

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**CIV-2010-009-002978
[2014] NZHC 204**

BETWEEN TSB BANK LIMITED
 Plaintiff

AND GARY OWEN BURGESS
 Defendant

Judgment: 18 February 2014

**JUDGMENT OF GENDALL J
(Dealt with on the papers)**

[1] On 10 December 2013 I gave judgment in this proceeding in favour of the plaintiff. On 16 December 2013 the defendant endeavoured to file and serve an application to have that judgment recalled. It appears that no filing fee was paid. It seems the Court registry advised that the defendant's application had not been accepted for filing.

[2] A notice of opposition to the defendant's application was filed by the plaintiff on a provisional basis however. This occurred on 20 December 2013.

[3] On 28 January 2014 I understand the defendant served notice that he was appealing my 10 December 2013 judgment to the Court of Appeal.

[4] So far as the defendant's recall application is concerned, I leave on one side here whether it has been appropriately filed or whether the required filing fee may as yet have been paid.

[5] What is clear in terms of r 11.9 High Court Rules is that a Judge may recall a judgment at any time before a formal record of it is drawn up and sealed.

[6] The principles concerning recall of judgment were set out in the leading statement in New Zealand of Wild CJ in *Horowhenua County v Nash (No 2)*.¹ On this, he stated:

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.

[7] McGechan on Procedure at para HR11.9.01(6) states:

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 2011 at [15].

[8] In *Russell v Klinac* the High Court noted at [15]:

It is clear that a common law rule exists that once a court has made an order, and an appeal has been lodged against that order, the court becomes *functus officio* and is therefore unable to take further action in relation to the matter.

[9] The Court of Appeal cited that case in *White v New Zealand Stock Exchange*² and stated:

It is repugnant in both theory and practice that a High Court Judge should be called upon to determine an application to recall his or her judgment at a time when a notice of appeal against that judgment is extant.

[10] It must follow therefore in my view that even if it has been properly filed, the defendant’s present application to recall my earlier 10 December 2013 judgment has been rendered nugatory as a result of his appeal of this decision to the Court of Appeal.

[11] And, in any event the application to recall my judgment also in my view is without merit here. For all these reasons this application is dismissed.

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

² *White v New Zealand Stock Exchange* [2001] 1 NZLR 683 at 702.

[12] As a result of this and as a second consequence of the defendant's appeal, my judgment of 10 December 2013 should now be sealed.

[13] Rule 11.13 High Court Rules requires that once an appeal has been filed the appealing party is:

To ensure the judgment is sealed without delay after the appeal is brought.

[14] Insofar as it may be required, a direction is now made that my 10 December 2013 judgment is therefore to be sealed.

[15] As to costs on the present application by the defendant, given that there is an extant appeal before the Court of Appeal, costs here are reserved.

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Gendall J

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Copy to Defendant