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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P.202/92

BETWEEN ECURIE TOP GEAR S.A.

Plaintiff

**NOT
RECOMMENDED**

AND

PHILLIP LAWRENCE KERR

Defendant

Counsel: A.G.W. Webb for plaintiff
 G.J. Judd Q.C. for defendant

Judgment: 8 June 1998

JUDGMENT OF POTTER J

Solicitors: Russell McVeagh McKenzie Bartleet & Co, Auckland, for
 plaintiff
 Beckerleg Cockle, Auckland, for defendant

By memorandum dated 30 April 1998, the defendant applied for -

- (a) An order recalling my judgment dated 5 February 1998 and an order dismissing the plaintiff's proceeding;
- (b) In the alternative, recalling order (3) in my judgment of 5 February 1998 directing a prompt pre-trial conference.

The matter was considered at the directions conference held on 28 May 1998. The minutes of that conference, a copy of which is attached to this judgment, record my decision to decline the application to recall my judgment of 5 February 1998 and that reasons would follow in writing.

The minutes also deal with the matter of a pre-trial conference in paragraph (3). It being advised to the directions conference that the defendant had filed an appeal against my judgment dated 5 February 1998, it was agreed by counsel present, that it was not appropriate to set down the matter for hearing nor to set further conference dates, until the appeal was disposed of.

REASONS FOR DECISION NOT TO RECALL JUDGMENT DATED 5 FEBRUARY 1998

1. My judgment records the result as follows -
 - (1) The defendant's application to stay or dismiss generally is declined.
 - (2) The plaintiff and Mrs P.Y. Brickett are required to file and serve within 21 days of the date of this judgment affidavits stating whether any of the documents exhibited to the defendant's affidavit of 20 October 1997 are or have been in their possession, custody or power and if they have been

but are no longer in their possession, custody or power when they parted with them and what has become of them.

- (3) A date for a pre-trial conference is to be fixed as soon as possible thereafter so that the matters of a hearing date and production of evidence can be addressed. I consider it desirable that this matter proceed to trial as promptly as possible.
- (4) Costs reserved.

Item (3) above has been dealt with at the directions conference of 28 May 1998 as noted above.

2. Affidavits have been filed by Mrs P.Y. Brickett and by Mr Patrick Lier, legal shareholder of the plaintiff company, as required by item (2) of my judgment. The affidavit filed by Mr Patrick Lier was not filed within the period of 21 days. The defendant filed an application that the proceeding be stayed or dismissed because that affidavit was not filed in time, but as recorded in paragraph (1) of the attached conference minutes, agreed that the application should be dismissed as the affidavit of Mr Lier, who is resident in Switzerland, sworn on 21 April 1998 in Switzerland, was filed on 8 May 1998.

3. Rule 540(2) provides -

Any judgment however delivered may be recalled by the Judge at any time before a formal record thereof has been drawn up and sealed.

My judgment of 5 February 1998 has not been sealed.

4. Rule 540(2) is stated in very wide terms.

The principles to be applied are the common law principles stated by Wild CJ in Horowhenua County v Nash (No 2) [1968] NZLR 632-633 -

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.

In Gazley v The-Attorney (CA.52/94, 16 July 1996) the Court of Appeal confirmed that this was the correct basis for approaching an application for recall.

5. The first two categories described in Horowhenua County v Nash (supra) are not applicable in this case. Accordingly, counsel for the defendant relies on "... some other very special reason" for which justice requires the judgment to be recalled.

6. Counsel refers to the two affidavits filed in response to my judgment by Mrs Brickett and Mr Lier and says they place before the Court facts which were not available when my judgment was given and which clearly confirm the abuse of process for which the defendant contends. He refers to a paragraph in my judgment at p.13 -

Nor am I persuaded that because the defendant has been able to locate and exhibit this documentation at this advanced stage in the proceedings, it would be appropriate for me to conclude, as the defendant asserts, that it defies belief that the plaintiff or Mrs Brickett did not have knowledge of this documentation which should have been disclosed on discovery, such that the plaintiff is abusing the process of the Court to the extent that the proceedings should be dismissed.

Counsel says that now that Mr Lier's affidavit sworn 21 April 1998 has been filed it is known that not only had the plaintiff knowledge of the five documents listed therein but had possession of them. He claims that previous affidavits of documents sworn by Mrs Brickett and Mr Lier are therefore false.

7. Counsel for the plaintiff contends that the affidavits filed in response to the order number (2) in my judgment of 5 February 1998 are unremarkable and do not have the effect or consequences suggested by the defendant. The particular documents have been discovered and disclosed. This is no more remarkable than the defendant discovering these and other documents which led to the defendant's affidavit of 20 October 1997 which described his finding the documents in October 1997, and exhibited those documents for the first time. The plaintiff submits the progress of discovery is not so unusual as to justify a "very special reason" to recall the judgment within the principles set out in Horowhenua County v Nash (supra).

8. I do not consider that any "very special reason" arises from the filing of the affidavits by Mrs Brickett and Mr Lier in response to the orders made in my judgment of 5 February 1998. My judgment expressly contemplated those affidavits should be filed and that the affidavits would provide evidence which should properly be before the Court as to the possession of those documents by or on behalf of the plaintiff or relating to their disposition by or on behalf of the plaintiff. The affidavits progress the matter as contemplated by my judgment,

in placing before the Court evidence relevant to the trial of this proceeding. It will be for the trial Judge in the context of a fully presented case to assess the relevance and weight of that evidence with the benefit of cross-examination of the witnesses.

9. I do not consider this is an appropriate case for recall of my judgment of 5 February 1998. The defendant's application to recall and dismiss the plaintiff's proceeding, is dismissed.

Justin Potter, J.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P.202/92

BETWEEN ECURIE TOPGEAR S.A.

Plaintiff

AND P.L. KERR

Defendant

Hearing: 28 May 1998

Counsel: A.G.W. Webb for plaintiff
 P.H. Cockle for defendant

Judgment: 28 May 1998

DIRECTIONS CONFERENCE MINUTE OF POTTER J

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1. **Application by the defendant for an order that the proceedings be stayed or dismissed** - Subsequently to filing that application Mr Judd Q.C for the defendant advised the Court that because the affidavit of Mr Patrick Lier had now been filed the application should be dismissed.

By consent therefore the application is dismissed with costs reserved.

2. Counsel for the defendant by memorandum dated 30 April 1998 applied
 - (a) For an order recalling my judgment dated 5 February 1998 and for an order dismissing the plaintiffs proceedings
 - (b) In the alternative recalling order 3 in my judgment of 5 February 1998 directing a prompt pre-trial conference in other matters

I indicated to counsel that I would decline the application to recall my judgment of 5 February 1998 and that reasons would follow in writing.

The situation is as confirmed by counsel that an appeal has already been filed against my judgment of 5 February 1998. It is appropriate that the matter raised in the application to recall my judgment be considered by the Court of Appeal in the context of the appeal already filed.

3. **Hearing** - Counsel for the plaintiff accepted that in the light of the appeal filed it was not appropriate to set the matter down for hearing nor to establish further conferences.

I direct that the matter be listed in the Duty Judge List on Monday 17 August 1998 so that the matter can be reviewed depending on the outcome of the defendant's appeal.

