IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-759
[2020] NZHC 3531

BETWEEN	PQW Plaintiff
AND	T C MALLARD Defendant

On the papers:

Counsel:	M F McClelland QC and A J Romanos for Plaintiff R K P Stewart and L Clark for Defendant
Judgment:	24 December 2020

JUDGMENT (NO. 2) OF CHURCHMAN J

The application

[1] On 23 December 2020, counsel for the plaintiff filed a memorandum seeking the following orders:

(a) pending determination of a recall application, a fresh interim order suppressing the same information as per the original interim suppression order, or if in fact the original orders remain in place, a minute confirming this;

(b) recalling the judgment in this matter of 22 December 2020; and

(c) directing the Registry to convene, in consultation with counsel, a teleconference hearing in February 2021 where these issues can be

discussed further and, if necessary, directions made for a hearing of full argument.

[2] Alternatively, if the judgment was not recalled, the plaintiff sought:

(a) a fresh interim order suppressing the same information as per the original interim suppression orders, pending the outcome of the appellate process; and

(b) leave to appeal.

Interlocutory applications

[3] Although a formal application is not always required for the recall of a judgment, particularly if the correction sought is minor, such an application would be expected given the nature of the challenges in this case. The applications seeking orders in relation to suppression, directions conferences and leave to appeal are interlocutory applications governed by HCR 7.19 of the High Court Rules 2016 (HCR). HCR 7.19 requires such applications to be in form G31 or G32. Normally, an application seeking the type of orders sought here would be supported by an affidavit. HCR 7.20 requires supporting affidavits to be filed at the same time as the application.

[4] The applicant has not filed either any application in the prescribed form or a supporting affidavit. The memorandum filed contains a mixture of legal submissions and allegations of fact. Given the imminence of the closure of the Court for the Christmas vacation, the Court will treat the memorandum of counsel as if it were an application filed in accordance with the rules.

Interim suppression order

[5] At [3] of the memorandum, counsel for the plaintiff expresses his understanding that the interim suppression orders remain in place and have not been set aside by the judgment of 22 December 2020. That is clearly the position. Interim orders that are not expressly time-limited continue in force until either:

(a) further order of the Court; or

(b) the conclusion of the proceedings.

[6] The judgment of 22 December 2020 did not vary or rescind the interim orders and these proceedings have not yet been concluded. Although a notice of discontinuance has been filed, it was expressly conditional upon the Court making a final suppression order and an order sealing the file. As the Court has declined to make such orders, the precondition upon which the notice of discontinuance was filed has not been met, and the proceedings have therefore not yet been discontinued.

[7] On that basis, the interim suppression orders will continue in effect until further order of the Court, or resolution of these proceedings. That is why the intituling of the judgment of 22 December 2020 did not contain the real name of the plaintiff but an anonymised set of initials. No further or fresh interim suppression order is therefore required.

Recalling of judgment

[8] HCR 11.9 provides that a Judge may recall a judgment at any time before a formal record of it is drawn and sealed. The judgment of 22 December 2020 has not yet been sealed.

[9] The recall of a judgment is serious step and there are significant policy reasons requiring an order or decision of the Court to stand as conclusive unless overturned.

[10] The standard authority in relation to recall applications is *Horowhenua County v Nash (No. 2)*.[1] This case set out three circumstances justifying recall. Firstly, that 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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1 *Horowhenua County v Nash (No. 2)* [1968] NZLR 632.

[11] The applicant appears to be relying on the third of these grounds. Counsel submits that they had assumed that as the proposed orders were being sought by consent, the Court would automatically make them or alternatively would seek submissions before making a final determination.

[12] For the reasons set out in the Court's decision of 22 December 2020,[2] the making of a suppression order in a civil proceeding permanently suppressing the name of a plaintiff raises important issues regarding the principle of open justice.

[13] An application for an order sealing a Court file also has serious implications for the same principle. In this case, if a final suppression order was made, it is difficult to see what basis there would have been for sealing the Court file.

[14] Where important rights such as the principle of open justice are concerned, counsel cannot assume that the Court will rubberstamp an agreement that they have been reached, particularly when no information at all is provided to the Court as to why such orders are justified.

[15] Neither the memorandum as to consent orders nor any other document filed with it, explained what jurisdiction was being relied on as justifying the orders, or which authorities or principles might support the outcome sought.

The current application

[16] Counsel for the respondent has not formally consented to the recall application but has informally advised the Registrar that the defendant does not oppose the application. That is a relevant factor when considering the application.

[17] The memorandum of counsel for the applicant asserts that the Court made numerous material errors of fact and misinterpreted the two prior decisions on the interim suppression orders. It is the function of the Court of Appeal to correct errors, whether of fact or law, made by a High Court Judge. The correction of such errors is

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2 *PQW v Mallard* [2020] NZHC 3527, at [4]-[9].

not one of the three grounds identified in *Horowhenua Country v Nash (No. 2)*[3] as justifying a recall. The allegation of errors is therefore not a factor favouring recall.

[18] Effectively, counsel for the applicant is seeking an opportunity to address the Court as to why a final suppression order and an order sealing the Court file should be made. Arguably this could be said to fall within the second ground in *Horowhenua County v Nash (No. 2)*, namely the situation where counsel has failed to direct the Court's attention to a relevant legislative provision or authority. The joint memorandum of 18 December 2020 did not direct the Court's attention to any relevant legislative provision or authority at all. In that situation, it is appropriate that counsel have the opportunity of addressing the Court on these points.

[19] However, it is not necessary for the judgment to be immediately recalled for counsel to have the opportunity to make such submissions to the Court. As explained above, the substantive proceedings are still on foot and the interim suppression orders made by Grice J are still in place. What appears to be the plaintiff's principal objective of keeping his identity secret is therefore not at risk pending further order of the Court.

[20] I will therefore set the application for the orders sought in the memorandum of counsel dated 23 December 2020 down for hearing. If the plaintiff is able to persuade the Court that, in accordance with the established principles relating to recalling decisions, that grounds exist for recalling the decision and making one or both of the orders sought in the consent memorandum, the Court can do that. If the plaintiff does not so persuade the Court, then the Court can consider the plaintiff's application for leave to appeal the interlocutory decision of 22 December 2020 to the Court of Appeal.

[21] I request the Registrar to allocate a fixture of two hours' duration, if possible, in the first week of February 2021 to hear the recall application.

[22] I direct that the applicant file a formal application detailing the specific orders sought, the jurisdiction of the Court relied on for the making of those orders, and the grounds upon which it is said that the orders are justified.

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3 Above n 1.

[23] To the extent that the legal propositions to be advanced turn on questions of fact, then I would expect those assertions of fact to be supported by affidavit evidence.

[24] I therefore direct that the plaintiff file an application and any supporting affidavit no later than **18 January 2021** with a written synopsis of argument to be filed no later than **26 January 2021**. If the defendant wishes to file an application, affidavit or submissions, they are to be filed by the same dates as the plaintiff's documentation.

Churchman J

Solicitors:
Bartlett Law, Wellington for Plaintiff
Dentons, Kensington Swan, Wellington for Defendant

Counsel:
M F McClelland QC and A J Romanos, Wellington for Plaintiff
R K P Stewart, Barrister, Auckland for Defendant