A. No. 1441/72

NO.

No Special Consideration

IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
AUCKLAND REGISTRY

BETWEEN E.R. SMITH LIMITED
Plaintiff

AND HEAVY CONTRACTING MAINTENANCE LIMITED
Defendant

Hearing: 12th November, 1973

Counsel: Hubble for Plaintiff
Beder for Defendant

Judgment: 12th November, 1973

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(ORAL) JUDGMENT OF WILSON, J.

The plaintiff has moved for a rehearing of this action which came before me on 27th to 30th August last, and in respect of which I entered judgment for the defendant.

The basis of the application for the new trial is that Mr. Clifford George Bool, who gave expert evidence for the Plaintiff at the trial, has filed two affidavits, the effect of which is to indicate that he made two serious mistakes when giving his evidence. Mr. Beder, for the defendant, objected to the reception of these affidavits under Rule 283, but I think that they are properly included within the second sentence of that rule, which provides that:

> "...an affidavit may be received from a material witness showing that he made a serious mistake in giving his testimony."

Accordingly, then, we have this situation, that Mr. Bool has referred to two matters in which he says he made a serious mistake in giving evidence at the hearing. There is an affidavit from the defendant's expert, Mr. Rice, referring to the matter deposed to in the first affidavit of Mr. Bool in which he says that that would not have affected his evidence, so it is clear that there would have been a further conflict of expert testimony if a new trial were to ensue. The reference to the other mistake is to be found in the second

affidavit filed by Mr. Bool. It has not drawn a reply from Mr. Rice, but I can say here and now that piecemeal introduction of mistakes by a witness in the evidence he has given is not a very impressive process.

Now Mr. Hubble has tried to bring this ground within Rule 276 of the Code, and he suggested that it came within paragraph (b) of that Rule. Paragraph (b) is the ground "that the Judge has admitted improper evidence or rejected evidence which ought to have been admitted." I do not think that that ground applies to these facts. That refers to an error on the part of a Judge who admits inadmissible evidence or rejects proper evidence. That was not the case here. Accordingly, then if there is any basis at all for this application, it must be on the basis that the examples of grounds upon which a new trial may be granted, as set out in Rule 276, are not exhaustive. The possibility of that is referred to in Sulco Limited v. E.S. Redit and Co. Ltd. [1959] N.Z.L.R. 46, by Turner J., and by Hardie Boys J. in Sanders v. Anderson [1968] N.Z.L.R. 172.

I would be reluctant to go on record as closing the door on any means of redressing a miscarriage of justice, and without deciding the point, I would like to add, for what it is worth, my tentative impression that these grounds are not exhaustive. In particular, I think that the ground put forward here (although it does not come exactly into any of the grounds enunciated in Rule 276), may be a good ground for a new trial, and I say that because of the provision in Rule 283 to which I have already referred - that is, that the Court may receive an affidavit from a material witness showing that he made a serious mistake in giving his testimony. I cannot imagine why the Court should be authorised to receive such an affidavit unless it were material to the point before it. Accordingly, therefore,

I am prepared to assume tentatively, what perhaps (if I gave the matter further consideration) I would decide definitely - namely, that a serious mistake made by a material witness in giving his testimony, may be a ground for a new trial. But against that conclusion, I must also point out that there is another very important principle, and that is that there must be an end of litigation; that a too ready acceptance of a statement by a witness that he has made a mistake in his testimony would open the gates wide to repetitious trials. Experience shows that repetitious trials are some of the least satisfactory examples of litigation. Although, then, I do not say that this ground is not a good ground in an appropriate case, it is a ground which should be applied with the utmost caution, and only where it is apparent that, had the evidence been correctly given in the first place, the result must almost inevitably have been judgment in favour of the party on whose behalf the witness was called.

Now that is not the case here. As I said when delivering oral judgment, substantially my decision in favour of the defendant depended on the evidence of the man Simpson, who was a shareholder and director of the defendant company at the time when the work was done by it, and who was responsible for doing most of the work complained of, - in fact, I think, virtually all of it. He inspired me with such confidence in his truthfulness and honesty that, irrespective of the theories put forward with great authority by Mr. Bool and Mr. Rice, I was unable to find that he had been guilty of negligence in performing the work - and the whole case was whether or not he had performed the work negligently. Accordingly, even if I were to order a new trial, even if the witness Bool appeared to give his amended evidence, I do not for a moment think that it would make any alteration in my decision on the re-hearing. The

matter, therefore, is analogous to the position covered by Rule 277, which says:

> "A new trial shall not be granted on the ground of misdirection or erroneous decision on any point of law, or of improper admission or rejection of evidence, unless in the opinion of the Court, some substantial wrong or miscarriage of justice has been thereby occasioned in the trial of the action; ..."

That principle applies equally to this ground.

The motion is dismissed. I allow costs to the defendant $75 and disbursements.

Solicitors:

Messrs. Alexander, Bennett, Warnock & Mellsop, Auckland for Plaintiff

Messrs. Dickson, Beder & Edwards, Auckland for Defendant.