IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

	[2024] NZACC 049	**ACR 306/21** **ACR 31/22**
UNDER	THE ACCIDENT COMPENSATION ACT 2001	
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACCIDENT COMPENSATION ACT	
BETWEEN	BRETT MACDONALD Appellant	
AND	ACCIDENT COMPENSATION CORPORATION Respondent	

Hearing: On the papers

Appearances: Ms K Koloni, advocate for the Appellant
Mr P McBride, Counsel for the Respondent

Judgment: 25 March 2024

RESERVED JUDGMENT OF JUDGE C J MCGUIRE
AS TO COSTS ON RECALL APPLICATION

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[1] This is an application by ACC for costs.

[2] ACC seeks costs jointly and severally against the appellant and the appellant's advocate, Ms Koloni, in respect of a dismissed application to recall my substantive judgment in this case, dated 26 October 2023.[1]

[3] The appellant's application to recall judgment was the subject of a judgment of this Court dated 16 February 2024,[2] in which that application recall was declined.

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1 *MacDonald v Accident Compensation Corporation* [2023] NZACC 175.
2 *MacDonald v Accident Compensation Corporation* [2024] NZACC 29.

[4] ACC's Counsel, Mr McBride, makes this application for costs in circumstances where the appellant, Mr MacDonald, and the appellant's advocate, Ms Koloni, were put on notice that ACC may seek costs due to what it sees as an abuse of process.

Background

[5] By email on 8 November 2023, Ms Koloni, as advocate for the appellant, advised the Court that "we seek a Recall of this judgment," that is to say the court's substantive appeal Judgment in this case, of 26 October 2023.[3]

[6] By memorandum dated 17 November 2023, ACC's Counsel, Mr McBride, submitted that ACC considered this application for recall:

(a) Is not properly made;

(b) Comprises an abuse of process; and

(c) Renders the applicant and/or advocate liable to a costs award and enforcement of that if the matter is pursued.

[7] In that memorandum, Mr McBride noted:

(a) The very limited (exceptional) circumstances in which an application for recall is properly made and/or can properly be entertained/granted. And he made reference to *Jones v New Zealand Bloodstock Finance and Leasing Limited*;[4]

(b) He noted that the advocate, Ms Koloni, had previously made a number of similar applications, including in each of three ACC appeal cases, which he listed as those of *Koloni*, *Foster* and *Beauchamp*.[5]

(c) Mr McBride noted that the Court, on each of those occasions, in dismissing the application set out the requirements of any sustainable

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3 See *MacDonald* n1 above.

4 *Jones v New Zealand Bloodstock Finance and Leasing Limited* [2023] NZSC 133.

5 *Koloni v Accident Compensation Corporation* [2021] NZACC 193; *Foster v Accident Compensation Corporation* [2023] NZACC 74 and *Beauchamp v Accident Compensation Corporation* [2023] NZACC 74.

application, including the criteria in the case of *Horowhenua County Council v Nash*.[6]

(d) Mr McBride noted that as the presiding Judge in the cases of both *Foster* and *Beauchamp* I explicitly placed the advocate on notice of costs liability in the event of repetition:

> [17] Ms Koloni is on notice that general and unsupported assertions of the kind she raises in these cases are not "special reasons" for the purpose of *Horowhenua County* and that further applications similarly unsupported may result in an award of costs against her.
>
> [18] Giving her the benefit of any possible doubt that she may have as to what are and are not grounds to recall judgment, no award of costs will be made against her on this occasion.

[8] Nevertheless, the application to recall judgment in this case was not withdrawn. Ms Koloni filed submissions dated 30 November and these are set out in full in the judgment of this Court dated 16 February 2024.[7]

[9] In declining her application, I noted the following:

> [44] The transcript of the proceedings shows that Ms Koloni had ample time to make her submissions and her submissions in reply.
>
> [45] The Supreme Court said recently in Jones v NZ Bloodstock Finance and Leasing Limited[8] that:
>
> > Recall is an exceptional procedure; … a judgment will only be recalled in exceptional circumstances, being those identified in *Horowhenua County v Nash (No. 2)* as applied by this court in *Saxmere Co Limited v Woolboard Disestablishment Co Limited (No. 2)*. A recall application cannot be used to relitigate the matter.
>
> [46] Ms Koloni's submissions in respect of the recall application are set out in full earlier in this judgment. Ms Koloni's submissions that her client has not had a fair hearing is rejected. The procedural steps taken prior to the hearing in this case and the conduct of the hearing itself set out in full in the transcript answers this allegation.

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6 *Horowhenua County Council v Nash (No 2)* [1968] NZLR 632
7 See *MacDonald* n2 above
8 See J*ones* n4 above.

Submissions on Behalf of ACC

[10] Mr McBride referred to Ms Koloni's submissions of 30 November 2023 and notes that in this Court's decision of 16 February 2024, those submissions were firmly rejected.

[11] He says:

> ACC is of the view that this was always a misplaced application for recall and amounted to an abuse of process. Consistent with that view, from the outset ACC sought to ensure the applicant and advocate were both explicitly on notice about costs consequences if the matter was advanced.

[12] He notes that the starting point in respect of costs in this jurisdiction is that the successful party is properly entitled to an award of costs against the unsuccessful party in terms of the District Court Rules.

[13] He refers to *Harley v McDonald*[9] where it was held that in appropriate cases a costs award can also be made against a non-party.

[14] He submits:

> As this Court and the High Court have noted (referring to *ACC v Carey*[10] and *Henson v ACC*[11]) ordinarily, ACC is reticent about seeking costs.

[15] He notes that the ACC does not ordinarily seek costs where a party makes a bona fide application but is unsuccessful.

[16] However, he also notes that where a party makes a misconceived and misguided application, particularly in the face of prior explicit judicial advice and/or ACC placing the party on notice as to its stance, ACC can and does seek costs.

[17] As to costs against an advocate or non-party, he refers to the case of *Mark Winter Waikato Ltd v Tracy International Ltd* [12] where the Court identified the jurisdiction as deriving from s 122 of the District Courts Act 1947 and the District Court Rules.

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9 *Harley v McDonald* [2002] 1 NZLR 1.
10 *Accident Compensation Corporation v Carey* [2021] NZHC 748.
11 *Henson v Accident Compensation Corporation* [2018] NZACC 104.
12 *Mark Winter Waikato Ltd v Tracy International Ltd* (1999) 13 PRNZ 259.

[18] He notes that the *Mark Winter Waikato* decision was followed by His Honour Judge Powell in *Brown*,[13] in which jurisdiction was confirmed and costs awarded against an advocate.

[19] In this case therefore, he seeks costs against the appellant's advocate, Ms Koloni.

[20] In summary, Mr McBride notes that ACC seeks costs as a last resort and in circumstances where it considers there to be a pattern of behaviour by the advocate to advance applications on behalf of her clients that is causing unnecessary use of resources by the Court and ACC.

[21] He seeks on ACC's behalf, an award of costs jointly and severally against the advocate and the appellant. While in the circumstances he submits an award at a substantially higher level is likely warranted, ACC seeks an award by way of Category 1A costs on this application as follows:

9.11	Preparing and filing opposition to interlocutory application (excluding summary judgment application and supporting affidavits)	0.25
9.12	Preparing written submissions	0.5
20.	Other steps in the proceeding not specifically mentioned – as allowed by the Court (by analogy to 9.8 in respect of "unpublishing")	0.2

[22] It is noted that the claim under item 20 relates to the separate application by Ms Koloni to "unpublish" or take down the judgment.

Ms Koloni's Submissions on Behalf of Herself and Mr MacDonald

[23] In an email dated 6 March 2024, Ms Koloni makes these submissions:

> 1. Mr McBride appears to want to "punish" us financially for exercising our right to appeal.

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13 *Brown v Accident Compensation Corporation* [2014] NZACC 65.

2. This right is within the AC Act, section 162, of which we are exercising.

3. The only expense ACC has is Mr McBride's costs, as ACC have not funded any costs to Mr MacDonald nor myself, so his memo doesn't make sense.

4. Mr McBride and ACC both know that Mr MacDonald is now on a WINZ benefit and has no means to pay Mr McBride's costs of $450.00 plus GST an hour, or any costs awarded by the Court, and neither do I. It appears to be a fear induced bully tactic, as regardless of the outcome, Mr McBride gets paid by ACC VERY well.

5. The AC Act makes no mention for costs against a claimant in the Part 5 Dispute Resolution process and neither should it as we are in partnership with ACC and covered by the Code of ACC Claimants' Rights. In fact, even Mr McBride and the Court are included under the definition of Corporation, section 39(c), therefore all are to operate within the spirit of the Code, a partnership of utmost good faith.

6. The ACC dispute resolution process is not to be adversarial, but is an investigation into the correctness of decisions. All parties and decision makers should not fear the appeal process and it is certainly not an abuse of process or resources when our right to appeal has been exercised.

7. Mr McBride wished Mr MacDonald well for his future, in spite of his amputation and struggles, when he said goodbye to him after the Tauranga District Court hearing. Now Mr McBride is seeking an award of costs against him for exercising his right to appeal.

   Was this "wish you well" genuine? It appears not, or perhaps Paul has forgotten his dialogue with Brett that afternoon.

   In fact, I remember Mr McBride telling Brett to not take offense at any of his oral submissions, as he "was just doing my job".

8. It seems this request for an award of costs is again "just doing his job", and bad faith in a partnership where we are all to come to the appeal with clean hands.

9. Mr McBride and ACC both know that I am medically certified to work only ten hours a week due to accident-related injuries, so I only encourage appeal if there appears to be an injustice and I believe there is merit in the argument. It is never to take up resources (as I have very little) of either myself, ACC, or the Court, and could never be seen as an abuse of process when the claimant's needs are put first.

10. Mr McBride and ACC know I operate on a "no-win, no-pay" basis, which is referred to in the District Court Rules 2014, 14.2 as "Conditional fee arrangement".

11. I do not get paid a contracted rate of approximately $8,500 plus GST per appeal, like Mr McBride gets paid, regardless of whether he wins or loses.

12. I do not have the resources, like he does, to even fund bundles of documents and courier fees and other costs involved in helping the

disabled client. So why would I waste my time if I didn't believe there was merit in an appeal?

So how could Mr McBride's request for costs be fair or reasonable, given he is not out of pocket, and ACC have paid him handsomely, even when he's lost.

13. Mr McBride's request for costs is in itself an abuse of my time and resources, let alone the Courts. It is an absurdity, and ACC was never set up so that claimants had to engage lawyers to fight their claims, and yet here we are!

I have sought funding parity so we all come to the table with equal footing, which is only fair and reasonable. It is basically laughed at.

Hypocrisy and correspondence like this, from Mr Bride and ACC, leave an even more bitter taste in the claimant's mouth. I did not think this was possible.

14. In summary, this request of ACC via Agent McBride is considered a bullying tactic of fear.

If there was to be an award of costs, neither myself nor Mr MacDonald could afford to pay it, and ACC knows this.

We request parity of funding, as a true partnership of utmost good faith should operate, in the spirit of the Code.

We request the equivalent of what ACC has paid Mr McBride (in excess of $10,000), awarded to Mr MacDonald to continue his quest for justice, fairness and reasonableness.

Decision

[24] In her Judgment in *R v Smith*,[14] Chief Justice Elias said:

> Recourse to the power to reopen must not undermine the principle of finality. It is available only where a substantial miscarriage of justice would result if a fundamental error in procedure is not corrected and where there is no alternative. Without such response, public confidence in administration of justice would be undermined.

[25] In my Judgments in *Foster* and *Beauchamp* I referred to *Horowhenua County v Nash.*[15] There Chief Justice Wild articulated the relevant ground for recall as:

> …where there is some other special reason that justice requires it.

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14 *R v Smith* [2002] NZCA 335 at [36].

15 See *Horowhenua County* n6 above.

[26] I also note that in *Horowhenua County v Nash* Chief Justice Wild said:

> "Generally speaking, a judgment, once delivered must stand for better or worse, subject, of course, to appeal. Were it otherwise, there would be great inconvenience and uncertainty.

[27] These cases therefore set the threshold for recall at a high level. Understandably so. Judicial resources are finite, and the standard remedies of appeal and judicial review are available.

[28] At any given time, there are approximately 200 ACC appeals awaiting hearing.

[29] And in order that the fundamental underlying ethos of the ACC system, set out in section 3 of the Act is realised, the progression of claims need to occur in a timely fashion.

[30] In my Judgment on the recall application of 16 February 2024, I said:

> [46] … Ms Koloni's submission that her client has not had a fair hearing is rejected. The procedural steps taken prior to the hearing in this case and the conduct of the hearing itself set out in full in the transcript answers this allegation.
>
> [47] The hearing commenced with the objection by Mr McBride to the filing of a further affidavit on behalf of the appellant, as well as a folder of documents relating to the appellant.
>
> [48] Despite Mr McBride's concern and in effect being taken by surprise, I provisionally admitted the affidavit and the ring binder of documents.

[31] It was therefore inevitable that her application for recall would be refused.

[32] Throughout the substantive appeal hearing the appellant and his wife were present. Ms Koloni, as she has on the other occasions when she has been an advocate before the court, presented as being very much in control of what was put forward on behalf of the appellant.

[33] I therefore conclude that the progression of all aspects of this case has been driven by her rather than the appellant himself.

[34] For this reason, I therefore decline ACC's application for costs so far as it relates to the appellant himself.

[35] However, Ms Koloni has chosen to pursue her meritless application for recall in spite of being warned by this court in *Foster* and *Beauchamp* that she was on notice of possible personal costs liability in respect of further unsupported applications.

[36] Accordingly, there will be an order that she pays costs.

[37] Mr McBride seeks Category 1A costs. I agree that Category 1A, being the lowest category, is the correct category in the circumstances of this case and that his items claimed under items 9.11 and 9.12 are justified. However I am not persuaded that Mr McBride's claim for .2 of a day in respect of 'unpublishing' is justified, as it is unclear from the papers before me, what that required of Mr McBride.

[38] Total costs are therefore awarded against Ms Koloni under Category 1A of $952.50, being .75 of a day at a rate of $1270 per day.

CJ McGuire
District Court Judge

Solicitors: McBride Davenport James Wellington