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IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

A.12/67

BETWEEN : DONALD WILLIAM FOSTER of Masterton, Solicitor

Plaintiff

AND : HENRY LENTON GRAY of Greytown, Contractor.

Defendant

Hearing : June 25, 1971
Counsel : Harding for plaintiff
Ellis for defendant
Judgment: 1st July 1971

RESERVED JUDGMENT OF WHITE J.

This is an application by the defendant to set aside a judgment of nonsuit and enter judgment for the defendant on the grounds that upon the findings of fact the defendant was entitled to judgment rather than judgment of nonsuit.

A claim for fraudulent misrepresentation was heard by me on October 29 and 30, 1970 and judgment was delivered on December 16, 1970. The present motion was not filed until 11 February 1971 but this was because a copy of the judgment was inadvertently sent by the Court office to the wrong address. As a result the defendant's solicitors did not receive the judgment, despite efforts to trace it, until after the time for appeal had expired. In these circumstances counsel for the defendant decided to move, pursuant to Rule 289 for the entry of judgment rather than apply for leave to appeal out of time.

This is a case in which an application for special leave to appeal would have been granted by me under Rule 274 of the Court of Appeal Rules had application been made, on the grounds that the justice of the case so required. The point was taken that on the motion before me there is no application for leave to appeal but an affidavit filed since the hearing makes it clear

that an application for leave to appeal would be consented to.

The question for me to decide is whether the defendant is entitled to judgment instead of nonsuit, pursuant to Rule 289, or in accordance with the inherent jurisdiction of the Court. It was agreed, indeed it was suggested by Mr Harding, that the matter should be dealt with in that way and not be limited to Rule 289.

In this case, as the judgment shows, the evidence left me in doubt and I expressed my conclusion as follows :

> "Applying the standard of proof required in a case such as this, which is laid down in Hornal v Neuberger Products Ltd (1957) 1 Q.B. 274, the evidence in my opinion is insufficient to establish on the balance of the probabilities that what Gray said was knowingly false, or was said without belief in its truth, or false. For these reasons the state of the evidence is such that I consider the proper course is to enter a nonsuit."

As this matter may go further I do not think I should do more than refer to what I have already said. It will be recalled that the action against the first of the two defendants was discontinued and although this was the act of the plaintiff the step was taken following a conference between counsel at the beginning of the hearing and subject to terms agreed on by them. This seemed to me to have an effect on the course of the trial. Further, Gray's account of what he claimed he had said was not put adequately in cross-examination to the plaintiff's witnesses. It is true that Mr Harding was given the opportunity by me of recalling witnesses and did not do so, but I considered that what happened could have affected the presentation of the evidence.

In making his submissions on Rule 289 Mr Ellis said that he had not found any really helpful authority on the application of Rule 289. The rule is similar in form to Rule 288 which deals with actions tried by a jury and provides that either party may move to set aside a judgment on the grounds that "the judgment given is not in accordance with the verdict of the jury". In

Rule 289 the relevant words provide that either party may apply to set aside a judgment upon the ground that upon the finding of the Judge on any question of fact the judgment is wrong. In my view both these two rules provide the machinery to correct obvious errors in entering judgment. In my opinion Rule 289 does not provide for applications to a Judge to reconsider his reasons for judgment or the exercise of his discretion. The limited scope of Rule 289 was referred to in one case to which Mr Ellis very propery referred. In Macarthy v Kelleher (No.2) (1897) 15 N.Z.L.R. 382, 395, there was a motion under Rule 283 (which became the present Rule 289) to vary a judgment as to the award of costs which it was submitted was not in accord with the complete success of the plaintiff in the action. In dismissing the motion Prendergast CJ. said he did not think the matter could be brought before the Court in that way and he added, "Manifestly there was no oversight. The judgment was deliberately given and there is no rule under which a party can move in this way". In the present case the judgment of nonsuit was deliberately given and, in my opinion, cannot be reconsidered under Rule 289.

Turning now to the Court's inherent jurisdiction the principles to be applied in reconsidering a judgment which has not been sealed have been stated recently by the Chief Justice in Horowhenua County v Nash No.2 (1968) 632. I quote a passage from p.632 :

> "That this Court has jurisdiction to reconsider a judgment at any time before it is perfected is conceded by counsel for the first defendant (Re Harrison's Share under a Settlement (1955) Ch.260;

> (1954) 2 All E.R. 453). But, accepting that, the question here is whether it is right to recall my reasons for judgment, and, in effect, to reconsider the ground upon which it was based.
>
> 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."

It is quite clear that the present case does not come within the first two categories referred to. As far as the third category is concerned in my opinion there is no special reason for reconsidering my judgment on the basis that justice requires that the judgment should be reconsidered.

Having regard to the matters to which I have referred I came to the conclusion that judgment of nonsuit rather than judgment for the defendant should be the result. This course was followed by Salmond J. in Mansfield v Blenheim Borough Council (1923) N.Z.L.R. 842, a Judge alone case, on the ground that the plaintiff in an action for dismissal had produced no evidence of the alleged contract. His judgment was affirmed on appeal. In Boracure (NZ) Ltd v Meads (1946) N.Z.L.R. 192 (which was tried with a jury) Myers CJ. said in the Court of Appeal at p.201; "We think that the plaintiff failed to establish his case and that the result in the Court below should have been judgment for the defendant, or at the least, the plaintiff should have been nonsuited. Possibly the latter would have been more proper as in the absence of Bell all available evidence was not tendered". In a case where it is apparent that a plaintiff has put his whole case, and it is clear that he cannot improve it, and that case fails, judgment should be entered for the defendant, but where there are doubts on these matters, as I had in the present case,

the proper course, in my opinion, was to enter judgment of nonsuit. If I am wrong my decision should be corrected on appeal.

During the hearing of the present application I was informed that the plaintiff had given notice of his intention to take advantage of the nonsuit and proceed. All I need to add is that if a plaintiff failed to proceed after nonsuit the defendant is entitled to have the matter disposed of finally, if he wishes, by an application to have the action dismissed. This was decided in Mansfield v Blenheim Borough Council (1926) N.Z.L.R. 842, at 856, where Hosking J. said :

> "If after a nonsuit the plaintiff fails to proceed the remedy of the defendant is to obtain the dismissal of the action and thereby finally dispose of the plaintiff's rights."

For these reasons the motion to set aside the nonsuit and enter judgment is dismissed. Leave is reserved to apply further regarding special leave to appeal and the question of costs is also reserved.

SOLICITOR FOR THE PLAINTIFF :

Messrs Foster & Waddington,
Solicitors,
MASTERTON.

SOLICITOR FOR THE DEFENDANT :

Messrs Thompson, Tate &
Cullinane,
Solicitors,
GREYTOWN.