IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-2478
[2017] NZHC 795

BETWEEN	CHRISTOPHER JOSEPH O'NEILL Plaintiff
AND	KIT TOOGOOD, CECIL HARDING CROUCHER AND MATT AMON Defendants

Hearing: 6 March 2017

Appearances: C J O'Neill in person
C Paterson and K Lawson-Bradshaw for defendants

Judgment: 27 April 2017

JUDGMENT OF CULL J

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[1] The defendants seek to strike out the plaintiff's (Mr O'Neill) "Petition" to "call back" a judgment of Toogood J because the "Petition" discloses no reasonably arguable cause of action, is likely to cause prejudice or delay, is frivolous or vexatious and/or is otherwise an abuse of process of the court. Mr O'Neill opposes this strike-out application.

Factual background

[2] Mr O'Neill has filed a proceeding intituled a "Petition", which is in the nature of a statement of claim, to "call back" the judgment given by Toogood J in *O'Neill v Accident Compensation Corp* (the Decision) on 13 December 2015.[1] In the Decision, the plaintiff's application for special leave to appeal a decision from the District Court on a question of law, pursuant to s 126(1) of the Accident Compensation Act 2001, was declined.

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

[3] The defendants named in the application before this Court are Toogood J, Cecil Croucher and Matthew Amon. The latter two are Deputy Registrars at the Auckland Registry of the High Court. Mr Croucher was the Court Taker at the hearing of the Plaintiff's application for special leave on 11 November 2015. Mr Amon is a Civil Appeals Case Officer.

Defendants' submissions

[4] The defendants submit, first, that the claim discloses no reasonably arguable cause of action, on the grounds that:

(a) The claim does not refer to any cause of action as is required by r 5.17 of the High Court Rules 2016, which states that distinct causes of action "must if possible be stated separately and clearly".

(b) If Mr O'Neill wished to apply to have the decision recalled, he should have filed an application pursuant to r 11.9 before it was entered into the formal record. The defendants submit that even if such an application was made it would have likely been dismissed due to the nature of the claim and that it would essentially have been a substitute for appeal.

(c) Even if this application is considered as one of judicial review it must fail because this Court does not have jurisdiction to review a decision of its own.

(d) Judicial immunity would bar any claim being made against Toogood J in his personal capacity.

(e) Further, the Crown has immunity from civil liability in tort under s 6(5) of the Crown Proceedings Act 1950 for anything done or omitted by any person while discharging any responsibilities of a judicial nature. The Crown also has no liability for alleged breaches of the Bill of Rights Act 1990 by the judiciary.[2]

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2 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 162.

[5] Second, the defendants submit that the claim is likely to cause prejudice or delay and/or is frivolous or vexatious, stating:

(a) Mr O'Neill has made a number of serious and extreme claims against the named defendants', including ones that are clearly scandalous, which have been made entirely without foundation.

(b) The statements made here are of a similar nature to the language of the pleadings in the case of *Van der Kaap v Attorney General*.[3] However, since there is no reasonably arguable cause of action in this case, unlike the Court in *Van der Kaap*, Mr O'Neill should not be given the opportunity to provide a new and redrafted statement of claim to be perused by the Judge in Chambers prior to being served.

[6] Finally, the defendants submit that the claim is an abuse of process because it is a collateral attack on the Decision by Toogood J and an attempt to relitigate the Decision. While the ordinary course for a dissatisfied party would be to appeal, Mr O'Neill has exercised and fully exhausted his appeal rights. The defendants submit that this application is an attempt to challenge the Decision by bringing separate proceedings and is an abuse of process.

[7] The defendants seek that Mr O'Neill's claim be struck out and that costs are awarded on an indemnity basis under r 14.6(4) of the High Court Rules.

Plaintiff's submissions

[8] Mr O'Neill issued the proceeding under "the New Zealand Bill of Rights." Mr O'Neill claims that justice was perverted in the matter before Toogood J by all of the defendants. He seeks relief by having the Court "call back" the Decision and order a fresh hearing.

[9] In summary, Mr O'Neill's claim contains the following allegations:

(a) Against Toogood J:

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[3] *Van der Kaap v Attorney-General* (1996) 10 PRNZ 162 (HC).

(i) he failed to apply the "fair minded lay observer test", verbally abused him, showed bias and ill-will;

(ii) he took evidence from one party only, lied to the plaintiff when saying he had all of the evidence before him when "it was later confirmed by the registry he did not";

(iii) he is not a fit and proper person to hold judicial warrant, is a criminal and a pervert, not mentally competent to sit on judicial matters; and

(iv) he ignored petitions to release the recording of the hearing, and did so to conceal his "crimes and perversions";

(b) Against Mr Croucher:

(i) he conspired with Toogood J to pervert justice, giving evidence in chambers in secret that favoured his "friend" acting as Counsel for the opposing party; and

(ii) such evidence was invented and given to the opposing party.

(c) Against Mr Amon:

(i) he withheld evidence from the Court (a written confession from opposing counsel that he lied to the Court).

[10] In opposing the defendants' submissions, Mr O'Neill further submits that:

(a) the transcript provided by the defendants' Counsel "is bogus and fraudulent";

(b) all authorities relied upon by the defendants are disagreed with and deemed "irrelevant";

(c) Mr O'Neill has made no scandalous or extreme claims and that he disagrees with all of the defendants' characterisations of his claims; and

(d) Mr O'Neill submits that he has a reasonably arguable cause of action and that no other avenue to justice now exists and he is entitled to justice.

[11] In support of this, Mr O'Neill files a number of documents related to the proceedings, including the Decision and correspondence with the Accident Compensation Corporation, the Auckland High Court Registry and the defendants' Counsel.

[12] During the hearing, Mr O'Neill made a further application for an adjournment and that I recuse myself from these proceedings. Mr O'Neill submits that he is entitled to costs.

Issues

[13] The combination of the defendants' application for strike-out and Mr O'Neill's opposition and further applications raise the following issues for determination:

(a) Does Mr O'Neill's proceeding disclose a reasonable arguable cause of action or is it frivolous or vexatious or an abuse of process, justifying a strike-out?

(b) Can this Court recall the November 2015 Decision in this proceeding?

(c) Should I recuse myself from hearing the defendants' application to strike-out?

(d) Is there a basis for an adjournment of the defendants' application?

[14] Before determining each of those issues, the legal principles applying to strike-out and recall of judgment are canvassed in the next section.

Relevant legal principles

Strike-out

[15] Rule 15.1 of the High Court Rules provides:

> **15.1 Dismissing or staying all or part of proceeding**
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> (1) The court may strike out all or part of a pleading if it—
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> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
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> (b) is likely to cause prejudice or delay; or
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> (c) is frivolous or vexatious; or
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> (d) is otherwise an abuse of the process of the court.
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> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
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> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
>
> (4) This rule does not affect the court's inherent jurisdiction

[16] The well-settled principles that apply on a strike out application were summarised by Kós J in *Siemer v Judicial Conduct Commissioner*:[4]

> The jurisdiction is exercised sparingly. Causes of action may be struck out only if so untenable that they cannot succeed. Facts pleaded are treated as true unless self-evidently speculative or false. These principles apply to judicial review as much as to general proceedings.

[17] The established criteria for striking out a cause of action where there is no reasonably arguable cause of action or defence were summarised by the Court of Appeal in *Attorney-General v Prince*[5] and endorsed by the Supreme Court in *Couch v Attorney-General*.[6] The cause of action or defence must be clearly untenable,[7] being "so certainly or clearly bad" that it should be precluded from going forward and the court can be certain that it cannot succeed.[8]

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4 *Siemer v Judicial Conduct Commissioner* [2013] NZHC 1853 at [13].
5 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.
6 *Couch v Attorney-General* [2008] NZSC 45 at [33].
7 *Prince*, above n 5.
8 *Couch*, above n 6.

[18] In *Van der Kaap v Attorney-General* the Court observed that the words "prejudice", "embarrassment" and delay" are to be given a liberal meaning and include proceedings that are both scandalous and irrelevant.[9]

[19] A frivolous proceeding is one that trifles with the court's processes and lacks seriousness.[10] A vexatious proceeding is one that vexes the defendant beyond what is usual in most proceedings. There must be some element of impropriety in the claim, which is often procedural. In *Reekie v Attorney-General* the Supreme Court noted:[11]

> Vexatiousness might be manifested, for instance, by the unreasonable and tendentious conduct of litigation, extreme claims made against other people involved in the case or perhaps a history of unsuccessful proceedings and unmet costs orders.

[20] Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* referred to the power to strike out as:[12]

> . . . the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.

[21] An abuse of process includes a proceeding brought where it is inevitable that a remedy will be refused even if one or more grounds of review are made out.[13]

Recall of judgment

[22] As Mr O'Neill's intention in issuing this proceeding is to "call-back" the Decision, it is appropriate to consider the rules and principles relating to recall of a judgment.

[23] Rule 11.9 of the High Court Rules outlines when a judgment can be recalled:

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9 *Van der* Kaap, above n 3, at 165.
10 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679, at [89].
11 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [39].
12 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 536.
13 *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478 (HC) at 502.

11.9 Recalling judgment

> A Judge may recall a judgment given orally or in writing at any time before a formal record of it is drawn up and sealed.

[24] This rule must be read alongside r 11.11 which determines the process for a judgment to be sealed, dated and served. The rule provides:

11.11 Judgments to be sealed, dated, and served

(1) A Registrar must seal judgments with the seal of the court.

(2) A judgment must be sealed—

(a) in accordance with any direction given by the Judge relating to the sealing of the judgment; or

(b) if no direction is given, at any time after the judgment is given.

(3) Except with the leave of the court, a judgment must not be sealed until any application under rule 11.9 for the recall of the judgment is determined.

(4) A sealed judgment must state—

(a) the date on which the judgment is given; and

(b) *[Revoked]*

(5) A party who has a judgment sealed must immediately serve a sealed copy of it on—

(a) every other party who has given an address for service; and

(b) any other person who, although not a party, is affected by the judgment.

[25] The Court regards the recall of a judgment as a serious step to be taken only in reasonably well identified situations. The leading statement in New Zealand on this issue is that of Wild CJ in *Horowhenua County v Nash (No 2*), where it was stated:[14]

> Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be recalled — first, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

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[14] *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.

[26] This statement has been subsequently applied in numerous cases.[15] The underlying policy behind recalling a judgment is to reconcile the broad ends of justice in relation to the particular case, and the desirability of finality in litigation.[16]

[27] In summary, therefore, there are three primary categories of cases where recall of a judgment has been considered appropriate:

(a) where since the hearing there has been an amendment to a relevant statute, regulation or a new judicial decision of relevance and high authority and such amendment or decision has the potential to materially affect the decision;[17]

(b) where counsel have failed to direct the court's attention to a legislation provision or authoritative decision of plain relevance, for example if that relates to the Court's jurisdiction;[18] and

(c) some other very special reason, which has generally been interpreted narrowly but has included:

(i) where the Judge failed to determine an issue that was properly put to him or misapprehended counsel's submissions;[19]

(ii) where the Judge overlooked a matter, for example that a party had applied to amend the orders it sought or where an application had not reached the Judge before the judgment was delivered;[20] and

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15 See for example, *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 122, [2010] NZLR 76; *Unison Networks Ltd v Commerce Commission* [2007] NZCA 49; and *Erwood v Glasgow Harley* [2007] NZCA 88, (2007) 18 PRNZ 336.

16 *Ashe v Tauranga Marina Society* (1991) 4 PRNZ 89 (HC) at 90.

17 *Rabson v Transparency International New Zealand Inc* [2016] NZCA 26.

18 *Smallbone v London* [2015] NZCA 391, (2015) 22 PRNZ 768.

19 *Brake v Boote* (1991) 4 PRNZ 86 (HC); and *Cynotech Securities Ltd v People Ltd (No 2)* HC Auckland CIV-2008-404-1559, 4 March 2009.

20 *Matua Finance Ltd v Bank of New Zealand* HC Auckland CP490/94, 4 August 1995; and *Greymouth Petroleum Ltd v Solicitor-General* HC Wellington CIV-2009-485-1425, 3 February 2010.

(iii) the judgment has been given without consideration of the interests of an affected person.[21]

[28] It has further been stated that applications which merely seek to relitigate matters already considered or seek to challenge substantive findings of fact and law will not be entertained.[22]

[29] Once a judgment has been sealed then a recall is no longer available and the appropriate process is an appeal only.[23] There are limited circumstances where the Court is able to alter the terms of a judgment after sealing, including:

(a) where a judgment contains a clerical mistake or error arising from an accidental slip or omission or is drawn up so that it does not express what was decided and intended;[24]

(b) where the judgment has been obtained by fraud;[25]

(c) where fresh evidence has been obtained since the hearing of the proceeding and which could not have been discovered sooner and would probably have altered the judgment;[26]

(d) if the order sealing the judgment is properly regarded as a nullity, for example as a result of a procedural irregularity.[27]

[30] Apart from recalling a judgment, the Court does have an inherent power to revisit its decision in exceptional circumstances, when required by the interests of justice. This action was confirmed as being available by the Court of Appeal in the case of *R v Smith* and only in circumstances where a substantial miscarriage of

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21 *McDonald v Simmonds* (1994) 8 PRNZ 12 (HC).
22 *Ngahuia Reihana Whanau Trust v Flight* CA23/03, 26 July 2004; and *Faloon v Commissioner of Inland Revenue* (2006) 22 NZTC 19,832 (HC).
23 *Thomson v Thomson* [1993] NZFLR 315 (HC).
24 High Court Rules 2016, r 11.10.
25 *Ongley v Brdjanovic* [1975] 2 NZLR 242 (SC).
26 *Carson v Fox* [1920] NZLR 3 (SC).
27 *AIC v DE (No 2)* [2013] NZHC 2663.

justice would result if a fundamental error in procedure is not corrected and where there is no alternative effective remedy that is reasonably available.[28]

Analysis

[31] Before turning to each of the issues for determination, it is important to understand the nature of this proceeding. Mr O'Neill has brought this proceeding against the three defendants, who were involved in the 11 November 2015 hearing. The proceeding is intituled as being brought under the "New Zealand Bill of Rights" and "In the matter of a Petition to the Court to call-back a Decision." It has been filed as a civil proceeding, commenced with a Statement of Claim and a Notice of Proceeding under CIV-2016-404-2478.

[32] The Statement of Claim consists of the allegations set out in para [9] above, being 14 serious, scandalous and inflammatory claims against the three defendants, but principally Toogood J, asserting a mix of dishonesty, criminality and conspiracy with 15 "Grounds" repeating the claims, with further allegations comprising either criminal or negligent actions and/or failures on the part of the defendants.

[33] There is no cause of action pleaded, as required by r 5.17 of the High Court Rules and no relief is pleaded.

[34] At the hearing, I gave Mr O'Neill an opportunity to address the Court first, in light of his previous application to the Court for an adjournment. He sought two things:

(a) that I recuse myself, as I could not recall Toogood J's judgment; and

(b) that an adjournment should be granted, to enable Mr O'Neill to call a witness and to enable the full transcript of the hearing before Toogood J to be disclosed and produced.

[35] In his oral submissions, Mr O'Neill clarified that his intention in issuing these proceedings was to recall the Decision of Toogood J, because the Judge did not have Mr O'Neill's submissions either at the hearing of 13 November 2015 or before the

[28] *R v Smith* [2003] 3 NZLR 617 (CA).

Decision was issued. Mr O'Neill explained that he had sent the submissions by post to the High Court on 6 November 2015. He had also sent them to ACC on or about 7 November but ACC's Counsel told the Court at the November hearing that he did not have them. The reason for seeking a recall of the Decision therefore was so that these matters could be rectified. He asked that I recuse myself therefore, as I could not recall Toogood J's judgment.

[36] In addition, Mr O'Neill sought the full transcript of the hearing, because he alleges that the Registrar had a discussion with the Judge prior to the hearing, which predisposed the Judge against Mr O'Neill, before the hearing had started. He made further inflammatory allegations concerning his views about this alleged exchange.

[37] I will now turn to deal with each of the issues arising.

Does the plaintiff's claim disclose a reasonable arguable cause of action in this proceeding or is it frivolous or vexatious or an abuse of process, justifying a strike-out?

[38] This proceeding, being a civil proceeding, not a judicial review proceeding, pleads neither a cause of action nor a form of relief. Mr O'Neill candidly told the Court that the purpose of the proceeding was to "call-back" the Decision of Toogood J, to enable a further hearing to take place.

[39] If Mr O'Neill wished to have the Decision recalled, it was necessary to file an application under r 11.9 of the High Court Rules in the proceeding between Mr O'Neill and the Accident Compensation Corporation under CIV-2015-404-1699. Instead, these proceedings have been issued as fresh proceedings against the three defendants, who were not parties to the proceedings of *O'Neill v Accident Compensation Corp*.[29]

[40] The Statement of Claim contains material that makes scandalous and inflammatory claims against the defendants and does not disclose any arguable cause of action. The only basis given for the allegations of misconduct is that the Judge told Mr O'Neill that he had read all the documents Mr O'Neill filed, when it now transpires that Mr O'Neill's submissions had not reached the Court file before or at

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[29] *O'Neill*, above n 1.

the hearing. This formed the basis for Mr O'Neill to issue these proceedings to enable the Judge to read Mr O'Neill's submissions. The allegations against the Registrar and Court Taker involve Mr O'Neill's view of the conduct of the hearing and discussions that preceded it.

[41] On any view of this Petition proceeding, it is doomed to failure. Causes of action may be struck out where they are so untenable that they cannot succeed.[30] Here there are no causes of action, but pleaded assertions, which are speculative and scandalous. The pleadings do not disclose any arguable or tenable cause of action and should be struck out.

[42] Although not specifically pleaded, the relief contained in the intitulement to "call-back the Decision" is not available in this proceeding. The application would need to have been made under CIV-2015-404-1699 and the defendants are not the appropriate parties to such an application. I am satisfied that there is no tenable cause of action and there is no prospect that this proceeding could succeed.

[43] For completeness, even if this application 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 it would also fail.

[44] I accept the defendants' submission that there are further legal obstacles facing Mr O'Neill, if his claim is against the Judge in his personal capacity and the Court staff, acting in the performance of their duties for the Court. The Judge is exempt from any personal civil liability for actions undertaken in his judicial capacity.[31] Similarly, judicial immunity has been held to extend to the Officers of the Court acting judicially or administratively in connection with the judicial process.[32] Further, s 6(5) of the Crown Proceedings Act 1950 includes any acts or omissions of the Judge, but has also been interpreted broadly to include the acts or omissions of Court staff in performance of their duties for the Court.[33]

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30 *Siemer v Judicial Conduct Commissioner*, above n 4 at [13].
31 *Nakhla v McCarthy* [1978] 1 NZLR 291 (CA); *Gazley v Lord Cooke of Thorndon* [1999] 2 NZLR 668 (CA).
32 *Crispin v Registrar of the District Court* [1986] 2 NZLR 246 (HC) at 252.
33 *Thompson v Attorney-General* [2016] NZCA 215, [2016] 3 NZLR 206, at [41].

[45] In *Attorney-General v Chapman*, the Supreme Court also held that the Crown has no liability for alleged breaches of the Bill of Rights by the judiciary, the substance of which has been claimed by Mr O'Neill against the Judge.[34]

[46] I have also given consideration to the defendants' submissions in respect to whether the proceedings are frivolous or vexatious or the claim is an abuse of process.

[47] It is plain that Mr O'Neill is seeking a recall of the Decision, because his submissions were not received or read by the Judge. There is no substance in his claims of improper or criminal or incompetent conduct. The problem lies in the fact that the submissions, sent by post to the High Court, did not reach the Court file in time.

[48] Mr O'Neill has issued these proceedings in an attempt to recall the Decision, but this is not achievable by the issuing of these proceedings, which are contemptuous and an abuse of process.

[49] I am satisfied that the Court can exercise its jurisdiction to strike-out these pleadings in their entirety, as disclosing no tenable or reasonably arguable cause of action as well as being frivolous, vexatious and an abuse of process.

Can this Court recall the November 2015 Decision in this proceeding?

[50] Having explained that he wished to recall the Decision by issuing this proceeding, Mr O'Neill recognised that I was not in a position to recall the Decision of Toogood J. For this reason, Mr O'Neill sought that I be recused.

[51] As r 11.9 of the High Court Rules makes clear, a Judge may recall a judgment given orally or in writing at any time before the formal record of it is drawn up and sealed. Both r 11.9 and 11.11, dealing with the process for the sealing of judgments, reinforce the fact that a judgment should be recalled by the original Judge. The categories of cases where recall of a judgment has been considered appropriate are set out above. Those are the matters which must be considered by the original Judge, where an application for recall of a judgment is made.

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[34] *Chapman*, above n 2.

[52] It is not open to this Court to exercise such jurisdiction, as the judgment sought to be recalled is from a different proceeding. This is a fresh proceeding with different parties. There is no jurisdiction for this Court to entertain an application for recall, even if such were made appropriately.

Should I recuse myself from hearing the defendants' application to strike-out?

[53] The matter before this Court for determination was a strike-out application. Mr O'Neill's application for recusal was based on his understanding that I could not recall Toogood J's Decision. That is the correct position. I cannot recall Toogood J's Decision. It does not mean, however, that I should recuse myself from hearing the defendants' application. There is no basis for me to recuse myself, as the defendants' application is a strike-out application of the current proceedings, which have no arguable or tenable cause of action and are an abuse of process in the circumstances.

Is there a basis for an adjournment of the defendants' application?

[54] Mr O'Neill had applied for an adjournment of the defendants' strike-out application on 14 February 2017. The two reasons given for the adjournment were that:

(a) the transcript for *O'Neill v Accident Compensation Corp* had not been provided to him.[35] Mr O'Neill claimed that he had been provided with a doctored version with vital evidence removed; and

(b) that he had not received a copy of the defendants' submissions which were due for filing and service on 13 February 2017. These were subsequently received.

[55] At the hearing, the further ground for an adjournment was Mr O'Neill's wish to call a witness, namely the Judicial Conduct Commissioner, to give evidence in this proceeding.

[56] Heath J, in a Minute dated 24 February 2017, was not satisfied that the information available to him at that time was sufficient to require an adjournment of

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35 *O'Neill*, above n 1.

the hearing, but he noted that Mr O'Neill was at liberty to renew his application at this hearing should he consider he is prejudiced on any of the grounds he identified.

[57] In making a renewal of his adjournment application, Mr O'Neill repeated that the transcript of the hearing before Toogood J has been edited and is not complete. He made a complaint to the Judicial Conduct Commissioner on 11 November 2015, that the Judge's comments to him at an early point of the hearing disclosed prejudice against him, which would be reflected in the Decision that was reserved. He described the Judge's reaction to him at the commencement of the hearing, following an alleged discussion between the Registrar and the Judge.

[58] The Judicial Conduct Commissioner received the same allegation and he accessed the audio recording of the hearing. Mr O'Neill provided the Court with a copy of the Judicial Conduct Commissioner's findings in relation to his complaint about Toogood J. The Judicial Conduct Commissioner said of the audio recording:

> [9] That recording serves to confirm that the Judge did no more than to tell you squarely but in measured tone and terms that you should do what court staff directed you to do.
>
> [10] Having done that, the Judge also made it plain that the issue of seating was not a matter of particular importance and it seems he allowed you to remain where you were.
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> [11] He then allowed you to deliver your submissions to the Court without interruption.
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> [12] There is nothing in the judgment issued on 30 November 2015 to suggest bias or prejudice arising from the seating issue. Again, it is expressed in measured and plain terms.
>
> [13] In my opinion the Judge was acting entirely within proper boundaries and speaking to you the way he did at the outset of the hearing.
>
> [14] I am not able to accept that any reasonable reaction to the Judge's comments could be the contemptuous and defamatory assertions you have made in your letter of complaint.

[59] The Judicial Conduct Commissioner was of the opinion that Mr O'Neill's complaint had not been made in good faith and was vexatious. He dismissed Mr O'Neill's complaint.

[60] A transcript of the hearing has been made available, to the Court, to Counsel and to Mr O'Neill. The transcript recording commences at 10.00 am and records the entire interaction between Toogood J, Mr O'Neill and Counsel for ACC.

[61] I am satisfied that Mr O'Neill's concern and allegations about the recording on the transcript prior to the hearing did not justify an adjournment of the defendants' application to strike-out this proceeding. The Judicial Conduct Commissioner has had access to the recording and provides some independent review of the audio transcript of that day.

[62] In respect of Mr O'Neill's request to call evidence, this was a hearing convened to determine the defendants' application to strike-out Mr O'Neill's current proceeding. There was no allocation of time to hear witnesses either in support of Mr O'Neill's claim or in rebuttal. The Court was not being asked to determine the outcome of the proceeding. A strike-out application concerns the facts and causes of action pleaded.

[63] There was no basis upon which an adjournment of the defendants' application could be justified, as this was an interlocutory application for determination on the pleadings. Mr O'Neill's application for adjournment is declined.

Conclusion

[64] Mr O'Neill's proceedings "In the matter of a Petition to the Court to call-back a Decision" is struck out.

[65] The defendants are entitled to costs on a 2B basis. Although the proceeding was an abuse of process, it is plain that Mr O'Neill misunderstood the process for applying for recall of judgment. Costs are therefore awarded on a 2B basis.

[66] Counsel for the defendants is to file and serve a Memorandum with the Registrar for approval.

Cull J