IN THE SUPREME COURT OF NEW ZEALAND

SC 29/2016
[2016] NZSC 66

BETWEEN	ANTHONY PRATT KAYE AND MORVA KAYE Applicants
AND	NORRIS WARD MCKINNON Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: Applicants in person
M J Dennett and C A Robertson for Respondent

Judgment: 15 June 2016

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants are to pay the respondent costs of $2,500.

REASONS

[1] The proposed appeal arises out of the purchase of a garden centre business and associated land by the applicants and a company they controlled. For ease of discussion we will conflate the company with the applicants. Due in part to the negligence of their original solicitors, the applicants came to be involved in a dispute with the vendor and under pressure from their financier. They instructed the respondent law firm to act for them, as to the finalisation of the purchase and to sue the original solicitors. In the proceedings now in issue, the applicants alleged negligence on the part of the respondent in both respects.

[2] In the High Court Peters J rejected the claims.[1]

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1 *Norris Ward McKinnon v Kaye* [2015] NZHC 1025.

[3] The claim in relation to the finalisation of the purchase failed because (a) any negligence on the part of the respondent was not obvious and (b) the applicants' contention that the respondent was negligent was not supported by expert evidence.[2] She also noted that there was a factual dispute as to the scope of the retainer. In respect of this dispute she accepted the evidence offered on behalf of the respondent.[3]

[4] Peters J accepted that the respondent had been negligent in their advice as to, and handling of, the claim against the original solicitors.[4] The particular failings were in respect of some delay in issuing proceedings and, more significantly, in over-estimating the damages which would be likely to be recovered.[5] She was, however, of the view that no loss had been sustained by the applicants.[6]

[5] Her judgment was upheld by the Court of Appeal.[7] The Court held that the applicants' contentions were unsound as to the scope of the retainer to finalise the purchase, with the result that the deficiencies they attributed to the respondent were in relation to services of a kind which the respondent had not agreed to provide.[8] The Court also observed that the solicitor concerned with this aspect of the case had "discharged his professional obligations with commendable skill and care in very difficult circumstances."[9] In relation to the handling of the claim against the former solicitors, the Court upheld the result and reasons of Peters J.[10]

[6] The basis of the proposed appeal is extremely factual and we do not discern a question of public or general importance.

[7] The applicants wish to put in issue the Court of Appeal's conclusions as to the scope of the retainer (with the applicants placing substantial reliance on some general statements in the respondent's client registration form) but the more

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2 At [30]–[38].
3 At [34].
4 At [44]–[46].
5 At [43].
6 At [64].
7 *Kaye v Norris Ward McKinnon* [2016] NZCA 32 (Harrison, Fogarty and Toogood JJ).
8 At [25]–[33].
9 At [42].
10 At [38]–[40].

significant aspect of the case, from their point of view, relates to the negligence of the respondent in relation to pursuit of the claim against the former solicitors. If leave were granted, the primary issue on appeal would be whether the advice given by the respondent as to quantum was material to commercial decisions which the applicants took which were to their later disadvantage. This would turn on whether the applicants had established that, absent the negligence of the respondent, they would have acted differently and would therefore have been better off.

[8] Both Peters J and the Court of Appeal held that the respondent's negligence was not causative of the loss claimed. There are thus concurrent findings of fact. As well, there is no appearance of error in the analyses which appear in the High Court and Court of Appeal judgments. The miscarriage of justice ground is therefore not engaged. [11]

[9] The applicants have complained about aspects of the hearing in the Court of Appeal and the later judgment, particularly as to the length of the hearing (which was shorter than they had anticipated), comments at it about them being accompanied by a McKenzie friend (who was allowed to remain despite no application having been made for a McKenzie friend), the late provision by the respondent of a list of issues and the judgment being "biased towards the legal profession". We do not see these complaints as justifying leave to appeal.

[10] Accordingly, the application for leave to appeal is dismissed.

Solicitors:
Kennedys, Auckland for Respondent.

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[11] See *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, [2006] 3 NZLR 522.