IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 59/2021
[2021] NZSC 122

BETWEEN	PETER WILLIAM MAWHINNEY Applicant
AND	AUCKLAND COUNCIL Respondent

Court:	William Young, Glazebrook and Ellen France JJ
Counsel:	Applicant in person K Anderson and L M Van for Respondent
Judgment:	21 September 2021

JUDGMENT OF THE COURT

A The application for leave to amend the application for leave to appeal is dismissed.

B The application for leave to appeal is dismissed.

C The applicant must pay the respondent costs of $2,500.

REASONS

Introduction

[1] The applicant, Mr Mawhinney,[1] and companies associated with him, have been involved in litigation against the respondent, Auckland Council, or one of its predecessors, for some 25 years. The litigation largely arose in the context of endeavours to subdivide some 120 hectares of land in the Waitākere Ranges.

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[1] In some cases, the proceedings have been brought by Mr Mawhinney in his personal capacity and, in others, in his capacity as trustee.

[2] The Council sought an extended order under s 166(4) of the Senior Courts Act 2016 to restrain Mr Mawhinney (in his personal capacity and as trustee) and associated entities from commencing or continuing civil proceedings against it in relation to the Waitākere land without the leave of the High Court. The High Court made an extended order for a five year period commencing in February 2019.[2] Mr Mawhinney appealed from that decision to the Court of Appeal. His appeal was allowed to the extent that the term of the order was reduced to three years.[3] The order accordingly expires in February 2022.

Background

[3] An extended order under s 166(4) may be made "if, in at least 2 proceedings about any matter in any court or tribunal, the Judge considers that the proceedings are or were totally without merit".[4] As the Court of Appeal did, we refer to the two or more proceedings relied on by the Council as the "candidate" proceedings.

[4] The High Court Judge treated the application as applying to proceedings brought by Mr Mawhinney in his own right or in his capacity as trustee and so did not consider proceedings brought by companies associated with Mr Mawhinney. Three candidate proceedings were identified. The Judge concluded that all three were "totally without merit".[5] The statutory threshold having been met, the Judge, in determining that an extended order should be made, identified a range of factors justifying that course. The Judge said these factors were all evident in each of the candidate proceedings and included the following: the fact that despite the history of his litigation, Mr Mawhinney has paid "no mind to forcing the Council to incur further costs" and has "largely failed to pay any costs orders and has been rendered bankrupt twice as a consequence";[6] he "continually brings proceedings about largely the same matters";[7] and, the way in which his proceedings are conducted have "many of the

2 *Auckland Council v Mawhinney* [2019] NZHC 299 (Hinton J) [HC judgment].
3 *Mawhinney v Auckland Council* [2021] NZCA 144 (Brown, Gilbert and Katz JJ) [CA judgment].
4 Senior Courts Act 2016, s 167(2). See also ss 167(4)–(6).
5 HC judgment, above n 2, at [116].
6 At [122].
7 At [123].

hallmarks of what would have been considered a vexatious claim" under the previous regime in s 88B of the Judicature Act 1908.[8]

[5] The Court of Appeal took a different approach to that of the High Court to the considerations relevant to the totally without merit threshold. The Court said that the High Court appeared to have treated factors indicating vexatiousness as relevant to that test. By contrast, the Court of Appeal adopted English jurisprudence and the submissions of the present parties that a proceeding is totally without merit "if it is bound to fail".[9] The Court entered one caveat to that description, noting that it was not engaging with "the proposition … that some proceedings are so manifestly vexatious that they would satisfy the s 167 test notwithstanding that the Court identified some legal or factual basis on which they might nevertheless succeed".[10] The Court considered the "bound to fail" test was met in relation to the candidate proceedings.

[6] In applying the test, the Court of Appeal also took a different view from the High Court on the extent to which the assessment made at the time by the Judges in the candidate proceedings was relevant. The Court said that although it was likely that the court would "carefully review the reasoning in the judgments given in the relevant proceedings, the question whether … the threshold is established is for the consideration of the Judge contemplating making the order".[11] The Court of Appeal rejected Mr Mawhinney's suggested approach to this aspect which was that erroneous decisions cannot meet the test. The Court said that the focus was whether the proceedings themselves were so lacking in merit that they were bound to fail.

Proposed appeal

[7] Mr Mawhinney does not challenge the Court of Appeal's conclusion that "totally without merit" in this context means bound to fail. Rather, his challenge concerns the extent to which the Court considering the application has to go back and re-examine the correctness or merits of the candidate proceedings. His case is

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8 At [124].
9 CA judgment, above n 3, at [58].
10 At [59].
11 At [66].

effectively that the Court must consider the merits of the candidate proceedings "from scratch", hear from the person who would be subject to the order, and take into account further materials including evidence and other materials relating to the candidate proceedings.[12] Hence, he says, a proceeding cannot be treated as bound to fail if that conclusion relies on a previous but erroneous court decision. His position is that the decisions in the candidate proceedings are erroneous. Mr Mawhinney also challenges the scope and use of the s 166 order.

Our assessment

[8] We accept that the nature and scope of considerations relevant to whether a proceeding is "totally without merit" in the context of an application for an extended order may give rise to a question of general or public importance which the Court may wish to consider at some point.[13] This case is not, however, an appropriate vehicle to consider this matter. That is because there cannot realistically be any prospects of a successful appeal. Nor, given the factual findings in both Courts is there any appearance of a miscarriage of justice.[14]

[9] The application for leave to appeal is dismissed. We also dismiss Mr Mawhinney's application for leave to amend the application for leave to appeal. As well as being unduly prolix, even if the application was amended as suggested, it has insufficient prospects of success.[15]

[10] Mr Mawhinney must pay the Council costs of $2,500.

Solicitors:
Anthony Harper, Auckland for Respondent

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12 Mr Mawhinney submits the Courts below failed to take into account cogent materials.

13 Senior Courts Act 2016, s 74(2)(a). We do not consider the other matters raised by Mr Mawhinney give rise to questions of general or public importance, nor to any questions of general commercial significance: s 74(2)(a) and (c).

14 Section 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.

15 The respondent submissions note that the material in the folios filed as part of "Chapter 4 – Grounds for proposed appeal" of the amended application exceeds 100 pages.