IN THE COURT OF APPEAL OF NEW ZEALAND

CA437/2015
[2017] NZCA 145

BETWEEN	DERMOT GREGORY NOTTINGHAM, PHILLIP NOTTINGHAM AND ROBERT EARLE MCKINNEY Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY First Respondent
AND	MARTIN RUSSELL HONEY Second Respondent

Court:	Asher, Heath and Dobson JJ
Counsel:	P Nottingham and R E McKinney in Person M J Hodge for First Respondent D W Grove for Second Respondent
Judgment: (On the papers)	28 April 2017 at 3 pm

JUDGMENT OF THE COURT

A The application for recall is declined.

B The appellants must pay the respondents costs for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Asher J)

[1] Mr D Nottingham, Mr P Nottingham and Mr McKinney (the appellants) seek an order recalling a judgment of this Court of 27 February 2017.[1]

Background

[2] The appellants are engaged in a long and bitter dispute with Mr Honey and the Real Estate Agents Authority. That dispute and its procedural history are set out in detail in the judgment sought to be recalled, and need not be repeated here.[2]

[3] For the purposes of the present application we note that shortly before the hearing in this Court we declined an application for an adjournment. We provided the parties with our reasons for doing so. In summary, these were:

(a) this was the second application for an adjournment;

(b) the lateness of the application was not explained;

(c) we were not satisfied that the circumstances warranted a second adjournment; and

(d) there was a need to achieve finality in proceedings that had already run for a long period.

[4] We allowed the appeal, but only to supplement the original order of Thomas J with a direction that the Tribunal panel re-hearing the complaint not include any members of the panel who originally considered the complaint. We rejected the appellants' claims of bias in the proceedings below. In particular, we took judicial notice of the fact that the National Transcription Service (NTS) performs transcription services for all statutory tribunals administered by the Ministry of Justice, and that there is no opportunity for a judicial officer to interfere with the recording and retention of transcripts in that process.

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1 *Nottingham v Real Estate Agents Authority* [2017] NZCA 1.
2 At [1]–[11].

The application

[5] The appellants' application for recall focuses on this Court's response to the appellants' allegation that the transcription of the proceeding in the Tribunal was doctored by members of that Tribunal to show themselves in a more favourable light. There are two key complaints:

(a) the Court should have allowed the second application for an adjournment. The adjournment would have allowed Mr D Nottingham to give evidence, based on his own research, as to the possibility of transcription doctoring; and

(b) the Court failed to properly investigate the allegation of transcription doctoring, and should not have taken judicial notice of the NTS process.

[6] The first and second respondents oppose the application for recall. They submit that the application is unmeritorious and amounts to an attempt to relitigate matters that have already been concluded.

The law

[7] The grounds upon which a judgment may be recalled are strictly limited. The leading statement is that of Wild CJ in *Horowhenua County v Nash (No 2)*:[3]

> Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. W ere 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.

[8] The only category in which the appellants' complaints could conceivably fall is the third category articulated by Wild CJ. This gives the Court the ability to recall a judgment for a very special reason to avoid an injustice.

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

[9] The third category is not defined with particularity in any judgments. 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.[4] 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 re-presenting 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.

[10] In *Ngahuia Reihana Whanau Trust v Flight* Anderson P commented:[5]

> It is becoming a matter of concern not just to this Court but to others in the western common law system that disaffected litigants, usually appearing in person, repeatedly make application for recall of judgments which they steadfastly refuse to accept. It is timely to characterise plainly unmeritorious applications of that sort as an abuse of the Court's process and to reaffirm the rarity of legal justification for recalling judgments.

Analysis

[11] The appellants' application for recall does not contain any of the rare circumstances in which recall might be justified. Rather, it is an attempt to re-open substantive matters already decided. Indeed much of the material filed in support of the application is irrelevant and relates to allegations of transcript tampering by other judicial officers in related proceedings.

[12] Whilst the appellants no doubt believe that justice requires a recall, that claim must be viewed objectively. The decision to deny an adjournment was reasoned and given after a hearing. The substantive judgment deals with all relevant issues after a one day hearing. The appellants' allegations of bias and conspiracy have been rejected by the High Court and Court of Appeal on the basis that they are not supported by the evidence. Nevertheless, so steadfast are the appellants in these allegations that, despite the appellants having successfully sought a rehearing of their

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4 *Faloon v Commissioner of Inland Revenue* (2006) NZTC 19,832 (HC) at [13].
5 *Ngahuia Reihana Whanau Trust v Flight* CA23/03, 26 July 2004 at [3].

complaints in the Tribunal, they appealed to this Court. They now seek to challenge this Court's determination. We adopt Anderson P's observation that unmeritorious applications for recall of this kind are an abuse of the Court's process.

[13] The threshold for recall is high. This reflects the need for finality in litigation. This is particularly important in a case such as the present, where there is a prolonged history of litigation in respect of the same dispute, and where a rehearing in the Tribunal has already been ordered.

Result

[14] The application for recall is declined.

[15] The appellants must pay the respondents costs for a standard application on a band A basis and usual disbursements.

Solicitors:
Meredith Connell, Auckland for First Respondent
Foy & Halse, Auckland for Second Respondent