IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 152/2025
[2026] NZSC 51

BETWEEN		LEPIONKA & COMPANY INVESTMENTS LIMITED Applicant
AND		GIBSON SHEAT Respondent

Court: Ellen France, Kós and Miller JJ

Counsel: M D O'Brien KC, S J Leslie and S T Hartley for Applicant
D P H Jones KC, C L Bryant and G J Luen for Respondent

Judgment: 7 May 2026

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

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

REASONS

[1] As a result of an unsecured land purchase transaction, the applicant investor, Lepionka & Co Investments Ltd (LCIL), found itself at risk of losing a deposit paid of some $463,000 when the vendor got into difficulties. LCIL sought legal advice on that risk from the respondent solicitors, Gibson Sheat. That advice was for LCIL to take over the vendor's mortgage interests.

[2] When a potential flaw in Gibson Sheat's advice was identified, LCIL's principal shareholder, Mr Lepionka, formally raised concerns about the advice. Gibson Sheat correctly took this as notice of a potential claim and notified its insurers. At that stage it thought it unlikely LCIL would incur loss.

[3] Discussions ensued between representatives of the parties. On 10 February 2016, Gibson Sheat wrote to Mr Lepionka:

> We do not accept there is any proper basis to question or criticise our advice. However, having raised this matter we are required by Chapter 5.11 and 5.12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (attached) to advise you to seek independent advice and that we may not act further until you have received that independent advice and the matters in dispute between us are resolved. Accordingly, to continue our engagement it will be necessary for Greg to confirm that you have taken independent legal advice and that any claim you may consider you have against our firm is fully and finally settled and resolved. In that event we may resume taking instructions to continue to act for you in this matter.

The reference to "Greg" was to Mr Greg Horton, a senior commercial lawyer, partner in Harmos Horton Lusk and a trustee of Mr Lepionka's family trust.

[4] Mr Horton responded the same day, stating that LCIL gave informed consent to Gibson Sheat continuing to act. However, the next day Gibson Sheat reiterated the need for resolution of the potential professional negligence claim. It signalled its willingness to continue to act if "having taken independent legal advice from you [i.e., Mr Horton], LCIL confirms that any claim it considers … it may have had against our firm is fully and finally settled and resolved". Gibson Sheat reiterated this position a third time, on 11 February 2016. Thereafter the parties exchanged proposals for settlement.

[5] On 26 February 2016 Gibson Sheat offered by letter to resume acting if LCIL agreed no claim would be brought against it. In consideration, it would deduct $100,000 from its outstanding invoices. LCIL made a counter-offer by email on 29 February 2016 on the basis it would withdraw its litigation threat and would accept Gibson Sheat's terms, save that it required a fee reduction of $131,651 plus GST. An email exchange followed, culminating in a telephone discussion the same day between Mr Lepionka and Gibson Sheat's Mr Wallace involving agreement to the combined terms of the email exchange and a reduction to outstanding invoices of $105,000 plus GST. Mr Wallace sent an email, recording:

> As per our discussion I confirm you and I have agreed Gibson Sheat will reduce our outstanding invoices by $105,000 plus gst on the terms 2-5 outlined in your email below and in paragraph 2 and 4 of our draft letter of 26/2/15 (copy attached). We will prepare a simple deed recording this.

An email from Mr Lepionka thanked Mr Wallace for his email, expressed hopes for an improved relationship and provided instructions for work now to be undertaken by Gibson Sheat.

[6] A draft written agreement was prepared by Gibson Sheat, but never executed or pursued. As Cooke J noted in the High Court, the terms of the informal 29 February agreement were nevertheless performed, including by Gibson Sheat giving LCIL the fee credit that had been agreed upon.[1]

[7] Ultimately, litigation ensued in which LCIL did sue Gibson Sheat for professional negligence. Gibson Sheat relied on the exchange of emails, discussion on 29 February 2016 and subsequent performance as constituting full and final settlement of the claim. It sought summary judgment, but unsuccessfully.[2] The question of whether the proceedings had been settled was made the subject of a preliminary question.[3]

[8] As to that preliminary question in the High Court, Cooke J concluded:

(a) The exchange of emails and discussion on 29 February 2016 constituted a settlement agreement, involving intention to be bound and agreement to all essential terms.[4]

(b) That settlement agreement was not conditional on execution of a formal written agreement.[5]

(c) Gibson Sheat had made clear that it could not act for LCIL until the claim against it was resolved, and that LCIL needed to take independent advice.[6]

---

1 *Lepionka & Co Investments Ltd v Gibson Sheat* [2023] NZHC 1981 at [37] and [46] [HC judgment].
2 *Lepionka & Co Investments Ltd v Gibson Sheat* [2022] NZHC 242.
3 *Lepionka & Co Investments Ltd v Gibson Sheat* [2022] NZHC 1488.
4 HC judgment, above n 1, at [45].
5 At [60].
6 At [78].

(d) LCIL was a "reasonably sophisticated commercial operator", not a vulnerable client.[7]

(e) Gibson Sheat could proceed on the basis that Mr Horton was an experienced commercial solicitor advising LCIL, that there was no reason to think he had a conflict and that he was able to give the necessary independent legal advice (with other lawyers acting for LCIL—including a King's Counsel—able to give further advice if LCIL required more advice than Mr Horton could provide).[8]

(f) LCIL was fully informed, knowing that Gibson Sheat may have failed to give adequate advice and knowing generally the implications of the potentially erroneous advice because it was the subject of concurrent litigation. It was unnecessary that LCIL know the kind of damages Gibson Sheat might be liable for; it sufficed it knew it was abandoning any claim it had against Gibson Sheat beyond compensation by way of the agreed fee credit.[9]

[9] In the Court of Appeal, LCIL reprised its arguments in the High Court, to the effect that the oral agreement (based on exchange of emails) was unenforceable because it did not receive independent legal advice in respect of the Gibson Sheat's conflict of interest. It also said that the parties did not intend to be bound until a formal written agreement was entered into.

[10] The Court of Appeal dismissed the appeal for reasons essentially aligned with those given by Cooke J and summarised at [8] above, albeit relying more on the involvement of LCIL's lawyers other than Mr Horton.[10]

---

7 At [79].
8 At [80]–[83].
9 At [84]–[86].
10 *Lepionka & Co Investments Ltd v Gibson Sheat* [2025] NZCA 469 (Mallon, Thomas and Campbell JJ).

Proposed appeal to this Court

[11] LCIL seeks to argue first, that the Court of Appeal was wrong to hold that the 29 February agreement was lawful when it had "not had independent advice as to the existence and extent of the lawyer's conflict of interest"—i.e., "advice including the client's ability to sue their lawyer, and the prospects of recovering from the lawyer, for losses arising from the negligent advice". In particular, it would argue the Court of Appeal erred in relying on the availability of advice by counsel engaged in associated litigation as fulfilling the requirement for independent advice.

[12] Secondly, it seeks to argue that the agreement was conditional upon the execution of a formal written agreement, although less emphasis was placed on this ground in written submissions.

Our assessment

[13] LCIL's arguments reprise those made unsuccessfully in both courts below. We accept that the first ground proposed may raise, in the abstract, a question of general or public importance in relation to the fiduciary obligations of the legal profession in context of a dispute involving a foreshadowed claim of professional negligence.[11] However, and essentially for the reasons given in the concurrent decisions of the High Court and Court of Appeal, we do not consider this an appropriate case in which to address the matter.

[14] First, the relevant principles have been the subject of general guidance in the case law, including long-standing decisions of the Court of Appeal in *Sims v Craig Bell & Bond* and *Witten-Hannah v Davis*.[12] As LCIL acknowledges, the essential fiduciary requirements are now encapsulated in rr 5.11 and 5.12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Any further elucidation of principle by this Court is likely to turn then on the particular facts of this case only.

---

11 See Senior Courts Act 2016, s 74(2)(a).

12 *Sims v Craig Bell & Bond* [1991] 3 NZLR 535 (CA); and *Witten-Hannah v Davis* [1995] 2 NZLR 141 (CA).

[15] Secondly, given the unequivocal terms of Gibson Sheat's communications to LCIL on 10 February 2016, drawing explicit attention to the requirements of rr 5.11 and 5.12, and LCIL's unequivocal response, we see insufficient prospect of this Court reaching a different conclusion from those reached below of the primary issue.

[16] Thirdly, turning to the conclusion noted at [8(e)] above, nor do we consider Cooke J erred in holding that Mr Horton held sufficient independence to advise LCIL on the agreement, the relevant conflict being that of Gibson Sheat. It is unnecessary in these circumstances to rely upon the availability of other counsel to LCIL to meet the requirement for independent advice.

[17] For these reasons, we do not consider LCIL has shown it is likely that a miscarriage of justice has arisen here (in the sense applicable in a civil context) and nor is it necessary in the interests of justice for leave to appeal to be granted.[13]

[18] As to the second ground proposed, we see insufficient prospects of success on this ground to justify further appeal or make it necessary in the interests of justice to grant leave.

Result

[19] The application for leave to appeal is dismissed.

[20] The applicant must pay the respondent costs of $2,500.

Solicitors:
Luke Cunningham Clere, Wellington for Applicant
Hesketh Henry, Auckland for Respondent

---

[13] See Senior Courts Act, s 74(1) and (2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].