IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA292/2022
[2023] NZCA 388

BETWEEN	IDEAL INVESTMENTS LIMITED Applicant
AND	EARTHQUAKE COMMISSION Respondent

Court:	Cooper P, Goddard and Katz JJ
Counsel:	G D R Shand for Applicant N L Walker and C J Curran for Respondent
Judgment: (On the papers)	24 August 2023 at 11:30 am

JUDGMENT OF THE COURT

A The application for recall is declined.

B The applicant must pay the respondent costs for a standard application on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] Ideal Investments Ltd (Ideal) filed a proceeding against the Earthquake Commission | Toka Tū Ake (EQC) making various claims on its own behalf.[1] It also

[1] The proceeding was subsequently transferred to the High Court by consent: *Ideal Investments Ltd v Earthquake Commission* [2022] NZHC 400 [High Court decision] at [9].

filed an application seeking orders enabling it to bring the same or similar claims in a representative capacity. Associate Judge Lester dismissed that application (the High Court decision).[2]

[2] Pursuant to s 56(3) and (5) of the Senior Courts Act 2016, an appeal can only be brought from an interlocutory decision of the High Court with leave of either the High Court or, if the High Court declines leave, this Court. However, decisions striking out or dismissing the whole or part of a proceeding, claim or defence may be appealed to this Court without leave under s 56(4).

[3] Ideal's application to the High Court for leave to appeal was declined,[3] as was its subsequent application to this Court for leave (the leave decision).[4] Ideal has now filed an application seeking:

(a) recall of the leave decision; and

(b) an extension of time to appeal the High Court decision on the grounds that it has a right of appeal because either:

(i) (contrary to the approach taken by Ideal to date) the High Court decision is not interlocutory in nature; or

(ii) the High Court effectively determined at least part of the proceeding, and Ideal is therefore entitled to appeal the decision pursuant to s 56(4).

The recall application

Legal principles

[4] A judgment, once delivered, must stand for better or worse, subject to appeal. A decision to recall a judgment will only be made in exceptional circumstances.

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2 High Court decision, above n 1.
3 *Ideal Investments Ltd v Earthquake Commission* [2022] NZHC 1079 [High Court leave decision].
4 *Ideal Investments Ltd v Earthquake Commission* [2022] NZCA 641 [Court of Appeal leave decision].

The limited grounds on which a court may recall a decision (other than under the slip rule) are well-established:[5]

(a) 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;

(b) where counsel have failed to direct the court's attention to a legislative provision or authoritative decision of plain relevance; or

(c) where for some other very special reason justice requires that the judgment be recalled.

[5] A recall application cannot be used to relitigate the reasons provided in a leave decision. Nor can it be a means of collateral attack on a decision.[6] A judgment should not be recalled in order to consider a challenge to substantive findings of fact or law, nor to allow a party to recast arguments previously made or advance arguments that could have been raised earlier but were not.[7] Recall applications that do not engage with the established grounds for recall but rather attempt to re-open the merits of the judgment sought to be recalled are an abuse of process and will be dismissed on that basis.[8]

Should the recall application be granted?

[6] With one possible exception (discussed below) Ideal does not engage with (or even expressly refer to) the recognised grounds of recall. Rather, Ideal's primary submission is that the leave decision should be recalled because it "is founded on incorrect evidence and law". Ideal claims that the Court made various factual and legal errors, including by ignoring, misunderstanding or otherwise failing to follow

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5 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633; approved in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 [*Saxmere (No 2)*] at [2].

6 *S (SC 39/2017) v R* [2022] NZSC 7 at [3]; and *Horowhenua County v Nash (No 2)*, above n 5, at 633.

7 *Navaratnam v HG Metal Manufacturing Ltd* [2023] NZCA 10 at [9]; *Nottingham v Real Estate Agents Authority* [2017] NZCA 145 at [9]; and *Wu v Stalix Property Ltd* [2022] NZCA 549 at [7].

8 *Wu v Stalix Property Ltd*, above n 7, at [7]–[8].

relevant case law. In short, Ideal says that this Court should recall the leave decision because, in Ideal's view, it is wrong.

[7] Ideal expands on these various assertions at some length, including repeating a number of arguments that were unsuccessful in the High Court, this Court, or both. With one exception (addressed further below) the grounds advanced do not fall within the recognised categories for recall. Rather, Ideal is seeking to collaterally attack the leave decision by challenging the substantive findings of fact and law made in that decision and taking issue with aspects of this Court's reasoning. As set out above, this is impermissible and inappropriate in a recall application.

[8] The only matter raised by Ideal which could potentially constitute a "very special reason" why justice requires that the leave decision be recalled is its allegation that the panel who delivered the leave decision, Goddard and Katz JJ, were both biased in favour of EQC.

[9] Judges are obliged to sit on any case allocated to them unless grounds for disqualification exist. A judge is disqualified from sitting if in the circumstances there is a real possibility that in the eyes of a fair-minded and fully informed lay observer the Judge may not be impartial in reaching a decision in the case.[9] The question is one of possibility, not probability. However, the possibility of bias must be "real", not "remote".[10] The test is a two-step one requiring consideration of the following:[11]

(a) what are the circumstances relevant to the possible need for recusal because of apparent bias; and

(b) whether those circumstances lead to a reasonable apprehension the judge may not be impartial.

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9 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 [*Saxmere*] at [3] per Blanchard J, [37] per Tipping J, [89] per McGrath J and [127] per Anderson J. See also *Saxmere (No 2)*, above n 5, at [4]; *Minister of Justice v Kim* [2020] NZSC 18, [2020] 1 NZLR 38 at [36]; and *Jones v New Zealand Bloodstock Finance and Leasing Ltd* [2023] NZSC 98 at [12].

10 *Saxmere*, above n 9, at [4] per Blanchard J and [81] per McGrath J, citing *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337 at [7].

11 *Minister of Justice v Kim*, above n 9, at [36].

[10] The circumstances Ideal points to as giving rise to apparent bias are that Goddard and Katz JJ both previously worked at law firms (Chapman Tripp and/or Russell McVeagh) "that represent/represented EQC for many years".

[11] Katz J last worked at Chapman Tripp, as an employed solicitor, 33 years ago. While there she undertook some low-level work (primarily discovery) on at least one EQC file, as either a law clerk or junior solicitor. Katz J was a Russell McVeagh partner from 2003 until her appointment to the High Court Bench eleven years ago. She cannot recall undertaking any work for EQC during her time at Russell McVeagh.

[12] Goddard J was formerly a partner of Chapman Tripp, but left that firm over 23 years ago. Goddard J provided advice to EQC on various matters when he was a partner at Chapman Tripp in the 1990s. When he was in practice as a barrister, after leaving that firm, he advised a number of clients with claims against EQC and acted for parties in proceedings against EQC.[12] To the extent that he has had any involvement in matters relating to EQC over the last 20 years, it has been as counsel for parties with interests adverse to EQC.

[13] Goddard and Katz JJ's associations with the relevant firms are entirely historical. There is no suggestion, or possibility, that they could have had any involvement through their connection to those firms in relation to the subject matter of the present proceeding.

[14] Ideal is required to identify a logical connection between Goddard and Katz JJ's historical connections to the relevant firms and their alleged lack of impartiality in this case.[13] Although it is not entirely clear, we infer that Ideal's argument is that a historical connection between a judge and a law firm will predispose the judge to a favourable outcome for a party that is (or was previously) a client of the relevant firm.

[15] In our view it is both far-fetched and fanciful to suggest that the remote and historical connections outlined above could give rise to a reasonable apprehension of

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12 See for example *Re Earthquake Commission* [2011] 3 NZLR 695 (HC).

13 *Saxmere*, above n 9, at [4] per Blanchard J, and [93] and [111] per McGrath J.

bias. There is simply no basis on which a fair-minded and fully informed lay observer could reasonably apprehend that Goddard and Katz JJ might have abdicated their responsibility to decide the leave application on the merits, and instead simply favoured the interests of a client (or former client) of a law firm they had an association with many years ago. Ideal's submissions do not refer to any cases in which a reasonable apprehension of bias has been found to arise in circumstances remotely similar to the current situation.

[16] Obviously, each case must be assessed on its own merits. Any suggestion, however, that an historical association (as an employee or partner) with a law firm will automatically preclude a judge from presiding over a case involving a party that is a current or former client of that law firm is novel and would be unworkable in practice.

[17] For the reasons outlined, the application to recall the leave decision is entirely devoid of merit and is declined.

Is the High Court decision interlocutory in nature?

[18] Having failed to obtain leave to appeal the High Court decision from either the High Court or this Court, due to the lack of merit of the proposed appeal, Ideal now seeks to pursue an alternative procedural course. It contends, in effect, that it erred in previously seeking leave to appeal, because it is entitled to pursue an appeal as of right. Due to the lapse of time, however, it requires an extension of time to bring such an appeal, which it now seeks.

[19] Section 56 of the Senior Courts Act relevantly provides as follows:

> **56 Jurisdiction**
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> (1) The Court of Appeal may hear and determine appeals—
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> (a) from a judgment, decree, or order of the High Court:
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> …
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> (2) Subsection (1) is subject to subsections (3) and (5) and to rules made under section 148.
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> (3) No appeal, except an appeal under subsection (4), lies from any order or decision of the High Court made on an interlocutory application in

respect of any civil proceeding unless leave to appeal to the Court of Appeal is given by the High Court on application made within 20 working days after the date of that order or decision or within any further time that the High Court may allow.

(4) Any party to any proceedings may appeal without leave to the Court of Appeal against any order or decision of the High Court—

(a) striking out or dismissing the whole or part of a proceeding, claim, or defence; or

(b) granting summary judgment.

(5) If the High Court refuses leave to appeal under subsection (3), the Court of Appeal may grant that leave on application made to the Court of Appeal within 20 working days after the date of the refusal of leave by the High Court.

(6) If leave to appeal under subsection (3) or (5) is refused in respect of an order or a decision of the High Court made on an interlocutory application, nothing in this section prevents any point raised in the application for leave to appeal from being raised in an appeal against the substantive High Court decision.

[20] The term "interlocutory application" is defined in s 4(1) of the Senior Courts Act as follows:

interlocutory application—

(a) means any application to the High Court in any civil proceedings or criminal proceedings, or intended civil proceedings or intended criminal proceedings, for—

(i) an order or a direction relating to a matter of procedure; or

(ii) in the case of civil proceedings, for some relief ancillary to that claimed in a pleading; and

(b) includes an application to review an order made, or a direction given, on any application to which paragraph (a) applies

[21] Ideal argues that its application for representative orders was not an interlocutory application because it did not relate to a matter of procedure or seek some relief ancillary to that claimed in the proceeding.

[22] We reject that submission. EQC, in its submissions in opposition, notes that Ideal itself intituled its application for representative orders as an "*interlocutory application* by plaintiff to sue as representative under rule 4.24" (emphasis added). Ideal maintained the view that the application (and resulting decision) was

interlocutory in nature until it had failed in its leave applications to both the High Court and this Court.

[23] The representative orders application clearly related to a matter of procedure. Rule 4.24 of the High Court Rules 2016 provides a procedural mechanism for a plaintiff to seek orders enabling them to sue in a representative capacity.[14] The order sought is procedural in nature. As EQC noted in its submissions, appellate courts have repeatedly referred to r 4.24 and its equivalents as providing for a "representative procedure".[15]

[24] The High Court decision was interlocutory in nature. The standard (and in our view, correct) approach is for a party to seek leave to appeal against decisions relating to representative orders.[16] Such an approach is also consistent with the conduct of this litigation to date.[17]

Is there an appeal as of right?

[25] Ideal further submits (presumably in the alternative) that there is an appeal as of right because the effect of the High Court decision was to finally dispose of the whole or part of the proceeding.

[26] Mr Shand, counsel for Ideal, recently advanced a similar argument (unsuccessfully) in *Sneesby v Southern Response Earthquake Services Ltd.*[18] In that case Mr Sneesby had also unsuccessfully applied to the High Court for representative orders. Mr Sneesby sought leave from this Court to appeal that decision. Although

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14 The application was made by reference to r 4.24 of the District Court Rules 2014, but was determined under r 4.24 of the High Court Rules 2016 as the proceeding was subsequently transferred to the High Court by consent: see High Court decision, above n 1, at [8]–[9].

15 See *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [4], [21] and [55] per Elias CJ and Anderson J, and [120] and [161] per McGrath, Glazebrook and Arnold JJ; and *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117 at [32]. See also, in the United Kingdom context, *Lloyd v Google LLC* [2021] UKSC 50, [2022] AC 1217 at [8], [23], [33], [47], [65], [67] and [71].

16 See for example *Sneesby v Southern Response Earthquake Services Ltd* [2022] NZHC 2100 at [1] and [6]–[8]; *Smith v Claims Resolution Service Ltd* [2019] NZHC 2738 at [4]; *Simons v ANZ Bank New Zealand Ltd* [2022] NZHC 2842 at [1]–[2] and [6]; *Body Corporate Number DPS 91535 v 3A Composites GmbH* [2022] NZHC 2912 at [1]–[3]; and *Harris v Smith* [2022] NZCA 313 at [7]–[9].

17 High Court leave decision, above n 3, at [3], [5] and [7]; and Court of Appeal leave decision, above n 4, at [13]–[14].

18 See *Sneesby v Southern Response Earthquake Services Ltd* [2023] NZCA 206 at [4]–[8].

Mr Shand acknowledged that the High Court decision did not fall within s 56(4), he submitted that an appeal was nevertheless available as of right because the decision had the effect of finally resolving the substantive proceeding.[19] This Court rejected that submission, stating that "[i]t is clear from s 56(3) that only those decisions identified in s 56(4) may be the subject of an appeal as of right."[20] The Court also reiterated the following observations made by Goddard J in *Dokad Trustees Ltd v Auckland Council*:[21]

> [10] The scheme of s 56 is that appeals as of right are reserved for final determinations in respect of a proceeding. A leave filter applies to appeals from decisions on interlocutory applications in order to avoid delay and unnecessary cost. The underlying assumption is that such decisions are made in the course of a proceeding, and appeal rights should be exercised when the proceeding comes to an end. If a procedural decision has affected the ultimate outcome, that issue can be raised in an appeal against the substantive High Court decision that concludes the proceeding: see s 56(6). I consider that s 56(4) must be interpreted purposively, to apply to decisions that have the effect of bringing to an end the whole of a proceeding. Such a decision is, for the purposes of s 56(4), a decision that dismisses the proceeding.

[27] Those observations are equally apt here. The High Court decision is an interlocutory one that does not give rise to an automatic right of appeal. Ideal's substantive proceeding remains on foot and has not been finally disposed of. Nor does the High Court decision finally determine the rights of potential class members or dispose of any claims they may have. Ideal's application to represent other potential class members has been declined, but any substantive rights those persons may have remain unaffected.

[28] Because we have found that Ideal does not have an appeal as of right, it is unnecessary to deal with its application for an extension of time.

Costs

[29] As the successful party, EQC is entitled to an award of costs. EQC submits that "[g]iven the abusive and unmeritorious nature of the applications, there may be

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19 At [5].
20 At [6] and [8].
21 At [7], quoting *Dokad Trustees Ltd v Auckland Council* [2022] NZCA 177.

grounds for increased or indemnity costs." It seeks leave to file a memorandum on costs following delivery of this judgment.

[30] It is not the practice of this Court to deal separately with costs after determining an application. Any submissions on costs should generally be included in the submissions on the relevant application, absent special reasons justifying a different approach (such as the making of a *Calderbank* offer).[22]

[31] Here, we acknowledge that there may possibly be grounds to seek increased costs, but neither party has addressed that issue in any detail in their submissions. We do not consider that the delay and cost that would result from granting leave to the parties to file further costs submissions is warranted in this case. We therefore propose to award costs on the usual basis.

Result

[32] The application for recall is declined.

[33] The applicant must pay the respondent costs for a standard application on a band A basis with usual disbursements.

Solicitors:
Grant Shand, Auckland for Applicant
Russell McVeagh, Wellington for Respondent

[22] See *Calderbank v Calderbank* [1976] Fam 93 (CA).