IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-404-000779
[2019] NZHC 632

BETWEEN	STEPHEN PATRICK FITZGERALD, NICOLA MARY FITZGERALD AND HAMISH ALEXANDER SCOTT AS TRUSTEES OF 111 INNES ROAD, SAINT ALBANS, CHRISTCHURCH Applicants
AND	IAG NEW ZEALAND LIMITED Respondent

Hearing: 26 March 2019

Appearances: S P Rennie for Applicants
I J Thain and C J Jamieson for Respondent

Judgment: 29 March 2019

JUDGMENT OF GENDALL J

Introduction

[1] This is an application by the applicants to recall a judgment I gave in this proceeding on 20 December 2018 ("the Judgment"). That judgment followed a trial in the High Court at Christchurch from 15 to 19 October 2018.

[2] The application to recall the Judgment with supporting material was filed on 29 January 2019. It was opposed by the respondent IAG New Zealand Limited (IAG) on 7 February 2019.

[3] A short time after, on 11 February 2019, the applicants also filed in the Court of Appeal a notice to appeal the Judgment. Following an application for leave to appeal which was granted on 4 March 2019, the substantive appeal remains to be heard at this point.

Legal principles

[4] Rule 11.9 High Court Rules addresses the issue of recalling a judgment and provides:

> **11.9 Recalling judgment**
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> A judge may recall a judgment given orally or in writing at any time before a formal record of it is drawn up and sealed.

[5] The principles governing recall of a judgment are well settled and not in dispute here. They are set out in the leading statement in New Zealand of Wild CJ in *Horowhenua County v Nash (No. 2)*[1] as follows:

> 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. There are, I think three categories of cases in which a judgment not perfected may be recalled – first, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

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[1] *Horowhenua County v Nash (No. 2)* [1968] NZLR 632 (SC) at 633.

[6] Here, the applicants rely upon the third category of case in which a Court may recall a judgment that being the situation where, for some very special reason, justice requires that to occur. This third very special reason category has been described as a limited category. The Court of Appeal in *Nottingham v Real Estate Agents Authority*[2] adopting *Faloon v CIR*[3] stated:

> The third category is not defined with particularity in any judgment. However, it is quite clear that the discretion to recall must be exercised with circumspection, and it must not in any way be seen as a substitute for appeal. In particular there are some things that it can be said the power to recall does not extend to. It does not extend to a challenge of any substantive findings of fact and law in the judgment. It does not extend to a party recasting arguments previously given, and representing them in a new form. It does not extend to putting forward further arguments, that could have been raised at the earlier hearing, but were not. It does not extend to asking the Court to reverse interlocutory decisions such as adjournment decisions on the grounds they were wrongly decided.

[7] Earlier in *Unison Networks Limited v Commerce Commission*[4] the Court of Appeal had cited with approval certain examples identified by the English Court of Appeal of cases where recall might be justified under this third very special reason category in this way:

> [A] plain mistake on the part of the courts; a failure of the parties to draw to the court's attention a fact or point of law that was plainly relevant; or discovery of new facts subsequent to the judgment being given. Another good reason was if the applicant could argue that he was taken by surprise by a particular application from which the court ruled adversely to him and that he did not have a fair opportunity to consider.

[8] On these issues it is clear from the authorities that the threshold for recall of a judgment is a high one. This reflects the need for finality in litigation and on this aspect the cases have made clear that the recall jurisdiction is one to be exercised sparingly. Obviously applications for recall will fail and will be seen as an abuse of process if they seek to relitigate matters already considered or to challenge substantive findings of fact and law.

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2 *Nottingham v Real Estate Agents Authority* [2017] NZCA 145 at [9].
3 *Faloon v CIR* (2006) NZTC 19,832 (HC) at [13].
4 *Unison Networks Ltd v Commerce Commission* [2007] NZCA 49 at [32].

[9] In the *Unison Networks Limited v Commerce Commission*[5] decision the Court of Appeal also concluded by stating:

> …While a decision may be recalled where a material issue properly put before the Court is not addressed, excluding a slip or minor error, the cases in which justice will require a recall on this basis are likely to be rare.

Summary of the applicant's position

[10] In their present recall application in this case, the applicants suggest that expert evidence at the trial advanced on behalf of IAG led the Court to an "incorrect assumption". It is said this was a failure by this expert, Mr Lewis, IAG's structural engineer, to bring to the attention of the Court what is said to be an important fact. This, it is alleged, is that the IAG promoted repair to the applicants' house was <u>not</u> similar to other repairs consented by the Christchurch City Council, despite Mr Lewis saying it was. Alternatively, the applicants say Mr Lewis should at least have qualified his evidence to the effect that the repair in question may not be similar and to provide the evidence on which Mr Lewis' opinion could be tested. The applicants have now filed an affidavit by the second-named applicant, Ms Fitzgerald, in support of the present application. This produces the Christchurch City Council file for what is said to be the specific example given in his evidence by Mr Lewis which the applicants say demonstrates the house repair to which he was referring was dissimilar and its repair took place on TC2 rather than TC3 land as here.

[11] Mr Rennie for the applicants refers to three paragraphs in the Judgment which he suggests contain findings which are engaged by the present application. In those paragraphs I held:

> [35] … IAG must pay for the cost of ensuring the foundations are repaired in accordance with such Government or local authority by laws or regulations as may apply. This includes the BA and the Building Code.

And:

> [82] Subject to the important caveat I note below, I find that the repair methodology proposed by IAG's experts meets IAG's obligations under the Policy and, from the material before the Court, there is the strong suggestion that it will also comply with the necessary requirements under the BA.

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5 Above n 4 at [34].

And:

> [83] This conclusion is based on the **premise** that building consents or appropriate exemptions will be issued for IAG's proposed repair works and ultimately any necessary code of compliance certificates will be provided. **The bulk of the evidence provided was that in the past similar repair strategies have been consented.** However, if the consents (or appropriate exemptions) and code compliance certificates which are required are not given for that foundation repair work, then the plaintiffs' proposed remediation will need to be carried out instead. Otherwise, it could not be said that the work properly meets the policy standard. In that event, IAG is to bear the increased cost of the enhanced work to replace the whole house foundation as part of its obligation under the Policy.
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> (emphasis added)

[12] On this, the applicants contend that the "premise" referred to in para [83] of the Judgment is based on an incorrect assumption. They say that the words in para [83] "the bulk of the evidence provided was that in the past similar repair strategies have been consented" derived primarily from the evidence of Mr Lewis. The applicants go on to note that the Judgment made a further reference to this at [69] as follows:

> [69] Mr Lewis gave evidence too that similar repair strategies have been found acceptable for a significant number of other houses he has worked on in Christchurch. He confirmed that on all these occasions he had gained appropriate local authority consents for these strategies to be carried out.

[13] The applicant goes on to note that the evidence of Mr Lewis to support this appears in the notes of evidence at page 274ff where Mr Lewis said the IAG repair had been done "numerous times". The applicants then referred to an example Mr Lewis gave in his evidence of a repair at "Roxland Terrace" which was said to be "very very similar". This was followed by questions from the Court to clarify that the foundation was indeed a 1920's rubble foundation. Mr Lewis then in his evidence went on to say it was code compliant and had "drilled in epoxy fixings of the bottom plate through the mortar packing into the concrete substrate."

[14] The applicants then contend that this "Roxland Terrace" example gave Mr Lewis' opinion the "air of credibility" as an expert with specialised knowledge, suggesting that it was a type of routine repair regularly endorsed by the Council. The applicants claim it was thus persuasive in terms of the Judgment but in light of matters

which Ms Fitzgerald has now placed before the Court, they contend now it was wrong. The applicants' position is that Mr Lewis gave his evidence as an expert agreeing to comply with the Experts' Code of Conduct. As an expert he enjoyed the privilege of giving opinion evidence based on his possession of specialised knowledge and this was therefore of some influence in the Judgment.

[15] Because of this degree of influence, Mr Rennie noted that an expert has a significant responsibility in assisting the Court to deliver a just outcome and accordingly s/he must ensure that their evidence is factually accurate.

[16] On all of this, the applicants say that the property Mr Lewis was referring to was in fact 18 Wroxton Terrace, Christchurch, and the Council file for this repair conducted under the auspices of Mr Lewis' structural engineering firm was attached to her recent affidavit. That file shows that the application to the Council was for an exemption and the land at 18 Wroxton Terrace was TC2 rather than TC3 which was the categorisation for the applicants' land.

[17] Here, the applicants contend that in terms of the second and third categories of "special reasons" for recall of a judgment noted in the *Unison Networks Limited* decision (as outlined at para [7] above) there has been, first, a failure to draw the Court's attention to a relevant fact here and also, secondly, the discovery of new facts post-judgment which justify a recall decision being made under all the circumstances prevailing in this case.

[18] Finally, the applicants argue that the Judgment should be recalled as they contend it is now seen generally as a precedent for settlements and for the repair of rubble foundations in situations similar to that faced here by the applicants. They suggest that the Judgment endorses the IAG repair proposal of packing a subsided foundation on TC3 land and that all this is based, first, on the significant weight afforded to the evidence provided by the expert Mr Lewis here and, secondly and ultimately, the Court's finding that IAG's repair methodology met the policy obligations. Those are matters which the applicants state should not be left to an appellate court. They involve what should be a proper reconsideration of a critical expert opinion which it is claimed is based on incorrect evidence, this having emerged

only following the further evidence obtained by the applicants, post-judgment. The applicants say the appellate Court here should have the benefit of this Court's reconsidered view and the parties should have an opportunity to call further evidence on this.

Summary of IAG's position

[19] In response to the applicants' contention that the very special reason why the Judgment should be recalled was because it was founded on the incorrect expert evidence provided on behalf of IAG by Mr Lewis, IAG maintains that the Judgment in fact was not founded on incorrect evidence at all. On this, IAG says, too, that it does not accept that the Wroxton Terrace property references were incorrect in any way.

[20] In any event, IAG submits that the Judgment was not founded on the Wroxton Terrace evidence. IAG then goes on to suggest that the express "caveat" in the Judgment and the declarations made therein mean that even if the Wroxton Terrace evidence was incorrect (and this is not accepted) the applicants could not be prejudiced and are fully protected.

[21] Finally, IAG maintains that the issues the applicants seek to raise against the Judgment here can and ought properly, to be dealt with through their appeal to the Court of Appeal, the grounds of which IAG says fully embrace these and additional issues.

[22] For all these reasons, IAG contends there is no very special reason which results in justice requiring the Judgment to be recalled in this case.

Analysis

[23] The major ground for recall advanced by the applicants here, as I understand it, is their contention that IAG's structural engineering expert, Mr Lewis, wrongly gave evidence that the Wroxton Terrace property remedial works were "very very similar" to the works proposed by IAG to their home. The applicants say Mr Lewis' evidence

was incorrect and that the two sets of works in fact were "very dissimilar". This ground is principally advanced on the assumption that:

(a) The comment in the Judgment that "the bulk of the evidence provided was that in the past similar repair strategies had been consented" was in fact a reference to the Wroxton Terrace evidence; and

(b) The declarations made in the Judgment were founded on the Wroxton Terrace evidence and on that statement or view.

[24] Both these assumptions, as I see it, however, are somewhat wide of the correct mark.

[25] The reference in the Judgment to "the bulk of the evidence" was not simply to the evidence of Mr Lewis relating to the Wroxton Terrace house repair in any event but, in fact, included:

(a) With regard to Mr Lewis' evidence, his confirmation that similar repair strategies had been found acceptable for a significant number of other houses he had worked on in Christchurch and on these occasions, appropriate local authority consents for these strategies to be carried out had been obtained.

(b) The evidence of Mr Roydon Turner, an experienced builder. He was called by IAG and gave evidence which included the following:

> …I have reviewed the methodology proposed by Mr Lewis to carry out localised relevelling of the timber floor where required, using a combination of jack and pack methodology, and isolated pile replacement. The concrete ring foundation is to be repaired in situ, with the epoxy injection, structural mortar and localised areas of replacement to the ring foundation. This is a practical and currently widely adopted strategy in repairing earthquake damaged dwellings throughout the Christchurch region.
>
> (Brief of evidence, para [14])

And:

> The words that I describe above should be completed under a building consent, or an exemption from a building consent as a minimum.
>
> (Brief of evidence, para [19].

And:

> I have carried out these types of repairs to over 20 similar dwellings, both under full building consent or exemption from building consent.
>
> (Brief of evidence, para [30].

The evidence of Mr Turner was not challenged on cross-examination in any significant way. This was confirmed in the Judgment.

(c) In addition, one of the applicants' own expert witnesses, Mr Elliot Duke, albeit a geotechnical engineer, confirmed in his evidence that he had seen remedial work such as that proposed by IAG here gain a consent. In his evidence contained in the notes of evidence at 129 he stated specifically:

> …I have certainly seen the remedial works that Mr Bruggers have been proposing gain a consent. It opens up a whole bunch of issues…look under s 112, they're not going to make anything worse. So I believe it would get consent, do I think it's the right solution? No.

[26] And, in any event, the Judgment made no actual finding on the point as to whether IAG's proposed repair strategy here would be consented to by the Council, although the evidence the Court had heard did indicate that in the past similar repair strategies had been either consented to or an exemption provided.

[27] Instead, the Judgment made clear that the declarations made by the Court were conditional on whether building consent or, as the case might be, appropriate exemptions would be issued for IAG's proposed repair works and ultimately any necessary code compliance certificates provided. If consents and the like were <u>not</u> issued, then the plaintiff's proposed repair strategy would instead be required.

[28] In taking this approach, this Court in the Judgment expressly allowed for any possibility that IAG's proposed repairs might not be considered compliant by the Council whether or not any similar or dissimilar repairs had been acceptable to Council at other properties in the past.

[29] The judgment made clear that the issue of whether an exemption or consent might be required and would be granted (that is whether the proposed work complied with the Building Act and the Building Code) was a matter for the Council here and not the Court. No fetter or guide to the Council in its consideration of these issues was added. These were matters within the Council's proper authority.

[30] It follows therefore, as I see it that, in any event, the applicants are protected from any possible injustice because, if what they now suggest was indeed true (that is the IAG repair strategy is dissimilar to the Wroxton Terrace repair strategy), and if that dissimilarity is materially adverse for compliance and consenting purposes, then the Council will not grant an exemption or consent. In that event, the declarations contained in the Judgment at para [85](a) which address that particular situation will govern their rights and the plaintiffs will not suffer prejudice.

[31] Any suggestion from the applicants that the declarations made in the Judgment assume that the IAG repair work complies with the Building Code and that this view was founded on the Wroxton Terrace evidence is simply untenable.

[32] I am satisfied here that the evidence advanced at trial to the Court supports the conclusions in the Judgment and it could not be said the Court was misled, such that the interests of justice require the judgment to be recalled. The threshold for a recall application is a high one and I am satisfied here that no very special reason exists requiring the judgment to be recalled. Nor, in my view, are issues of any precedent effect from the Judgment of special relevance here. These are matters which will, no doubt, be appropriately considered by the appellate Court.

[33] On this question of the appellant's appeal of the Judgment to the Court of Appeal, finally, it is useful to note the comment in *McGechan on Procedure*[6] which says in part:

> **HR11.9.01(7)**
>
> It will generally not be appropriate for a trial court to recall its judgment or order a new trial, once appeals have been lodged: *Russell v Klinac* (HC) Whangarei AP18/01 11 December 2001 at [15].

Conclusion

[34] For all the reasons I have outlined above, this application fails. No very "special reason" exists for recall of the judgment, nor does justice require that this step should be taken here. As the Court of Appeal concluded in *Unison*,[7] this third some other very special reason category is intended to be "narrow" and that cases appropriate for recall on that basis "are likely to be rare". The present case is not one where recall is justified. That threshold for recall of a judgment has not been met in this case.

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Gendall J

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6 *McGechan on Procedure* at para HR11.9.01(7)
7 *Unison Networks Ltd v Commerce Commission*, above n 4.