IN THE SUPREME COURT OF NEW ZEALAND

SC 66/2010
[2015] NZSC 181

BETWEEN	ROBERT ERWOOD Appellant
AND	JANET MAXTED AND JANET MAXTED AND ALEXANDER JAMES JEREMY GLASGOW AS TRUSTEES OF THE ESTATE OF EDWARD ERWOOD First Respondents
	THE OFFICIAL ASSIGNEE Second Respondents

Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	Appellant in person
Judgment:	25 November 2015

JUDGMENT OF THE COURT

A The application for recall is dismissed.

B There is no order for costs.

REASONS

Application for recall

[1] The appellant has applied for recall of this Court's judgment in this appeal, which was delivered in March 2011.[1] In that judgment, the Court allowed the appellant's appeal against a judgment of the Court of Appeal delivered in March

[1] *Erwood v Maxted* [2011] NZSC 23 [*Erwood* (SC)]. An application by the first respondents for recall of this judgment was dismissed in July 2011: *Erwood v Maxted* [2011] NZSC 78.

2008 (the substantive COA decision).[2] The circumstances are summarised in this Court's judgment as follows:[3]

> [1] We have heard an appeal against the striking out of an appeal to the Court of Appeal on the ground that the appellant, Mr Erwood, had not paid the security for costs ordered by the Court of Appeal. Leave to appeal to this Court was granted because at a late stage it has become apparent that the Court of Appeal proceeded on the basis of a crucial misapprehension about the matter. The respondents have offered no opposition and, this Court being satisfied that the Court of Appeal was in error, Mr Erwood's appeal must be allowed.

Court of Appeal proceedings

[2] The background to the "crucial misapprehension" was as follows. The appellant had two appeals before the Court of Appeal, both of which related to bankruptcy proceedings against him. One was an appeal against a High Court decision[4] refusing to set aside the bankruptcy notice against the appellant (the bankruptcy notice appeal) and one was a subsequent appeal against a High Court decision[5] adjudicating the appellant bankrupt (the adjudication appeal). The security for costs had been fixed by the Registrar of the Court of Appeal for the bankruptcy notice appeal. In the substantive COA decision, the Court of Appeal had separately set security for costs for the adjudication appeal and made an unless order that the Court would strike out both appeals if the amount of security fixed for the adjudication appeal was not paid by a specified date. The Court of Appeal also ordered the appellant to pay costs of $3,000 to the respondents. Subsequently, when the security for costs for the adjudication appeal had not been paid by the specified date, the Court of Appeal struck out both the adjudication appeal and the bankruptcy notice appeal.

[3] The appellant applied to the Court of Appeal for the recall of the substantive COA decision but that application was dismissed in a judgment delivered in November 2009.[6] We will call this the first COA recall decision. The first

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2 *Erwood v Maxted* [2008] NZCA 74 (William Young P, Ellen France and Baragwanath JJ).
3 Citations omitted.
4 *Erwood v Maxted* HC Nelson CIV-2007-442-331, 27 September 2007 (Associate Judge Christiansen).
5 *Maxted v Erwood* HC Nelson CIV-2007-442-331, 22 November 2007 (Associate Judge Christiansen).
6 *Erwood v Maxted* [2009] NZCA 542 (Arnold, Randerson and Allan JJ).

respondents did not appear at the hearing of this application and the case against recall was advanced by a major creditor in the bankruptcy of the appellant, Mrs Harley. The Court of Appeal awarded costs against the appellant in favour of Mrs Harley in the first COA recall decision.[7]

[4] The appellant then made an application to the Court of Appeal for recall of the first COA recall decision. This application was dismissed in a judgment delivered in March 2010 (the second COA recall decision).[8] In the course of that application it was submitted on behalf of the appellant that the Court of Appeal did not have jurisdiction to make a costs award in favour of Mrs Harley in the first COA recall decision. The Court of Appeal rejected that submission, noting that Mrs Harley was the principal creditor in the appellant's bankrupt estate and that she was directly affected by his attempts to have his adjudication set aside.[9]

[5] After the second COA recall decision, the appellant sought leave to appeal to this Court against the substantive COA decision. At this time he produced a notice of abandonment of the adjudication appeal which had apparently been filed in the Court of Appeal in December 2007. Leave was granted on 30 November 2010.[10] The appeal was heard on 18 March 2011 and was allowed in an oral judgment delivered at the hearing. As this Court observed in its judgment, the existence of the notice of abandonment not only meant that the adjudication appeal had not been extant at the time that the substantive COA decision had been made, but it also made it obvious that the bankruptcy notice appeal should not have been struck out for non-payment of security for costs. After making that observation, the Court continued:[11]

> The security ordered in relation to [the bankruptcy notice appeal] was duly paid. The strike-out order was made only because security for costs had not been provided in relation to the adjudication appeal. But, as that appeal had already been abandoned, plainly the Court of Appeal could not fix security for costs in relation to it, link the two appeals for the purpose of payment and then struck out the bankruptcy notice appeal for non-compliance.

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7 At [58](e). The award was costs for a standard appeal on a band A basis plus usual disbursements.

8 *Erwood v Maxted* [2010] NZCA 93 (Arnold, Randerson and Allan JJ).

9 At [18].

10 *Erwood v Maxted* [2010] NZSC 143.

11 *Erwood* (SC), above n 1, at [19].

[6] Having allowed the appeal, the Court reinstated the bankruptcy notice appeal and remitted the proceeding to the Court of Appeal for hearing.[12] It also set aside the costs order made by the Court of Appeal in the substantive COA decision.

Test for recall

[7] In *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)*,[13] this Court endorsed the following criteria for recall set out in the decision of Wild CJ in *Horowhenua County v Nash (No 2)*:[14]

> [F]irst, 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.

[8] In this case only the third of the *Horowhenua County v Nash* criteria is of relevance: whether there is "some other very special reason justice requires that the judgment be recalled".

Grounds for recall

[9] The appellant seeks recall of this Court's judgment on two separate bases. The first is that this Court should not only have ordered that the costs award made against him in the substantive COA decision be set aside, but also award costs to him as a successful party in the Court of Appeal. He had been represented by counsel, Mr Soondram, at the Court of Appeal hearing that preceded the substantive COA decision. The second is that this Court "overlooked" the costs order made against him in favour of Mrs Harley by the Court of Appeal in the first COA recall decision.

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[12] The Court of Appeal dismissed the bankruptcy notice appeal: *Erwood v Maxted* [2012] NZCA 110. This Court refused leave to appeal: *Erwood v Maxted* [2012] NZSC 81. An application to recall this Court's judgment was dismissed: *Erwood v Maxted* [2012] NZSC 87. Further applications for recall were dismissed summarily.

[13] *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 at [2].

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

Constitution of court

[10] There are a number of difficulties in dealing with an application to recall a judgment over four years after it was delivered. In this instance, four of the Judges of this Court who dealt with the appeal have now retired. As the application seeks the recall of a judgment issued in relation to an appeal, it is necessary for the application to be considered by a panel of five Judges. There is no practical alternative to the application being dealt with by the current permanent Judges of the Court, notwithstanding that William Young J was on the Court of Appeal panel that delivered the substantive COA decision and Arnold J was on the Court of Appeal panel that dealt with the two Court of Appeal recall applications. As the issue before the Court relates to the appropriateness of this Court's decision in relation to costs, and does not require any judgment as to the merits of the Court of Appeal judgments in relation to the substantive appeal or the recall applications, we are satisfied that there is no impediment to William Young and Arnold JJ participating in the panel for this application, in addition to the fact that there is no viable alternative to their doing so.[15]

Ground 1: award of costs?

[11] We have checked the written submissions made to this Court in relation to the appeal and the transcript of the hearing, and it is clear that no application was made by, or on behalf of, the appellant, for a costs award in relation to the substantive COA decision. The appellant effectively acknowledges this by saying in his application for recall:

> I apply for the costs of Mr Soondram [the counsel who appeared for him in the Court of Appeal substantive appeal].

[12] It is simply impractical for the Court to consider a costs application after delivery of its judgment, especially after a delay of more than four years. There is no evidence before us that the appellant actually incurred any costs to Mr Soondram (bearing in mind that the appellant was a bankrupt at the time of the hearing). Even if he did incur such costs, it is too late for him to seek costs now and far from clear

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[15] The appeal against the substantive COA decision was, as highlighted above, allowed because the Court of Appeal had not been informed about the notice of abandonment, not because of any error on its part.

that an award of costs would have been made if sought timeously. The judgment of this Court was given orally in the presence of the appellant. An application for an award of costs in relation to the Court of Appeal hearing at which Mr Soondram appeared could have been made at that time. That did not happen. In addition, a further opportunity arose when the first respondents sought to recall this Court's judgment. In the circumstances, we are satisfied that it is not in the interests of justice effectively to embark on consideration of a fresh application for costs now. It is certainly not a "very special reason" for recall of the kind contemplated by *Horowhenua County v Nash*.

Ground 2: costs awarded in the first COA recall decision

[13] In relation to the costs awarded to Mrs Harley in the first COA recall decision, there is an additional practical difficulty in that Mrs Harley has died since this Court's decision in the substantive appeal was delivered. In any event, we do not see any error in the original decision of this Court. It would not have been appropriate to rescind a costs award in favour of Mrs Harley in the context of a decision of this Court to which she was not a party. The first recall decision of the Court of Appeal was simply not in issue before this Court. But it was not overlooked, as it was specifically mentioned in the judgment.[16]

[14] Even if the Court had been asked to quash the costs award made in the first COA recall decision, we consider it likely that it would have refused to do so. We say this because the substantive appeal to this Court was not resisted by the respondents once their attention was drawn to the existence of the notice of abandonment of the adjudication appeal. If that document had been drawn to the attention of the respondents and/or the Court of Appeal at the time of the first and/or second recall application(s), it is likely that the respondents and Mrs Harley would not have resisted the recall of the Court of Appeal judgment to bring about the outcome that was ultimately achieved in the substantive appeal to this Court. They would have not been put to the expense of preparation for hearings to deal with points that were advanced at those hearings on the appellant's behalf and rejected.

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16 *Erwood* (SC), above n 1, at [18].

[15] In those circumstances, we see no justification for interfering with the award of costs made in the first COA recall decision. There is certainly no "very special reason" to reopen the matter.

Result

[16] For all of these reasons the application for recall is dismissed.

Costs

[17] We make no award of costs in relation to this application.