REMINDER: EXTANT ORDER SUPPRESSING DETAILS OF SEXUAL CONDUCT ALLEGED IN RELATION TO THE FOURTH RESPONDENT AND WITNESS Z

IN THE SUPREME COURT OF NEW ZEALAND

SC 109/2015
[2015] NZSC 192

BETWEEN	LINDSAY JAMES TREVOR SMALLBONE Applicant
AND	GEORGE PAUL LONDON First Respondent
	IAN NEVILLE WISHART Second Respondent
	HOWLING AT THE MOON PUBLISHING LIMITED Third Respondent
	PAULETTE MERLE LONDON Fourth Respondent

Court:	Glazebrook, Arnold and O'Regan JJ
Counsel:	P A McKnight for Applicant C J Tennet for First and Fourth Respondents Second Respondent in person
Judgment:	17 December 2015

JUDGMENT OF THE COURT

A **The application for leave to appeal is dismissed.**

B **Costs of $2,500 are awarded to the first and fourth respondents.**

REASONS

Defamation proceedings

[1] After a jury trial in 2013, Mr Smallbone succeeded in defamation proceedings relating to allegations made about him in a book entitled "The Hunt", written by the first and second respondents, Messrs London and Wishart. The third respondent is Mr Wishart's publishing company. The fourth respondent, Mrs London, is Mr Smallbone's former wife. She is quoted extensively in the book. The jury awarded Mr Smallbone $220,000 general damages and $50,000 aggravated damages.

[2] Immediately after the verdict on Friday 9 August 2013, Williams J saw counsel in chambers. Counsel for Mr Smallbone moved for judgment. Counsel for Mr and Mrs London requested that the judge defer entering judgment. The Judge responded that Mr Smallbone was entitled to judgment and it would be improper for him to delay entering it. Accordingly, he entered judgment for Mr Smallbone.

[3] On Monday 12 August 2013, Williams J recalled the judgment on his own motion. He explained that he had entered judgment in the mistaken belief that he was required to do so,[1] despite the defendants wishing to be heard on damages. He reserved leave for the parties to make such applications as they thought fit.

[4] A number of applications were made. Then, in late September 2013, the defendants applied for an order admitting the affidavit evidence of Witness Z. She provided a materially similar account of Mr Smallbone's behaviour to that outlined by Mrs London in the book.

[5] Williams J, in a judgment delivered on 23 April 2014, indicated that he was minded to set aside the jury's verdict and order a new trial.[2] He held that, prior to

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1 Rule 11.15 of the High Court Rules had presumably come to the Judge's attention.

2 *Smallbone v London* [2014] NZHC 832 [*Smallbone* (HC)] at [63] and [64]. He did not make the orders at this time as he proposed an alternative course of action that could be taken if both parties consented. The parties did not consent and the formal order was made on 21 May 2014: *Smallbone v London* HC Wellington CIV-2012-485-482, 21 May 2014 (Minute and Final Order).

the sealing of a judgment, the power to hear new evidence, recall a judgment and set aside a jury's verdict remained, either under r 11.15(b) or (c) or under the inherent jurisdiction of the High Court.[3]

[6] Williams J said[4] that, if it were a judge-alone trial, the new evidence would be admitted pursuant to the test set out by the Supreme Court in *Paper Reclaim Ltd v Aotearoa International Ltd (No 2)*.[5] He was satisfied that Mr Wishart, before trial, had done all that was reasonably possible in the circumstances to find Witness Z.[6] He considered her evidence sufficiently credible and highly probative as potentially powerful propensity evidence.[7] Williams J had little doubt that the new evidence would have changed the complexion of the trial.[8]

Court of Appeal decision

[7] Williams J's judgment was upheld by the Court of Appeal. As to the recall of the judgment on 12 August 2013, the Court held that, because counsel did not draw the Judge's attention to r 11.15, the Judge believed he had no choice but to enter immediate judgment pursuant to the jury verdict. As a result, the Court of Appeal said the Judge was right to recall the judgment and he was wise to do so unilaterally before the judgment was sealed.[9]

[8] As to whether there was jurisdiction to order a retrial, the Court of Appeal held that, despite the fact that r 494 of the former High Court Rules (with an explicit power to order a new trial) was not carried forward into the current Rules, either r 11.15 or the inherent jurisdiction allowed the High Court to order a retrial in a jury case. In considering what circumstances a judge may order a retrial after a jury verdict, the Court of Appeal said that, among other things, the power could be

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3 *Smallbone* (HC), above n 2, at [63].
4 At [47].
5 *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 2)* [2007] NZSC 1, [2007] 2 NZLR 124.
6 *Smallbone* (HC), above n 2, at [31].
7 See at [35] and [47].
8 At [39].
9 *Smallbone v London* [2015] NZCA 391 (Harrison, Stevens and Miller JJ) [*Smallbone* (CA)] at [29].

exercised where the verdict would have been different had new evidence been admitted.[10]

[9] The Court was not persuaded that the Judge was wrong to find Witness Z's evidence credible on its face.[11] It was satisfied the evidence was fresh.[12] The Court was also satisfied as to cogency because the evidence lent credibility to Mrs London's account of Mr Smallbone's behaviour. The Court said that, in a "he-said, she-said case, where the only two eyewitnesses to an encounter give conflicting evidence about what passed between them, evidence of a third person that established a relevant propensity is unquestionably capable of satisfying the jury".[13]

[10] The Court also addressed procedural complaints by Mr Smallbone, including that Witness Z was not subject to cross-examination. The Court rejected that complaint, stating that experienced counsel had decided not to cross-examine Witness Z even when the Judge indicated his view that the evidence was credible and cogent.[14]

Application for Leave to Appeal

[11] Mr Smallbone applies for leave to appeal on the basis that the Court of Appeal incorrectly endorsed the High Court's decision to recall the original judgment. He also argues that the Court of Appeal was wrong to uphold the High Court's finding that it had jurisdiction to order a retrial post verdict.

[12] In any event, Mr Smallbone submits that the three-part test in *Paper Reclaim Ltd*[15] was not satisfied with regard to Witness Z's affidavit. Finally, and in the alternative, he argues that this Court should revisit the test in *Paper Reclaim* on the discovery of new evidence "to bring New Zealand into line with the more modern principles of England and Australia".

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10 At [42].
11 At [50].
12 At [51].
13 At [52]–[54].
14 At [45].
15 See above *Paper Reclaim Ltd*, above n 5.

Application to adduce new evidence

[13] Mr Smallbone applies for leave to adduce further evidence, supporting his position that the respondent could have found Witness Z, namely an affidavit from him and a private investigator showing how easy it would have been to find Witness Z prior to, or during, the trial.

[14] This evidence should have been adduced in the High Court or the Court of Appeal. The application is therefore declined.

Discussion on the application for leave to appeal

[15] The test for leave to appeal is not met. Even if Williams J should not have recalled his judgment and there was no jurisdiction to order a retrial, there would have been a right of appeal against the judgment. The issue of new evidence could have been raised on appeal. It is implicit in the Court of Appeal's finding that the evidence of Witness Z was sufficiently credible, fresh and cogent that the appeal would have been allowed. Given this, there would be no practical benefit in an appeal to this Court on the question of jurisdiction.

[16] Further, the Court of Appeal's findings relating to Witness Z were concurrent findings with those of the High Court. They are factual findings relevant to the particular circumstances of this case. There is thus no point of general or public importance involved. Nor does anything raised by Mr Smallbone suggest a risk of a miscarriage of justice.

[17] Mr Smallbone argues that, as the evidence of Witness Z goes solely to credit (presumably meaning veracity), it probably would not have influenced the result of the trial. In addition, Mr Smallbone argues that, where proposed new evidence solely goes to credit, the evidence should be especially compelling to justify a new trial.[16] The courts below held that the evidence was propensity evidence and that, as

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[16] Mr Smallbone relies on the English case of *Hamilton v Al-Fayed (No 4)* [2001] EMLR 15 (CA) and, in particular, the comments made by the Court at [28]–[34]. In that case, the fresh evidence arose following the revelation that the defendant in a defamation action had violated legal professional privilege by purchasing from a third party documents which the plaintiff's counsel had discarded.

such, it was potentially powerful evidence.[17] Nothing raised suggests that this characterisation of the evidence was wrong. Mr Smallbone also submits that the finding as to cogency should not have been made absent cross-examination. As pointed out by the Court of Appeal, however, counsel did not seek to cross-examine Witness Z.[18]

[18] As to the suggestion that this Court should revisit its decision in *Paper Reclaim Ltd*, nothing raised suggests that the test (in a relatively recent decision) should be revisited. In any event, Mr Smallbone is really complaining about the application of the test in the Courts below. No real modification to the test itself is proposed.

Result

[19] The application for leave to appeal is dismissed.

[20] Costs of $2,500 are awarded to the first and fourth respondents.[19]

Solicitors:
Langford Law, Wellington for Applicant
Debbie Goodlet, Whanganui for First and Fourth Respondents

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17 *Smallbone* (HC), above n 2, at [35]. *Smallbone* (CA), above n 9, at [52].
18 *Smallbone* (CA), above n 9, at [45].
19 No costs are awarded to the second and third respondents. Mr Wishart filed submissions personally and, purportedly, on behalf of the third respondent.