NOTE: THE ORDER OF THE DISTRICT COURT MADE ON 23 NOVEMBER 2007 PERMANENTLY SUPPRESSING THE NAME AND IDENTIFYING DETAILS OF THE WITNESS REFERRED TO IN THIS JUDGMENT AS "L" REMAINS IN FORCE

IN THE SUPREME COURT OF NEW ZEALAND

SC 132/2014
[2015] NZSC 17

BETWEEN	PHILIPPA CURRIE, RAYMOND DONNELLY & CO, THE CROWN SOLICITOR AT CHRISTCHURCH AND THE ATTORNEY-GENERAL OF NEW ZEALAND Applicants
AND	VINCENT JAMES CLAYTON AND LINDA JOYCE WESTBURY Respondents

Court:	Elias CJ, McGrath and Glazebrook JJ
Counsel:	J C Pike QC for Applicants Respondents in person
Judgment:	5 March 2015

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay the respondents reasonable disbursements (to be fixed if necessary by the Registrar).

REASONS

[1] The applicants seek leave to appeal against the decision of the Court of Appeal[1] which reinstated a cause of action for misfeasance in public office against a

[1] *Currie v Clayton* [2014] NZCA 511, [2015] 2 NZLR 195 (Randerson, Wild and White JJ) PHILIPPA CURRIE, RAYMOND DONNELLY & CO, THE CROWN SOLICITOR AT CHRISTCHURCH AND THE ATTORNEY-GENERAL OF NEW ZEALAND v VINCENT JAMES CLAYTON AND LINDA JOYCE WESTBURY [2015] NZSC 17 [5 March 2015]

Crown Prosecutor which Priestley J in the High Court struck out.[2] The alleged misfeasance relates to the Crown Prosecutor's failure to disclose the full text of a sentencing indication given to a Crown witness, L.

Background

[2] The alleged Crown case was that L was a burglar and that he had effectively been stealing to order on behalf of the respondents and a Mr Machirus. L was originally charged alongside the respondents and Mr Machirus but pleaded guilty in April 2005 before trial.

[3] The first trial of the respondents and Mr Machirus was terminated (in October 2006) after one of the defendants became ill. L had been sentenced on the charges, before giving evidence in that first trial. He received a discount as a result of his assistance to the police.

[4] A second trial took place in July 2007. In between the first and second trial, L was charged with a number of unrelated offences. For reasons of safety, L did not want to be sentenced on these additional charges before testifying in the second trial.[3] He did, however, receive a sentencing indication before the second trial.[4]

[5] There were two arguably conflicting passages in the sentencing indication. One suggested that a discount would be given (when sentencing for the further offending) for the assistance on the earlier matters. The other passage, considered in isolation from the earlier passage, would likely have been taken as indicating that no discount would be given for those matters. It was only the latter passage that was disclosed by Ms Currie, the prosecutor, to the respondents and Mr Machirus.

[6] Mr Machirus became aware some time later of the full text of the sentencing indication. He appealed against his conviction and sentence. That appeal was allowed (on the basis of the non-disclosure).[5] The respondents' appeals were later

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[*Currie* (CA)].

2 *Clayton v Currie* [2012] NZHC 2777, [2013] 1 NZLR 263 (Priestley J) [*Currie* (HC)].

3 He wished to remain a remand prisoner.

4 *Police v [L]* DC Wellington CRI-2007-32-94, 31 May 2007 (Judge Radford).

5 *R v Machirus* [2008] NZCA 477.

allowed by consent.[6] While a re-trial was ordered by the Court of Appeal in Mr Machirus' and the respondent's appeals, the Crown elected not to conduct a retrial.

[7] Later the respondents filed civil proceedings against the applicants for deceit, New Zealand Bill of Rights 1990 damages and misfeasance in public office. The claim in deceit was struck out by Associate Judge Osborne[7] and there has been no appeal against that decision. The claim for misfeasance in public office was struck out by Priestley J but Associate Judge Osborne's decision refusing to strike out the Bill of Rights claim was upheld.[8] On appeal, the claim for misfeasance in public office was reinstated by the Court of Appeal.[9] The decision not to strike out the Bill of Rights claim was upheld.[10]

Decision

[8] The general policy of the Supreme Court Act 2003 is that the Court should not give leave to appeal in an interlocutory application unless it is necessary in the interests of justice for the point at issue to be determined before trial.[11] In this case it would be premature for us to hear the proposed appeal before trial. There is no obvious error in the Court of Appeal's approach to the strike out application and all the arguments the applicants seek to raise can be raised in the course of the trial. These arguments are much better considered in the context of a full factual matrix.

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

[10] The respondents are entitled to reasonable disbursements (to be fixed if necessary by the Registrar).[12]

Solicitors:
Crown Law Office, Wellington for the Applicants

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6 *R v Clayton* [2008] NZCA 493 and *R v Westbury* [2009] NZCA 104.
7 *Clayton v Currie* [2012] NZHC 1475.
8 *Currie* (HC), above n 2.
9 See *Currie* (CA), above n 1, at [40]–[63].
10 See at [74]–[92].
11 Supreme Court Act 2003, s 13(4).
12 The respondents have represented themselves in this Court.