IN THE SUPREME COURT OF NEW ZEALAND

SC 124/2015
[2016] NZSC 130

BETWEEN	CHARLES WILLIAM WILLIAMS, JEAN ELIZABETH MORLEY, INEZ BEVERLY FLAVELL, LESLEY ANNE HENSLEIGH, THE ROYAL NEW ZEALAND FOUNDATION OF THE BLIND, DONALD ALEXANDER MACKINTOSH, LYNDA ANNE RYAN, JANICE AILEEN ROBERTSON, GILLIAN MADGE CLARK, ROSALIE HILDA MAILAND, DONALD MICHAEL STEWART, PATRICIA DORA MARY SPENCER-WOOD, SOPHIE MARIA HUNT AND DAVID JOHN MCCORMICK First to Seventh Applicants
AND	AUCKLAND COUNCIL Respondent

Court:	Elias CJ, William Young and O'Regan JJ
Counsel:	C R Carruthers QC for Applicants M E Casey QC and G W Hall for Respondent
Judgment:	30 September 2016

JUDGMENT OF THE COURT

A **The application to recall the judgment in *Williams v Auckland Council* [2016] NZSC 20 is dismissed.**

B **The applicants must pay costs of $1,000 to the respondent.**

REASONS

[1] On 11 March 2016, this Court issued a judgment dismissing the applicants' application for leave to appeal.[1]

[2] On 30 June 2016, the applicants filed a notice of application to recall the judgment. Their counsel sought an oral hearing to argue the application and, if it succeeded, the substantive application for leave to appeal.

[3] The Court sought submissions from the respondent on the application. After these were received, the applicants sought, and were granted, leave to file submissions in reply. Having considered the points made in the notice of application for recall, the submissions of the respondent and the reply submissions of the applicants, we are satisfied that there are no proper grounds for recalling the judgment. We do not consider it necessary to have a hearing. Our reasons follow.

[4] As stated in this Court's judgment in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)*, there are three categories of cases that have been recognised by New Zealand Courts in which a judgment may be recalled if not already perfected.[2] These are:

(a) 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;

(b) where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; or

(c) where for some other very special reason justice requires that the judgment be recalled.

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1 *Williams v Auckland Council* [2016] NZSC 20.

2 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 at [2] citing *Horowhenua County v Nash (No 2)* [1968] NZLR 632 at 633.

[5] In this case the application for recall appears to be made on the basis that the third category applies. This was confirmed by the applicants in their reply submissions.

[6] The applicants say the Court based its judgment on two statements that were incorrect, and this meant the Court relied on a factual basis to dismiss the application for leave which was not supported by the evidence. They say this brings the case within the same category as the *Saxmere* decision referred to earlier, in which this Court recalled its earlier judgment refusing leave to appeal.

[7] The first statement from the leave judgment on which the applicants rely is the second sentence of [7] of the judgment, shown in italics below:

> [7] The applicants submit that they should not be penalised for delay because the respondent should have come forward and offered the land back to them as soon as it became subject to the offer back process. *That submission must be seen against the background that the respondent did not, and still does not, believe that the land is subject to that process.*

[8] The applicants say that the judgment declining leave to appeal was based on the italicised statement above. They say the statement is wrong and that the only legal advice received by the predecessor of the respondent was found to be incorrect. The respondents contest this, and the reply submissions of the applicant engage with the respondent's version of events in some detail.

[9] It is unnecessary for us to engage with those submissions because we do not consider that the judgment was based on the italicised statement. Rather, the statement was an observation made in response to the point made by the applicants that they should not be penalised for delay in pursuing their claim. There was no doubt that the applicants, as recorded in the judgment,[3] delayed either for 20 years or 10 years in bringing their claim, depending on the date on which the offer back was said to have arisen. The observation made by the Court was simply recording that the respondent had throughout resisted the proposition that it was obliged to make an offer back, as, indeed, it does to this day. We do not see the extent of the legal advice received by the respondent and its predecessors or the quality of that advice

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[3] *Williams*, above n 1, at [6].

to have any relevance to that observation. Nor do we see any error in the statement in the context in which it was made.

[10] The second statement relied on by the applicants appeared in paragraph [9] of the leave judgment. We set out that paragraph, with the statement in issue italicised, below:

> [9] We do not read the Court of Appeal's judgment as being critical of the use of a litigation funder, but rather as emphasising that the purpose of the Public Works Act is to restore to someone whose land has been compulsorily taken land with which that person has a personal or familial connection. That is in keeping with the fact that the offer back right applies only to the original owner and the original owner's successor, as that term is restrictively defined in s 40(5). In the present case the land was taken in the 1950s and *the present named applicants did not have any real personal interest in the land*.

[11] The applicants contest the correctness of the statement about the need for familial connection, but accept that this is not a matter that can be litigated in a recall application. But they say that the italicised words above are factually incorrect. They suggest that the statement must be based on the Court of Appeal's assessment, which, they say, scarcely adverted to the oral evidence given in the High Court. They say that the applicants had a personal and familial interest in connection with the land. The statement was made in the context of the conclusion made at [10] of the judgment that the evaluation in the lower Courts was essentially factual in nature and did not give rise to a point of general or public importance. It was not a finding that the lack of familial interest is a disqualifying fact as a matter of law. Nor do we see the statement as being factually incorrect when applied to the present applicants.

[12] We dismiss the application for recall of the leave judgment.

[13] We award costs of $1,000 to the respondent.

Solicitors:
P M Cassin, Auckland for Applicants
Buddle Findlay, Auckland for Respondent