

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA419/2017
[2017] NZCA 505**

BETWEEN CHRISTOPHER JOSEPH O'NEILL
 Applicant

AND KIT TOOGOOD, CECIL HARDING
 CROUCHER AND MATT AMON
 Respondents

Hearing: 30 October 2017

Court: French, Winkelmann and Brown JJ

Counsel: Applicant in person
 S M Earl for Respondent

Judgment: 9 November 2017 at 11.30 am

JUDGMENT OF THE COURT

- A The application for an extension of time is declined.**
**B The applicant must pay the respondents costs for a standard application
 on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Winkelmann J)

[1] Mr O'Neill brought proceedings in the High Court, styled as a "Petition to Call-Back" (the petition proceedings), seeking to recall a judgment of Toogood J in another set of High Court proceedings.¹ The named defendants in the petition proceedings were Toogood J and two registrars, one a court taker at the hearing before Toogood J and the other involved in the management of the court file. Cull J

¹ *O'Neill v Accident Compensation Corporation* [2015] NZHC 2823.

struck out the petition proceedings, finding they disclosed no reasonable cause of action, and were frivolous, vexatious and an abuse of process.²

[2] The time to appeal the strike-out expired on 25 May 2017. On 21 July 2017 Mr O'Neill applied for an extension of time to appeal. The ultimate question when considering whether to grant an extension of time is what the interests of justice require.³ This necessitates an assessment of the circumstances of the case, including:

- (a) the length of the delay;
- (b) the reasons for the delay;
- (c) the conduct of the parties, particularly of the applicant;
- (d) any prejudice or hardship to the respondent or others with a legitimate interest in the outcome;
- (e) the significance of the issues raised by the proposed appeal, both to the parties and generally; and
- (f) in principle, the merits of the proposed appeal.

[3] The respondents oppose the grant of leave. They say the delay is not adequately explained and the appeal is without merit.

[4] In our assessment, the delay is not great and seems largely attributable to procedural confusion. That on its own would not be grounds to decline leave. As to the second ground of opposition, the merits of the proposed appeal, in *Almond v Read* the Supreme Court expressed the need for caution when declining an extension of time predominantly on the merits of the proposed appeal.⁴ The Supreme Court did, however, accept that a lack of merit is likely to be decisive when there is an

² *O'Neill v Toogood* [2017] NZHC 795 at [49].

³ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].

⁴ At [39].

obvious problem with an appeal such as a legally untenable claim or a claim which is an abuse of process.

[5] In this case, we consider that Mr O’Neill’s proposed appeal is so fatally flawed that it could not possibly succeed. Therefore, although the delay has not been great, the application for an extension of time should be declined.

Background

The petition proceedings

[6] Mr O’Neill is seeking to pursue a claim for accident compensation coverage for medical misadventure arising from surgery undertaken in 1995. Proceedings to date relating to this underlying claim have been complex and we do not narrate the full extent of them here. The relevant procedural history begins with Toogood J’s refusal of special leave to appeal a decision from the District Court on a question of law.⁵ There was no right of appeal in respect of that decision.⁶ Mr O’Neill filed the petition proceedings in response to that judgment.

[7] Although it took the form of a statement of claim, the relief sought in the petition proceedings was to “Call-Back” the judgment of Toogood J refusing special leave. Mr O’Neill made a variety of allegations including, as regards the Judge, that he was biased against Mr O’Neill because of something the court taker told Mr O’Neill outside of court, that he was abusive of Mr O’Neill during the hearing in connection with where Mr O’Neill should be seated, that he lied when he said he had read submissions which had not yet reached the court file, and that he had taken actions to “conceal his crimes”. The court taker, Mr Croucher, was alleged to have conspired with the Judge to pervert justice — an allegation seemingly founded on an assumption that he had given secret “evidence” to the Judge out of court. The registrar involved with the management of the file, Mr Amon, was alleged to have concealed evidence. The pleading also included abusive material, for example, the allegations that the Judge was a “criminal and pervert” and that he was not “mentally compitant [sic] to sit on judicial matters”.

⁵ *O’Neill v Accident Compensation Corporation*, above n 1.

⁶ Accident Compensation Act 1972, s 168 (now repealed).

Judgment of Cull J

[8] Cull J found that the claim did not disclose a reasonable cause of action and that it was frivolous, vexatious and an abuse of process. She identified many fatal flaws in the claim including:

- (a) Mr O’Neill pleaded neither a cause of action nor a form of relief.⁷
- (b) Mr O’Neill’s purpose (which he confirmed before us) was to seek a recall of the decision of Toogood J to enable a further hearing to take place.⁸ He had not, however, filed an application under r 11.9 of the High Court Rules 2016 for that purpose, but instead brought proceedings against the three defendants who were not parties to the proceedings that were the subject of Toogood J’s judgment.
- (c) Even if the proceeding were to be construed as an application for judicial review, the High Court does not have jurisdiction to review a decision of its own and the application would therefore also fail.⁹
- (d) The proceedings were frivolous, vexatious and an abuse of process as they allege improper criminal or incompetent conduct on the part of the Judge and the Registry staff, with no proper factual basis.¹⁰

[9] We agree that, as Cull J said, each of these issues presents fatal flaws in the underlying proceeding and that consequently the proposed appeal against the strike-out has no merit. The petition proceedings disclosed no reasonable cause of action, and Mr O’Neill made scurrilous allegations against Toogood J and court staff for which there was no proper factual basis.

[10] We are also satisfied that there is no risk of a miscarriage of justice in this case. Mr O’Neill’s essential complaint was and is that Toogood J did not have Mr O’Neill’s written submissions before he issued his judgment. Mr O’Neill

⁷ *O’Neill v Toogood*, above n 2, at [33].

⁸ At [39].

⁹ At [43].

¹⁰ At [49].

provided us with the written material he says was not before the Judge, including a memorandum and a letter from Fairway Resolution Ltd. Although that written material may not have been before the Judge, it is apparent from the transcript of the hearing that the issues addressed in the memorandum were addressed in Mr O'Neill's oral submissions and were responded to by counsel for the Accident Compensation Corporation. There is therefore also no basis on which the decision could have been recalled.

[11] To conclude on this point, the proposed appeal is both legally untenable and an abuse of process. In those circumstances, the application for an extension of time to bring the appeal is declined.

[12] There is no reason why costs should not follow the event. Mr O'Neill must pay the respondents costs for a standard application on a band A basis and usual disbursements.

Result

[13] The application for an extension of time is declined.

[14] The applicant must pay the respondents costs for a standard application on a band A basis and usual disbursements.

Solicitors:
Meredith Connell, Auckland for Respondents