

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 125/2021
[2024] NZSC 39

BETWEEN ANTHONY PRATT KAYE AND MORVA
KAYE
Applicants

AND NORRIS WARD MCKINNON
Respondent

Court: Glazebrook, Ellen France and Kós JJ
Counsel: Applicants in person
Judgment: 23 April 2024

JUDGMENT OF THE COURT

- A** The application for recall of this Court’s judgment of 3 December 2021 (*Kaye v Norris Ward McKinnon* [2021] NZSC 168) is dismissed.
- B** There is no order as to costs.
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REASONS

Introduction

[1] The applicants, Anthony Pratt Kaye and Morva Kaye, seek leave to recall our judgment of 3 December 2021 declining to grant an extension of time to apply for leave to appeal (the 2021 judgment).¹ The application is made on the basis that “for some other very special reason justice requires that the judgment be recalled”.²

¹ *Kaye v Norris Ward McKinnon* [2021] NZSC 168 (O’Regan, Ellen France and Williams JJ) [SC 2021 judgment].

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

Background

[2] The application for recall has its genesis in proceedings filed in the High Court.³ In those proceedings, the applicants alleged negligence on the part of the respondent both in respect of the finalisation of a purchase of a garden centre business and associated land, and in implementing instructions to sue their former solicitors.

[3] The High Court rejected the claims.⁴ That judgment was upheld by the Court of Appeal.⁵ In 2016 this Court declined leave to appeal noting, amongst other matters, the proposed appeal was “extremely factual” and did not raise any question of general or public importance.⁶ Nor was the miscarriage of justice ground engaged.⁷ This Court later dismissed an application for recall of the decision to decline leave to appeal.⁸

[4] The 2021 judgment concerned two judgments of the Court of Appeal. Both of those judgments involved unsuccessful applications to recall the Court of Appeal’s judgment dismissing the appeal against the High Court judgment.⁹ In the 2021 judgment, this Court described the decision declining leave in 2016 as “the end of the road” for the claim against the respondent.¹⁰ The Court went on to note the interests of justice did not warrant a grant of leave.¹¹

The proposed appeal

[5] In support of their submission that the test for recall is met, the applicants say there are three questions for which justice requires an answer:¹²

³ *Norris Ward McKinnon v Kaye* [2015] NZHC 1025 (Peters J) [HC judgment].

⁴ At [65].

⁵ *Kaye v Norris Ward McKinnon* [2016] NZCA 32 (Harrison, Fogarty and Toogood JJ).

⁶ *Kaye v Norris Ward McKinnon* [2016] NZSC 66 (William Young, Glazebrook and O’Regan JJ) at [6]. See also Senior Courts Act 2016, s 74(2)(a).

⁷ At [8] citing *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369. See also Senior Courts Act, s 74(2)(b).

⁸ *Kaye v Norris Ward McKinnon* [2016] NZSC 104 (William Young, Glazebrook and O’Regan JJ).

⁹ *Kaye v Norris Ward McKinnon* [2020] NZCA 333 (Miller and Collins JJ); and *Kaye v Norris Ward McKinnon* [2021] NZCA 247 (Miller and Collins JJ).

¹⁰ SC 2021 judgment, above n 1, at [7].

¹¹ Senior Courts Act, s 74(1).

¹² The applicants develop their submissions by reference to *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

- (a) Was “proper advice” given in relation to the situation presented?
- (b) Did the respondent consider the potential consequences of the path advised?
- (c) Was a prompt and efficacious settlement achievable?

[6] As is apparent from these submissions, the applicants essentially want to reargue their claim with a view to achieving a different outcome. That is not a basis for recall but rather, in substance, an attempt to relitigate this Court’s earlier decision to decline leave to appeal. Nothing has been advanced which meets the test for a recall of either that decision or the 2021 judgment.

Result

[7] The application for recall is accordingly dismissed.

[8] As the respondent was not asked to make any submissions, we make no order as to costs.