

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA39/2022
[2023] NZCA 659**

BETWEEN	MARTIN MAILLEY Applicant
AND	ANTONY SHAW First Respondent
AND	THE NEW ZEALAND LAW SOCIETY Second Respondent

Court: Cooper P, Gilbert and Katz JJ

Counsel: Applicant in Person
D A Cowan and J E G San Diego for First Respondent
T P Mullins, D A C Bullock and N Sussman for Second Respondent

Judgment: 19 December 2023 at 4.30 pm
(On the papers)

JUDGMENT OF THE COURT

- A The application for special leave to appeal is declined.**
- B Mr Mailley must pay costs to each of the respondents calculated for a standard application in band A, together with usual disbursements.**
-

REASONS OF THE COURT

(Given by Cooper P)

[1] Mr Mailley applies for special leave to appeal from a decision of the High Court, upholding on review a decision of Associate Judge Andrew striking out Mr Mailley’s claim against Mr Shaw and the New Zealand Law Society.¹ The application is the latest step in litigation that has already been described by the Supreme Court as having had a “lengthy and tortuous procedural history”.²

Background³

[2] In 2003, Mr Mailley was charged in Queensland with 11 counts of fraud.⁴ He failed to appear in court, and a warrant was issued for his arrest.⁵ In 2008, Mr Mailley was arrested in New Zealand and faced extradition to Queensland. Mr Mailley fought the extradition in protracted proceedings spanning eight years. Eventually, in 2016 Mr Mailley was extradited to Queensland where he pleaded guilty to fraud and was imprisoned.⁶

[3] While Mr Mailley was fighting the extradition to Queensland, he engaged Mr Shaw as his lawyer for a 12-month period between 2008 and 2009.⁷

[4] The current proceedings began when Mr Mailley became dissatisfied with Mr Shaw. The original statement of claim was dated 2 June 2015, and was followed by five others culminating in the 26 August 2020 statement of claim.⁸ Despite these successive pleadings, the Associate Judge held that the pleading contained “multiple defects”.⁹ Mr Mailley alleged that Mr Shaw charged excessive fees and engaged in misconduct. Between 2010 and 2013, Mr Mailley made three complaints against

¹ *Mailley v Shaw* [2021] NZHC 2359 [Review decision]; and *Mailley v Shaw* [2020] NZHC 3102 [Strike-out decision]. The Review decision was made under s 26P of the Judicature Act 1908 because Mr Mailley’s claim was commenced prior to the enactment of the Senior Courts Act 2016.

² *Mailley v Shaw* [2022] NZSC 93 at [2]. A second applicant, Ms Nutarelli, originally applied for special leave to appeal the Review decision but abandoned her application on 6 May 2022.

³ This summary of facts is based on the detailed chronology of events relevant to the claims (including the procedural history) contained in the Strike-out decision, above n 1, at sch 1.

⁴ Strike-out decision, above n 1, at sch 1, referring to *Mailley v District Court at North Shore* [2016] NZCA 83. At [4] this Court summarised the charges Mr Mailley faced in Australia.

⁵ *Mailley v District Court at North Shore*, above n 4, at [6].

⁶ Strike-out decision, above n 1, at sch 1.

⁷ At sch 1.

⁸ See sch 1, from 15 July 2010 to 26 August 2020.

⁹ At [4].

Mr Shaw to the New Zealand Law Society (NZLS), and the NZLS also carried out an investigation into Mr Shaw on its own motion.¹⁰

[5] The three complaints and the NZLS' own-motion investigation resulted in four NZLS Standards Committee determinations:

- (a) In the first determination, the Standards Committee decided to take no action because the parties had resolved the issues between themselves.¹¹
- (b) In the second determination, the Standards Committee found that:¹²
 - (i) Mr Mailley was trying to resurrect his previous complaint.
 - (ii) Mr Shaw had not breached his professional obligations.
 - (iii) The complaint about fees was over two years old. Under the relevant regulations, a complaint about fees could not be dealt with if it is over two years old unless there are special circumstances.¹³ There were no special circumstances in this case.
- (c) In the third determination, the Standards Committee found that:¹⁴
 - (i) Mr Shaw had not breached his professional obligations.
 - (ii) There was insufficient reason to re-open Mr Mailley's previous complaints.

¹⁰ At sch 1.

¹¹ At sch 1.

¹² At sch 1.

¹³ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 29(a).

¹⁴ Strike-out decision, above n 1, at sch 1.

- (d) In the fourth determination, the Standards Committee again decided to take no further action.¹⁵

High Court proceedings

[6] Mr Mailley commenced proceedings in the High Court against both Mr Shaw and the NZLS.¹⁶

[7] The claims against Mr Shaw were for breach of fiduciary duty, breach of contract, deceit, and negligence.¹⁷ Mr Shaw applied to strike out the proceeding against him under r 15.1 of the High Court Rules 2016 on the basis that it was vexatious and an abuse of process, incapable of success and statute barred.¹⁸ The Associate Judge considered the crucial issue was whether, in assessing the defects in the pleading in combination and overall, the “high threshold” for strike out under r 15.1 had been reached.¹⁹

[8] The claims against the NZLS were for negligence, breach of statutory duty in carrying out its functions under the Lawyers and Conveyancers Act 2006, and public misfeasance.²⁰ The NZLS also applied to strike out the proceeding under r 15.1.²¹ The strike-out application engaged s 272 of the Lawyers and Conveyancers Act, which, in the absence of bad faith, protects the NZLS from criminal or civil liability in respect of actions or omissions in the course of carrying out its functions under the Act.

¹⁵ At sch 1.

¹⁶ At sch 1.

¹⁷ At [53(a)].

¹⁸ At [3].

¹⁹ At [4].

²⁰ At [53(b)].

²¹ At [3].

High Court strike-out decision

Mr Mailley's claims against Mr Shaw

[9] Associate Judge Andrew decided that Mr Mailley's claims against Mr Shaw should be struck out.²² The Associate Judge found that the claims were incapable of success, were frivolous or vexatious, and were an abuse of process.²³

[10] In relation to the claim for breach of fiduciary duty, the Associate Judge found that the alleged breaches did not cause loss,²⁴ did not involve fiduciary duties,²⁵ and/or were not sufficiently particularised.²⁶ The Associate Judge also found that the alleged breaches of contract did not cause loss.²⁷

[11] In relation to the claim for deceit, the Associate Judge found that the alleged breaches were not sufficiently particularised for an allegation of fraud,²⁸ and/or did not cause loss.²⁹ In relation to the claim for negligence, the Associate Judge found that there was no pleaded loss.³⁰

[12] The Associate Judge also found that most of the claims for breach of contract and negligence related to events which occurred more than six years prior to the filing of the first statement of claim and were barred by the Limitation Act 1950.³¹ The Associate Judge found that Mr Mailley was not under any disability at the time that would allow him to bring a claim despite the Limitation Act bar.³²

[13] The Associate Judge accepted that Mr Shaw may have acted inappropriately and that parts of his conduct might be criticised. However, he held that it did not reach the level of establishing any liability.³³

²² At [61]–[115].

²³ At [111]–[112].

²⁴ At [72] and [75]–[77].

²⁵ At [73]–[74].

²⁶ At [78].

²⁷ At [82] and [84].

²⁸ At [89]–[91] and [94].

²⁹ At [93].

³⁰ At [96]–[98].

³¹ At [99]–[100].

³² At [105].

³³ At [94] and [112].

Mr Mailley's claims against the NZLS

[14] Associate Judge Andrew also held that Mr Mailley's claims against the NZLS should be struck out.³⁴

[15] First, he considered s 272 of the Lawyers and Conveyancers Act, which protects the NZLS from civil liability unless it acted in bad faith. He held that Mr Mailley's allegations of bad faith were not sufficiently particularised or substantiated.³⁵

[16] The Associate Judge also found that there was no duty of care upon which to base the claims for negligence and breach of statutory duty.³⁶

[17] In relation to the claim for negligence, the Associate Judge found that the pleadings did not plead any loss.³⁷

[18] In relation to the claim for misfeasance in public office, the Associate Judge found that there was a failure to adequately plead that the NZLS intentionally or recklessly acted unlawfully, or intentionally or recklessly harmed Mr Mailley.³⁸

[19] Finally, the Associate Judge found that the claims for misfeasance in public office and breach of statutory duty were barred by the six-year limitation period.³⁹

High Court review decision

[20] Mr Mailley applied under (the now repealed) s 29P(1) of the Judicature Act 1908 for the Associate Judge's decision to be reviewed by a High Court Judge.

³⁴ At [123]–[145].

³⁵ At [124]–[126], [137]–[139] and [142].

³⁶ At [131], citing *Parker v Legal Services Commissioner* [2015] NZHC 524, [2015] NZAR 637 at [111]; *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA) at [41]; and *Wellington District Law Society v Price Waterhouse* [2002] 2 NZLR 767 (CA).

³⁷ Strike-out decision, above n 1, at [133].

³⁸ At [136].

³⁹ At [143].

[21] Toogood J dealt with the application to review the Associate Judge’s Strike-out decision. He delivered a comprehensive judgment upholding it, with the result that all the claims remained struck out.⁴⁰

High Court leave decision

[22] Mr Mailley then applied to the High Court under s 26P(1AA) of the Judicature Act for leave to appeal the review decision to this Court.

[23] The High Court declined leave on the basis that there was no question of law or fact capable of bona fide and serious argument that could outweigh the cost and delay of having the matters considered by this Court.⁴¹

[24] Mr Mailley now applies to this Court under s 26P(1AA) for special leave to appeal the Review decision to this Court.

Applicant’s submissions

[25] Mr Mailley submits that the High Court made errors of fact and law. His main submissions are that:

- (a) The High Court erred in finding that the alleged breaches caused no loss.
- (b) The High Court erred in finding that the allegations of fraud were not sufficiently particularised or substantiated.
- (c) The High Court erred in finding that the claims were outside the limitation period or that the exceptions to the bar did not apply.
- (d) The High Court erred by applying the wrong threshold for strike-out.
- (e) The High Court erred by dealing with two reviews together.

⁴⁰ Review decision, above n 1, at [130].

⁴¹ *Mailley v Shaw* [2021] NZHC 3433 [Leave decision] at [22]–[26].

Respondents' submissions

[26] Mr Shaw and the NZLS submit that the proposed appeal is not arguable and does not involve issues of sufficient importance to justify the appeal. The NZLS specifically relies on the protection against civil liability in s 272 of the Lawyers and Conveyancers Act.

Discussion

[27] In *Peterson v Lucas* this Court confirmed that the approach to an application for leave under s 26P(1AA) of the Judicature Act was the same as that where an application is made for leave to bring a second appeal. That means that the proposed appeal must raise some question of law or fact capable of bona fide and serious argument, which is of sufficient importance to outweigh the costs and delay of a further appeal.⁴² On such an appeal this Court is not engaged in general error correction — its primary function is “to clarify the law and to determine whether it has been properly construed and applied by the Court below”.⁴³ It is not every error of law that is of such importance as to justify further pursuit of litigation which has already been examined and decided by a court on two occasions.⁴⁴

[28] We consider that Mr Mailley’s proposed appeal does not raise any issues of sufficient importance to outweigh the cost and delay of an appeal, nor does it give this Court an opportunity to clarify any aspect of the law. The proposed appeal merely challenges the High Court’s findings of fact and the application of settled legal principles to those facts.

[29] We need do no more than record the arguments that Mr Mailley wishes to pursue against Mr Shaw on appeal to this Court. The issues raised relate almost exclusively to matters of fact. In the leave decision Toogood J summarised Mr Mailley’s argument before him as a “widespread challenge to almost every instance” in which he had upheld the findings made by the Associate Judge for the

⁴² *Peterson v Lucas* [2013] NZCA 453 at [8]–[9], citing *Sharma v Wati* [2012] NZCA 195, (2012) 21 PRNZ 161 and *Waller v Hider* [1998] 1 NZLR 412 (CA).

⁴³ *Waller v Hider*, above n 42, at 413.

⁴⁴ At 413.

purpose of assessing whether any of Mr Mailley's claims disclosed a reasonably arguable cause of action.⁴⁵ We consider that description was accurate.

[30] Toogood J also said:⁴⁶

[20] There is no merit in the submissions challenging the Associate Judge's findings or mine on limitation issues concerning the claims against Mr Shaw. The Associate Judge decided, on the application of orthodox principles, that the overcharging claims were out of time and barred by statute. Moreover, the Judge's finding that the plaintiffs' pleading did not demonstrate that they had suffered any loss justifying an award of damages was also entirely justified. I held accordingly.

[21] The plaintiffs' claims against Mr Shaw are founded on complaints of overcharging and other misconduct in his representation of Mr Mailley which have been the subject of five separate determinations by Standards Committees constituted under the Lawyers and Conveyancers Act 2006 (LCA). The determinations were considered fully by both Associate Judge Andrew and me in our respective judgments. The plaintiffs' application for leave to appeal contrives to continue their pursuit of a remedy for those grievances, despite being rebuffed on every prior occasion.

[31] The same issues are raised for the purposes of the present application. These are essentially factual issues, and to the extent that a limitation issue was raised, it too was based on factual findings upheld by the High Court in the review decision. We consider Toogood J correctly found they did not warrant a grant of leave to appeal to this Court.

[32] As to the claim against the NZLS, there does not appear to be a serious issue as to the applicability of immunity conferred by s 272 of the Lawyers and Conveyancers Act. Mr Mailley asserts that the NZLS acted in bad faith but no credible basis on which such a claim can be sustained has been advanced in argument. Nor is there a proper pleading on which such a claim might succeed, despite the numerous iterations of the claim.

⁴⁵ Leave decision, above n 41, at [18].

⁴⁶ The reference to "the plaintiffs" (plural) at the end of [21] was a reference to Mr Mailley and Ms Nutarelli, who has not pursued the present application.

Result

[33] The application for special leave to appeal is declined.

[34] Mr Mailley must pay costs to each of the respondents calculated for a standard application in band A, together with usual disbursements.

Solicitors:

Ord Legal, Wellington for First Respondent

LeeSalmonLong, Auckland for Second Respondent