal with it to any real extent.

[48] Mandamus is a discretionary remedy. A Judge must consider all of the circumstances before using it to direct a public official to discharge his function in relation to a particular plaintiff. In this case the first defendant is charged with a public duty and I am satisfied that the plaintiff has a legal right to the performance of that duty by way of processing his complaint in a timely manner. The plaintiff has made demand upon the first defendant and, although there has been some response, his complaint has not been dealt with to any great extent.

[49] Nevertheless, in the circumstances of this case, mandamus is not an appropriate remedy.¹⁰ I do not consider that granting the application will be practically effective, in that it will not result in better compliance by the first defendant with his statutory obligations. There are three reasons:

- (a) There has been no refusal by the first defendant to discharge his function. He wants to deal with the plaintiff's complaint, he intends to deal with the plaintiff's complaint, and what is at issue is timeliness.
- (b) The first defendant has deposed to there being a backlog of complaints. He deals with them in the order in which they are received, save for giving priority to cases of exceptional urgency and cases, such as in the Family Court's jurisdiction, where there is great personal anguish on the part of the complainant. If I were to make an order by way of mandamus, it would assist the plaintiff but disadvantage other complainants who might themselves have to apply to the Court in order to "jump the queue".

¹⁰ *Tebbutt v Egg Marketing Board of New South Wales* [1976] 2 NSWLR 179 at 188.

- (c) Although the first defendant acknowledges his failure promptly to deal with the plaintiff's complaints, the plaintiff is not entirely without fault. His response to the first defendant's letter dated 4 February 2011 was to issue these proceedings; he did not, however, respond to the first defendant's invitation to comment on the contents of the District Court Judge's letter.

[50] I therefore decline the application for mandamus.

[51] A prerogative declaratory order is also discretionary. However, it is trite that a Court should not make a declaration without it achieving a purpose. For example, a declaration that an official has acted ultra vires his authority (or, conversely, within his authority) provides a clear signpost for future direction. But in this case, if I were to make a declaration that the failure of the first defendant to deal with the plaintiff's complaints is against the purpose of the Act, constitutes a failure to duly perform his function or is otherwise unlawful, what would that achieve? The first defendant has pointed squarely to a lack of resources. He has raised that matter directly in his annual report. I am not in a position to assess the validity of his views on the sufficiency of the resources supplied to him, but neither am I justified in making declarations which would be empty in the circumstances. In addition, it is not entirely clear that the plaintiff's application would not have progressed sooner had the plaintiff provided a response to the first defendant's letter as requested on 4 February 2011.

[52] I summarise the situation I am faced with as follows:

- (a) There is an Act of Parliament, the Act, which is not being given effect as Parliament intended.
- (b) The application brought by the plaintiff, coupled with the affidavit of the first defendant, demonstrates that there is both a backlog of complaints and that delays are systemic and constitute a failure by the first defendant to fulfil his functions.

- (c) The first defendant puts the blame squarely on a lack of resources. In the absence of evidence which would enable me to take a contrary view, I find that orders by way of mandamus or declaration would be inappropriate.

[53] In my view, the application brought by the plaintiff has revealed a problem which needs to be addressed by the Executive. While I will decline the plaintiff formal relief, I will ensure that this judgment is brought to its attention.

[54] I dismiss the plaintiff's application against the first defendant.

[55] The plaintiff's application against the second defendant was withdrawn orally and for completeness I dismiss it also.

[56] I direct that a copy of this judgment be sent to the Attorney-General and the Minister of Justice.

Costs

[57] The plaintiff, although self-represented, is a practising lawyer and he is entitled to an award of costs against the first defendant. He has made out the basis of his cause of action and it is only that I have decided that the remedies he seeks would serve no real or proper purpose that he is denied relief. I am prepared to allow him costs on a category 2B basis. In accordance with *Brownie Wills v Shrimpton*,¹¹ he cannot claim the costs of instructing or attending upon a client. Disbursements as approved by the Registrar.

[58] Costs in respect of the claim against the second defendant will lie where they fall.

Brewer J

¹¹ *Brownie Wills v Shrimpton* [1998] 2 NZLR 320.