IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-001899
[2016] NZHC 2721

BETWEEN	NSK LIMITED First Plaintiff	
	NSK NEW ZEALAND LIMITED Second Plaintiff	
AND	GENERAL EQUIPMENT CO LIMITED Defendant	

Hearing: 12 September 2016

Counsel: Zane Kennedy and Oliver Skilton for the Plaintiffs
Clive Elliott QC and Sarah-Jane Neville for the Defendant

Judgment: 14 November 2016

JUDGMENT OF MOORE J
[Recall application]

This judgment was delivered by me on 14 November 2016 at 2:00 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Introduction

[1] The plaintiffs (collectively referred to as NSK) apply to recall my judgment dated 13 July 2016. They do so on the basis that the orders made in that judgment relied on a factual position asserted by GE which has subsequently been accepted as misleading. NSK, as a consequence, applies for the reinstatement of my judgment dated 28 June 2016.[1]

Factual background

[2] In my judgment of 28 June 2016 I made the following orders:

(a) granting NSK's application for discovery of the customer names and details of GE; and

(b) directing GE to file a supplementary affidavit of documents.

[3] Following the delivery of the judgment, GE applied for leave to appeal the decision. In the alternative, GE applied to vary the orders referred to above. It sought the appointment of an independent expert to ascertain from GE's customers whether they were likely to have received counterfeit NSK-branded bearings from GE.

[4] GE's application to vary was based on what it alleged was a material change in circumstances, namely:

(a) GE consenting to judgment of liability being entered; and

(b) On 1 March 2016, one of GE's 28 customers, SAECO Wilson ("Saeco"), approaching NSK, identifying itself as one of GE's customers.

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[1] *NSK Limited & Anor v General Equipment Co Limited* [2015] NZHC 1424.

[5] In support of its application to vary, GE filed an affidavit from Mr Reid dated 5 July 2016. Mr Reid deposed as follows:

> " Saeco Wilson received approximately 50% of the NSK-branded bearings purchased from XRT-Sinda and Barton. The remaining 50% went to the other 27 customers, Plus Travel Motors and Donovans. In some cases our top 10 customers received as little as one or two NSK-branded bearings."

[6] Both GE's application and Mr Reid's affidavit unambiguously represented to the Court that Saeco had received 50 per cent of the total number of bearings that GE imported from Sinda and Barton Bearings.

[7] GE's submissions in support of its application to vary relied on Mr Reid's evidence on this point, recording:

> "... The reason this is a material change in circumstances is that Mr Reid's evidence is that Saeco Wilson received approximately 50% of the NSK-branded bearings purchased from XTR-Sinda and Barton."

[8] NSK was unable to verify or dispute the claim that Saeco had purchased 50 per cent of the bearings at issue.

[9] On 13 July 2016 I delivered my decision on GE's application for leave to appeal and the alternative application to vary the orders of 28 June 2016.[2] I refused leave to appeal but I granted GE's application to vary the orders I had made. I did so under r 7.49 of the High Court Rules and, in particular, that I was satisfied there had been either a material change of circumstance or some other special circumstances had arisen which justified that course.[3]

[10] GE promoted its application on the basis there had been a material change of circumstances in two respects. The first was that GE had consented to judgment on liability being entered. For reasons set out in my judgment of 13 July 2016 I did not consider that to be a factor which materially affected the validity of my existing orders.[4]

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2 *NSK Limited & Anor v General Equipment Co Limited* [2016] NZHC 1586.
3 *Carter v Coronor's Court at Wellington* [2015] NZHC 2998 at [11].
4 *NSK Limited & Anor v General Equipment Co Limited* above n 2 at [23].

[11] The second alleged material change was the advice that Mr Reid had confirmed that Saeco had received approximately 50 per cent of the NSK-branded bearings which are the subject of the claim. I agreed with GE that this was a material change of circumstance which required a fresh assessment of the appropriateness of my orignial order. While I accepted the submission of Mr Kennedy, for NSK, that the disclosure of one customer's identity does not affect the relevance of the remaining 27, I considered it affected how central the information supplied by the other customers was likely to be to NSK's case. NSK was then at liberty to make the necessary inquiries of Saeco. It could ascertain whether as much as 50 per cent of the bearings in dispute were likely to be counterfeit. I determined that in this sense the disclosure of the names and details of the remaining customers no longer carried the significance it previously had. On the other hand, the commercial sensitivity of this information, which I found existed to some extent, remained at the same level it did at the time of my judgment. Thus I concluded that the weight of the balancing exercise undertaken under r 8.19 had shifted.

[12] I also ordered the appointment of an expert to make inquiries of GE's unidentified customers to ascertain, to the extent it was possible, what proportion of NSK-branded bearings supplied to them by GE were counterfeit or likely to be counterfeit.

[13] NSK appealed my decision to vary the orders.

[14] On the afternoon of Friday, 22 July 2016 GE served a memorandum and a further affidavit from Mr Reid. In that affidavit Mr Reid acknowledged that the affidavit he had filed in support of GE's application to vary was wrong in a material respect, namely that Saeco had not in fact received 50 per cent of the bearings as previously advised. In fact, the correct percentage was a little over 2 per cent in quantity and 17 per cent in value.

[15] Relying on this misrepresentation (which I accept was made innocently) NSK applied to recall my judgment of 13 July 2016, and paragraphs [30] to [32] in particular, and reinstate my judgment of 28 June 2016. GE opposed this course of action and replied with a series of counter-allegations.

[16] In a Minute dated 11 August 2016, I informed that parties of my view that the procedural complexities of the current matter had become unmanageable. As a result I formed the view that the allegations and counter-allegations made could no longer addressed through memoranda and telephone conference (of which there had been many). Mr Elliott sought a hearing at which all outstanding matters could be addressed and properly argued. For the reasons discussed I agreed. A hearing was set down for 12 September 2016. I also directed that both sides were to file submissions covering all outstanding issues. These have now been received and the hearing has taken place.

[17] This judgment addresses the recall application.

Legal principles on recall

[18] Rule 11.9 of the High Court Rules provides:

> "A Judge may recall a judgment given orally or in writing at any time before a formal record of it is drawn and sealed.

[19] The leading statement on recall of a judgment is to be found in *Horowhenua County v Nash (No. 2)* where Wild J said:[5]

> "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."

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

[20] Mr Kennedy relies upon the third instance referred to by Wild J, namely that my judgment should be recalled "for some other very special reason justice requires ...".

[21] Unsurprisingly, an order founded on incorrect evidence amounts to "a very special reason" justifying recall of the judgment.[6]

Submissions

NSK

[22] Mr Kennedy submits that it is plain the Court varied the original orders on an entirely false premise. As such, there was not, in fact, a material change of circumstance. Even with Saeco's co-operation it is not possible for NSK to ascertain whether as many as 50 per cent of the bearings are likely to be counterfeit. Mr Kennedy thus submits this amounts to a very special reason requiring the judgment to be recalled.

[23] Mr Kennedy also submits that while the usual principle is that a Court becomes *functus officio* once it has made an order and an appeal has been lodged, NSK would abandon its appeal in order to provide the jurisdictional and procedural basis for this Court to recall its judgment.

GE

[24] Mr Elliott, while readily accepting the evidence provided by Mr Reid was incorrect, submits that this does not necessarily mean the judgment must be recalled. He says the question is whether a variation could have been made on the correct evidence. He says that in the present circumstances it could have.

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6 *Gitmans v Alexander* HC Auckland, CP243/IM01, 17 July 2002.

[25] Secondly, he submits that even if the Court considers the judgment should be recalled, there have been fresh and material changes in circumstance since it was issued which justify the varied orders remaining. He submits that the relevant changes are that:

(a) The defendant has accepted liability for supplying the counterfeit bearings. The identity of the customers is not necessary to determine the issues.

(b) GE has also amended its statement of defence so as to formally acknowledge that NSK has goodwill and a reputation to protect.

(c) The plaintiffs propose to file expert evidence from a statistician to determine the number of counterfeit bearings supplied. If adopted, this method would obviate the need to identify GE's customers.

(d) NSK has chosen not to use the independent expert I directed to be appointed. That mechanism would have permitted NSK to inquire about each customer.

(e) Saeco's involvement in the proceeding remains centrally important, albeit in a different way, given that it has now provided new briefs of evidence confirming that 40 of the 60 bearings have been replaced by a customer and that no complaints were received in relation to these bearings.

[26] Mr Elliott submits that NSK's failure to utilise the expert reveals that the disclosure of the identities of the customers is not actually necessary to prosecute their claims. This refusal reveals NSK's real motive in knowing the identity of GE's customers, namely to obtain a collateral commercial advantage.

Decision

[27] There can be no doubt that the material change which I relied on in reassessing the appropriateness of my original order was the information contained

in Mr Reid's affidavit. This is reflected in my discussion of the issue at [24] where I stated:

> "... [NSK] can now ascertain whether as much as 50 per cent of the bearings in dispute were likely to be counterfeit. In this sense disclosure of the names and details of the remaining customers no longer carries the significance it previously did. On the other hand, the commercial sensitivity of this information, which I found exists to some extent, remains at the same level it did at the time of my judgment. In this sense, the weight of the balancing exercise undertaken under r 8.19 has shifted."

[28] It is, of course, wholly unsatisfactory that this error was made, albeit unintentionally. It has led to avoidable complications and has required the Court and counsel to be involved in the preparation of time consuming applications, numerous memoranda and telephone conferences. It is regrettable that the fixture which was set down in October 2015, has also had to be adjourned although this cannot be attributed to Mr Reid's error alone.

[29] Despite Mr Elliott's strenuous submissions to the contrary I cannot see I have any option but to recall my judgment. The grounds for the variation were advanced on the basis there had been a material change in circumstance by reason of two factors; first that GE had accepted liability and secondly that Saeco had received 50 per cent of the NSK-branded bearings from GE. In my judgment of 13 July 2016, I determined that GE consenting to judgment on liability was not a matter which materially affected the validity of my earlier orders but thatthe evidence Saeco had received 50 per cent of the NSK-branded bearings supplied by GE to its customers did. If I had known the correct position I could not, and would not, have made the variation sought. Saeco's disclosure that it had received NSK-branded bearings would not, in itself, have been sufficient. The quantity of bearings Saeco was said to have received, which we now know to have been erroneous, was the determinative factor.

[30] Given the centrality and materiality of that factor to the ration of my decision of 13 July 2016 I consider that the only appropriate and available course of action is to recall the judgment.

[31] But that does not dispose of the matter. The question is whether there have been fresh and material changes in circumstance that could justify the varied orders remaining or whether my original decision of 28 June 2016 should simply be reinstated as pressed for by NSK.

[32] Given that the judgment of 13 July 2016 will be recalled, if the variation is to remain in place, I would have to make a fresh order to this effect. This raises the issue of whether GE is time barred in seeking this result.I made the variation order under r 7.49 which relevantly provides:

> "**7.49 Order may be varied or rescinded if shown to be wrong**
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> (1) A party affected by an interlocutory order (whether made on a Judge's own initiative or on an interlocutory application) or by a decision given on an interlocutory application may, instead of appealing against the order or decision, apply to the court to vary or rescind the order or decision, if that party considers that the order or decision is wrong.
>
> ...
>
> (3) Notice of an application under subclause (1) must be filed and served, —
>
> (a) if it is made by a party who was present or represented when the order was made or the decision was given, within 5 working days after the order was made or the decision was given:
>
> (b) if it is made by a party who was not present and not represented, within 5 working days after receipt by the party of notice of the making of the order or the giving of the decision, and of its terms."

[33] Mr Kennedy submits that GE is now out of time. It had five days after the judgment of 28 June 2016 to apply to vary the orders contained in that decision. It did so on two grounds only. To allow it to re-litigate the matter now, on different grounds, would be to defeat the requirement set out in r 7.49(3) and undermine the need for finality.

[34] Mr Elliott submits that NSK's argument on this issue is entirely without merit. He argues that it cannot be correct that a party should lose its right to vary orders through a strict and unyielding application of the five day limit particularly

where arguments about the validity of the first variation to a judgment inevitably mean that a party runs foul of the statutory time limit to apply for a second if need be.

[35] Mr Elliot also points out that the Court has the power to enlarge these time limits under r 1.19, which provides:

> **"1.19 Extending and shortening time**
>
> (1) The court may, in its discretion, extend or shorten the time appointed by these rules, or fixed by any order, for doing any act or taking any proceeding or any step in a proceeding, on such terms (if any) as the court thinks just.
>
> (2) The court may order an extension of time although the application for the extension is not made until after the expiration of the time appointed or fixed."

[36] In any case, he submits that the Court has the inherent jurisdiction to rescind or vary the order should the interests of justice require it, notwithstanding rr 7.49 to 7.51.[7]

[37] There is no need for me to delve into a deep analysis of these provisions. In the circumstances, I am satisfied I have the power to extend the time limit set out in r 7.49 under r 1.19. I am less certain about the application of the Court's inherent jurisdiction but it is unnecessary for me to decide this point.

[38] The question is not of any great importance because ultimately I have reached the conclusion that it is not appropriate to allow the variation to remain in place in any case. I am not satisfied that any of the new grounds raised by GE amount to fresh and material changes of circumstance.

[39] The issue of GE now accepting that if counterfeit bearings were supplied there was a misrepresentation, does not affect the need for NSK to establish the number of customers who were provided with counterfeit bearings, as well as the number of such bearings these customers received. This remains critical to the issue

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7 *West Harbour Holdings Ltd v Waipareira Investments Ltd* [2013] NZHC 402 at [11].

of quantum which, as both parties seem to recognise, now appears to be the primary issue to be resolved in this litigation.

[40] For the same reason, GE's acknowledgement that NSK has a goodwill and reputation is not of critically significance. The issue of quantum can only be determined by effectively demonstrating the extent to which GE provided counterfeit bearings.

[41] I do not consider that NSK's engagement of a statistician, and GE's proposal to provide similar evidence in rebuttal, greatly affects matters either. This evidence, taken at its highest, will now allow for an estimate to be made as to the extent to which GE provided counterfeit bearings to customers. While this will certainly be of assistance in determining the quantum issue, I do not consider that NSK should be curtailed in its attempts to prove its loss to the greatest degree of precision it can. Any information NSK could obtain from the customers themselves, which I accept is likely to be somewhat limited given the amount of time that has now passed since bearings were provided, will necessarily result in more accurate and reliable findings and remains relevant as a result.

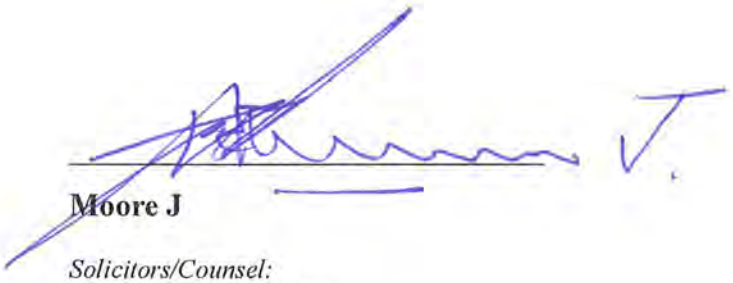
[42] Nothing can be taken from NSK's failure to engage in the process of appointing an expert to conduct enquires of GE's customers. While I saw some merit in this proposal at the time, I note that NSK opposed it from the outset and almost immediately signalled its intention to appeal the order once it was made. It was perfectly entitled to take this course of action.

[43] Finally, the disclosure of Saeco as a customer of GE's is not, based on its accurate purchasing history, a major or determinative development. It is now known that Saeco purchased only 60 out of a total of some 3000 bearings. This amounts to approximately two per cent. I accept that Saeco has filed briefs of evidence stating that 40 of these 60 bearings have now been replaced and are no longer available for inspection. However, the bearings sold to Saeco provide only a limited sample and I consider that it would be unsafe to make any assumptions, based on this information, as to the degree to which will be possible for NSK to now locate and inspect the bearings sold to other customers.

[44] On the whole, I am not satisfied that any of the matters raised by GE, either alone or in combination, amount to a material change of circumstance. Accordingly I do not consider that the varied orders should remain in place and I decline to make fresh orders to this effect.

Result

[45] NSK's application to recall my judgment of 13 July 2016 is granted and the orders contained in my judgment of 28 June 2016 are reinstated.



Moore J

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