ORDER PROHIBITING PUBLICATION OF SEXUAL ALLEGATIONS MADE BY MS LONDON AND WITNESS Z.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA324/2014
[2015] NZCA 391

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

Hearing:	2 June 2015
Court:	Harrison, Stevens and Miller JJ
Counsel:	P A McKnight and A J Romanos for Appellant C J Tennet for First and Fourth Respondents Second Respondent in person and (by leave) for Third Respondent
Judgment:	26 August 2015 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The application for an order disallowing the privilege in respect of communications between the second respondent and Witness Z is dismissed.

C The first and fourth respondents will have one set of costs as for a standard appeal on a band A basis. All respondents will have usual disbursements.

D Order prohibiting the publication of the name or identifying particulars of Witness Z.

E Order prohibiting the publication of the fourth respondent and Witness Z's allegations of sexual acts.

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] This appeal raises a narrow question of trial court jurisdiction: whether the High Court may order a new trial before the judgment is sealed in civil proceedings tried before a jury.

Narrative

[2] Mr Smallbone was the plaintiff in a successful defamation action in the High Court. His claim was brought on allegations made against him in a book called The Hunt which was written by George Paul London and Ian Wishart. Paulette London, who was married to Mr Smallbone between 1967 and 1976 and is now married to Mr London, was quoted extensively in the book. It was published by Mr Wishart's company Howling at the Moon Publishing Ltd (HATM).[1]

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[1] Mr Wishart was given leave to represent HATM on the appeal, the Court stressing that this decision was taken for exceptional reasons and with the consent of counsel for Mr Smallbone.

[3] Mr Smallbone alleged that the book made claims about his sexual behaviour that carried a number of defamatory meanings: that he was a sexual deviant and voyeur who sexually abused his former wife, that he is of weak character and immoral, and that he is a loathsome and shady person. To these allegations the defendants pleaded, inter alia, truth and fair comment.

[4] The trial was held in July and August 2013 before Williams J and a jury. The trial was a credibility contest between Mr Smallbone and Ms London, whose evidence included a claim that he had committed certain sexual acts on her during their marriage and a claim that he took her to red light districts. The jury preferred Mr Smallbone's evidence to that of Ms London. They awarded him $220,000 general damages and $50,000 aggravated damages.

[5] The Judge saw counsel in chambers on Friday 9 August, immediately after the verdict was taken. Mr McKnight, plaintiff's counsel, moved for judgment. Mr Tennet, for the Londons, said he would like to "do a motion on arrest of judgment" but said he was not sure whether that "survived the new High Court Rules". He asked the Judge to defer entering judgment. The Judge responded that he thought Mr McKnight was entitled to judgment and it would be improper for him not to enter it. He entered judgment accordingly.

[6] The Judge was mistaken in his belief that he had no choice in the matter. Rule 11.15 of the High Court Rules (the Rules) provides:

> **11.15 Judgment after proceeding tried with jury**
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> After a Judge takes the jury's verdict in a proceeding, he or she may—
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> (a) give judgment immediately; or
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> (b) adjourn the proceeding for further consideration; or
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> (c) give judgment for either party and reserve leave for either party to apply—
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> (i) to set aside the judgment; and
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> (ii) for another judgment.

[7] Over the weekend of 10–11 August Mr McKnight drew up a judgment for sealing on Monday 12 August, but the Judge pre-empted him, recalling the judgment of his own motion without hearing from counsel.[2] He explained that the defendants had made it clear that they wanted to be heard on the damages award but he had entered judgment in the mistaken belief that he had no discretion. It is evident (from the judgment under appeal) that r 11.15 had come to his attention. He reserved leave for 14 days to allow the parties to make such applications as they might think fit.

[8] By memoranda dated 26 August the defendants made several applications. It appears that the registry had given the defendants to understand, contrary to the Judge's direction, that memoranda would suffice. The plaintiff took the point, but the Judge extended time, directing by minute of 30 August that applications must be made by 4 September.[3]

[9] Applications were duly made. Mr Wishart moved for an order that he and HATM be heard on damages and costs and to set aside judgment pending an application under r 11.16 for a new trial. His grounds amounted to a challenge to much of the evidence, the Judge's conduct of the trial and the jury's reasoning. The Londons moved to set aside the verdict, challenging it as unreasonable and contending that no reasonable jury could have awarded so much. They too challenged much of the evidence and the Judge's directions.

[10] The defendants then applied for an order admitting the affidavit evidence of Witness Z, a woman who knew Mr Smallbone after his marriage to Ms London. It appears that she and Ms London have never met. Witness Z gave a materially similar account of Mr Smallbone's behaviour. Mr Wishart, who obtained her evidence and was first to apply, on 26 September 2013, contended that the evidence was fresh and cogent. He argued that it in a "he said, she said" contest the evidence of another woman who claimed to have been treated in the same way, albeit years apart, could have made all the difference.

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2 *Smallbone v London* HC Wellington CIV-2012-485-482, 12 August 2013.
3 *Smallbone v London* HC Wellington CIV-2012-485-482, 30 August 2013.

[11] The gist of Witness Z's evidence was that Mr Smallbone had met with her before the trial and asked her to give evidence to the effect that he was not the sort of man who would do the things that Ms London alleged. She deposed he promised that if she did so, he would pay the money that he owes her. She says that she refused because she would not give false testimony, much less for a financial incentive. She says that the behaviour concerned happened on an overseas trip that included Mr Smallbone's sister.

[12] Mr Smallbone swore an affidavit in opposition. He denied the allegations and argued that Witness Z lacked credibility. He accused her of making constant financial demands. He accepts that he asked her to make a statement but says that she demanded money and refused to be involved when he did not agree to pay. He denies seeking to bribe her. He denies any misconduct against her and notes that his sister was with them for the whole of the overseas trip. He denies taking her to red light districts. Mr Smallbone's mother, Mavis, and his sister, Robyn Cooper, say that there was no evidence in Witness Z's demeanour to suggest that anything had happened, and Ms Cooper believes that it could not have happened on the trip because she was with Mr Smallbone and Witness Z at all times and shared accommodation with them.

[13] Witness Z's rejoinder went into greater detail about her allegations. She confirms that the incident happened on the trip whilst they were accompanied by Ms Cooper but says she would never have confided in her about something of that kind.

[14] As noted, Mr Smallbone was able to contact Witness Z before the trial. Mr Wishart, however, said that he could not, although he made attempts. He deposed to the steps that he took to try to find her using public directories and internet and social media searches. It was not until after the trial that contact was made. His only reason to contact Witness Z before trial was that the book had mentioned a "half naked" photo of her that Mr Smallbone had kept in his office; he did not know that she would make an allegation similar to that made by Ms London.

[15] The hearing of the various applications took place on 10 October 2013. Although Mr McKnight challenged the new evidence for freshness and credibility, there was no cross-examination of any deponent. The Judge observed that Witness Z's evidence went to propensity and veracity, and stated he had little doubt that it would have changed the complexion of the trial.

[16] The Judge concluded the hearing by recording that there were three options, one of which was a retrial if the evidence was credible, cogent and previously unavailable. He noted that the former rr 494 and 495 had been repealed, which left the question whether he had jurisdiction to order a new trial. He appears to have accepted that this Court would have jurisdiction to do so, because he observed that one option was to enter judgment for the plaintiff and force the defendants to appeal. The parties were given leave to file submissions on the jurisdiction question. Submissions were duly filed. At Mr Tennet's insistence a further hearing was held on 26 November 2013, but it was very brief. Judgment was reserved.

The High Court judgment

[17] The judgment was delivered on 23 April 2014.[4] After reviewing the procedural background, the Judge recorded that:

> [15] [Witness Z's] affidavit completely changed the complexion of post-trial argument. When the applications came on for hearing, it was agreed that the focus of argument would be the application in relation to Witness Z's evidence and that in this judgment I too should concentrate on the application to adduce her evidence and set aside the jury's verdicts.

[18] The Judge discussed the evidence for and against the retrial application before turning to the test for the admission of the affidavit.

[19] He was satisfied that Mr Wishart did all that was reasonably possible in the circumstances to find Witness Z. He was also satisfied that the evidence was highly probative; specifically, that it would likely have had an important influence on the result. He described Witness Z's evidence as potentially powerful propensity evidence. Addressing the challenge to her credibility, he was not prepared to accept the allegations that she was motivated by spite and was lying about what happened

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4 *Smallbone v London* [2014] NZHC 832 [High Court judgment].

on the overseas trip, stating that it was impossible for him to so conclude on the basis of the affidavits: no assessment of credibility could be made until she actually gave evidence and was cross-examined. He accordingly concluded that if this were a judge-alone trial the new evidence would now be admitted pursuant to the test in *Paper Reclaim*.[5]

[20] Turning to the question of whether he had jurisdiction to order a new trial, Williams J surveyed the Rules, including the former rr 494 and 495, and the High Court judgment in *Lee v The New Korea Herald Ltd (No 2)*, in which Heath J held that, rr 494 and 495 not having been carried forward into the new Rules, there was now no express power to order a retrial, nor could one be found in the inherent jurisdiction.[6] Williams J distinguished *Lee* on the ground that it concerned the Court's residual powers after judgment had been sealed. Before that, the recall power remains, as does the Court's power to hear new evidence. There was no reason to distinguish this case on the ground that the Judge was not the fact finder.

[21] The Judge concluded that one might read the power to order a retrial into the general words of r 11.15(b) or (c), or source it in the inherent jurisdiction to fill gaps in procedure to enable the machinery of the law to work. He stated that it must always be open to the judge in a jury trial to vacate verdicts in cases where it is necessary in order to see that justice is done, provided the Court is not functus officio. He accordingly set aside the jury verdicts and ordered a retrial.

[22] The Judge concluded his judgment by extending to the parties an invitation to have him hear the new evidence himself, drawing his own conclusions in light of the previous evidence and substituting his judgment for the verdicts of the jury. Not all of the parties were prepared to accept this proposal. Indeed, Mr McKnight expressed surprise that the Judge had not ordered a voir dire to decide the credibility of Witness Z's evidence.

[23] The Judge responded by issuing a final order on 21 May 2014, stating that no party had suggested such procedure when the application was heard, and in any

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5 *Paper Reclaim Ltd v Aotearoa International Ltd (No 2)* [2007] NZSC 1, [2007] 2 NZLR 124.
6 *Lee v The New Korea Herald Ltd (No 2)* HC Auckland CIV-2008-404-5072, 9 November 2011.

event he doubted that cross-examination of Witness Z would have so undermined her evidence as to lead him to conclude that it was not credible. He accordingly ordered a retrial.[7]

Issues on appeal

[24] It is not necessary for us to survey everything done since the appeal was filed, but we do note that Mr Wishart tried to broaden its scope in a notice filed under r 33 of the Court of Appeal (Civil) Rules 2005. The Court rejected that attempt, ruling by minute of 4 November 2014 that the appeal is confined to the post-verdict issues addressed in the judgment of 23 April.[8] Those issues are three in number: whether the Judge ought to have recalled his judgment in the first place; whether, having recalled it, he had jurisdiction to order a retrial; and whether he was right to order a retrial in the circumstances.

[25] One ancillary matter remains for decision. In a second affidavit of documents filed in the High Court Mr Wishart claimed privilege under s 56 of the Evidence Act 2006 for communications with Witness Z during the period 9 September 2013 to 14 August 2014. On appeal Mr Smallbone disputes that claim to privilege, and that issue was also scheduled to be heard as part of the present appeal. In fact it was not argued before us on 2 June and the parties agreed that it should be decided on the papers, submissions having been filed.

The decision to recall the judgment of 9 August before sealing

[26] Mr McKnight complained that the Judge was wrong to recall the judgment immediately following the trial. He pointed out that the Judge acted without application or hearing from the parties, and submitted that none of the criteria for recall applied.

[27] Rule 11.9 provides that a judge may recall a judgment at any time before a formal record of it is drawn up and sealed. It is not in dispute that the Judge acted

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7 *Smallbone v Parlane* HC Auckland CIV-2012-485-482, 21 May 2014 (Minute of Williams J).

8 *Smallbone v London* CA324/2014, 4 November 2014 (Minute and directions of the Court) [Court of Appeal minute].

before sealing. Mr McKnight's complaint is that none of the settled criteria set out in *Horowhenua County v Nash (No 2)* were met.[9]

[28] We reject this submission. The second of the *Horowhenua County* criteria concerns the case where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance.[10] In this case counsel were duty-bound to draw the Judge's attention to r 11.15, but they did not. The rule was plainly dispositive of the question whether judgment must be entered at once, as Mr McKnight wanted, or might be adjourned for further submissions and any applications, as Mr Tennet requested. Because counsel did not draw his attention to it, the Judge relied on an error of jurisdiction, stating that he believed he had no choice but to enter judgment at once.

[29] In our opinion the Judge was right to recall the judgment and he was wise to do so unilaterally, before it could be sealed. We add that the plaintiff did not complain about the recall at the hearing on 10 October 2013. On the contrary, counsel very properly acknowledged that the Judge was right to recall the judgment.

Jurisdiction to order a retrial when judgment had not been sealed

[30] The next question is whether, the judgment having been recalled, the Judge had jurisdiction to order a new trial.

[31] We have quoted r 11.15 at [6] above. The rule is longstanding, and its language is broad; it does not limit the further consideration that it permits the judge to give to the verdict, or the Court's power to set aside judgment on application. It appeared in essentially identical form in 1956, in the Code of Civil Procedure, when this Court held in *J M Heywood & Co Ltd v Attorney-General* that the rule was quite wide enough in its terms to permit the trial judge to give judgment for a plaintiff notwithstanding the jury's verdict for the defendant, drastic though that course of action was.[11] That case did not concern a retrial, but it did confirm that the trial Court has a wide jurisdiction to act otherwise than in obedience to the jury's verdict.

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9 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC).
10 At 633.
11 *J M Heywood & Co Ltd v Attorney-General* [1956] NZLR 668 (CA) at 677.

[32] It was also held in *Dellabarca v The Northern Industrial District Storemen and Packers and Warehousemen's Industrial Union*, a 1989 judgment of Smellie J, that the inherent jurisdiction allows the High Court to order a retrial in a jury case in which something has gone wrong with the trial, on the principle that the Court may act as necessary to do justice so long as it does not contravene its own rules.[12]

[33] Until 2009 the Rules provided expressly in r 494 that the Court might order a new trial where, in the Court's opinion, some miscarriage of justice justified it. The rule gave examples of circumstances in which the Court might find there had been a miscarriage of justice.

> **494 Power to order new trial**
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> (1) A new trial may be ordered only where, in the opinion of the Court, there has been a miscarriage of justice that justifies a new trial.
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> (2) An order under subclause (1) may be made on such terms as the Court thinks fit.
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> (3) Without limiting the circumstances in which the Court may hold that there has been a miscarriage of justice that justifies a new trial, it is hereby declared that the Court may hold that there has been such a miscarriage of justice if —
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> (a) The Judge has misdirected the jury on any material point of law, or, if the action is tried without a jury, has during the course of the trial decided any point of law erroneously; or
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> (b) The Judge has admitted improper evidence, or rejected evidence which ought to have been admitted; or
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> (c) The damages are excessive or too small; or
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> (d) The verdict has been obtained by any unfair or improper practice of the successful party to the prejudice of the opposite party; or
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> (e) Material evidence has been discovered since the trial which could not reasonably have been foreseen or known before the trial; or
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> (f) The jury or any juror has been guilty of misconduct, if such misconduct can be proved by extrinsic evidence; but the verdict cannot be impugned on the evidence of any of the jurors; or

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[12] *Dellabarca v Northern Industrial District Storemen and Packers and Warehousemen's Union* [1989] 2 NZLR 734 (HC) at 764; and *Champtaloup v Morgan Districts Aero Club Inc* [1980] 1 NZLR 673 (SC) at 679.

(g) A special verdict or other finding of the jury is so defective that the Judge cannot give judgment upon it; or

(h) Any witness has been guilty of such misconduct as to affect the result of the trial; or

(i) The verdict is against the weight of evidence.

(4) If it appears to the Court that the miscarriage of justice affects part only of the matter in dispute, the Court may give final judgment as to the part not so affected, and direct a new trial as to the affected part only:

Provided that no new trial shall be ordered as to the affected part if the amount of damages awarded in respect thereof can be separately ascertained, and the plaintiff consents to reduce the whole sum awarded to him by that amount.

(5) A new trial may be ordered on any question in a proceeding, whatever be the grounds on which a new trial is applied for, without interfering with the decision upon any other question.

(6) Where there is more than one defendant, a new trial may be ordered against any one or more of them.

[34] Rule 495 provided that an application for a new trial must be made by interlocutory application filed within 14 days after the jury verdict or, in the case of trial before a judge alone, from the date of delivery of judgment.

495 Application for new trial

(1) Application for a new trial shall be made by interlocutory application filed within 14 days after the verdict of the jury, or, in the case of trial before a Judge alone, from the date of delivery of judgment.

(2) The application shall state the circumstances alleged to have resulted in a miscarriage of justice and no other circumstances will be considered by the Court.

(3) The application shall not operate as a stay of proceeding unless the Court so orders.

(4) The Court shall not receive —

(a) Any affidavit of any witness to explain or add to evidence given by him at the trial; or

(b) An affidavit of any facts which might have been given in evidence at the trial.

> (5) Notwithstanding subclause (4), the Court may receive an affidavit from a material witness showing that he made a serious mistake in giving his testimony.
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> (6) Where misdirection by the Judge is relied upon, the terms of the direction may be proved by reference to any record thereof approved by the Judge, including the transcription of any shorthand note or tape taken at his direction.

[35] As Heath J explained in *Lee v The New Korea Herald Ltd (No 2)*, the grounds listed in r 494 indicated that the rule "was primarily directed to cases in which factual determinations and assessments of damages were made by a jury," but the rule also applied to trials before a judge alone.[13]

[36] Rules 494 and 495 were removed as part of an extensive set of amendments made to the Rules in 2008, leaving what was then r 525 and is now r 11.15. The question is whether the Rules Committee or the legislature[14] intended to eliminate the High Court's power to order a new trial in circumstances of the sort formerly listed in r 494, leaving the losing party to its remedy on appeal. Heath J reached that conclusion in *Lee*, drawing the inference that greater emphasis had been put on rights of appeal.[15] In the circumstances, he held that to rely on inherent or implied jurisdiction would be to contravene the rules.[16] As the Judge recognised, it is more accurate here to speak of ancillary or implied powers than of inherent jurisdiction, as Richmond J explained in *Taylor v Attorney-General*:[17]

> … when one speaks of the "inherent jurisdiction" of the Court to make orders of the kind now in question the problem really becomes one of powers ancillary to the exercise by the Courts of their jurisdiction in the primary sense … Many such ancillary powers are conferred by statute or by rules of Court, but in so far as they are not so conferred then they can only exist because they are necessary to enable the Courts to act effectively within their jurisdiction in the primary sense.

[37] However, there is an alternative explanation for the removal of the former rr 494 and 495. They were evidently considered redundant in circumstances where

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13 *Lee v The New Korea Herald Ltd (No 2)*, above n 6, at [32].

14 The amendments were incorporated into the Judicature (High Court Rules) Amendment Bill because some of them were thought to require legislative authority.

15 *Lee v The New Korea Herald Ltd (No 2)*, above n 6, at [40].

16 At [38]. This is the approach laid out in *Smith v Covington Spencer Ltd* [2008] 1 NZLR 75 (CA) at [37].

17 *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) at 682. See also Rosara Joseph "Inherent Jurisdiction and Inherent Powers in New Zealand" (2005) 11 Canta LR 220.

civil jury trials were all but obsolete and, on the authorities at that time, r 11.15 was held to be of very wide ambit and the inherent jurisdiction was available to order a retrial. The amendments were made as part of a revision of the Rules that organised them into a more logical structure, made a number of specific and necessary changes and rewrote the rules in modern language. The objective was that of restating the rules in plain English, shortening some that had become too long, and reorganising them for better accessibility. Although there were some changes of substance, the removal of rr 494 and 495 was not identified as one of them and the drafters were at pains to describe the work as an exercise in re-organisation and modernisation.[18]

[38] Nothing in the legislative history suggests that the Rules Committee or the legislature intended to remove a trial judge's ancillary or implied power to order a retrial. Had the Rules Committee intended to eliminate an existing jurisdiction, one would expect to find some discussion of the topic in the explanatory material and possibly some positive amendment to preclude the very controversy that has now arisen.

[39] We have considered whether the intention may have been to adopt English practice, in which, by tradition, applications for a new trial on the ground of new evidence are made to the Court of Appeal.[19] But there is no evidence of that. The only commentary of which we are aware on the decision to remove rr 494 and 495 is found in an article by Don Mathieson QC, who took responsibility for the drafting.[20] He said only that the rules no longer apply in modern conditions, apparently because civil jury trials had become obsolete. This account is consistent with the Rules being tidied up, rather than a conscious decision to eliminate an existing jurisdiction.

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[18] Robert Chambers "Case Management - does it help or hinder?" (paper presented to New Zealand Bar Association Civil Litigation Conference, Auckland, February 2008); and (26 August 2008) 649 NZPD 17952 and (11 September 2008) 650 NZPD 18846, per Hon Rick Barker MP (Minister for Courts).

[19] *Re Barrell Enterprises* [1973] 1 WLR 19 (CA) at 27. There appears to be no rule restricting jurisdiction to the Court of Appeal, but the practice has "for generations" been that applications are made to that Court alone. The Civil Procedure Rules 1998 (UK) contain no express power to order a retrial, but it appears that the High Court has such jurisdiction in some instances, as for example where the judgment was obtained by fraud. We note that *re Barrell Enterprises* concerned an application for a rehearing made after an oral judgment had been delivered by a Judge alone.

[20] Don Mathieson "Reforming Civil Procedure? (2012) 43 VUWLR 127 at 143.

[40] Mr McKnight pointed out that the Supreme Court drew attention to r 494 in *Paper Reclaim Ltd v Aotearoa International Ltd (No 2)* when stating that for reasons of policy retrials are closely restricted.[21] However, that decision was concerned with the merits of an application to adduce new evidence on appeal. It drew on r 494 by analogy. It does not assist us to answer the question whether the High Court retains jurisdiction to order a retrial following removal of r 494.

[41] The notion that a High Court judge may order a retrial before judgment is entered is consistent with rr 11.9 and 11.11, which do limit the Court's powers but take effect only after judgment has respectively been given and sealed.[22] Until then the judge has all the powers available under the rules of Court. As to that, r 7.43 provides that a judge may make any interlocutory order that is provided for in the rules or may be made under r 1.6, which provides that in any case for which no form of procedure is prescribed the Court must dispose of the case as nearly as may be practicable in accordance with rules affecting any similar case or, there being no such rules, as the Court thinks is best calculated to promote the just, speedy and inexpensive determination of the case.[23] An interlocutory order is defined to include an order for a new trial.[24] These rules are broadly co-extensive with the ancillary or implied power to do what is necessary to exercise an express or substantive jurisdiction effectively. There being no prescribed form of procedure and nothing in the rules to the contrary, we consider that r 1.6 may authorise an interlocutory order for a new trial, whether before or after verdict, where that is in the interests of justice and the judgment has not been sealed.

[42] We are not called upon in this case to decide in what circumstances it might be necessary for a High Court judge to order a new trial where a judge was also the finder of fact.[25] Circumstances in which the necessity arises are likely to be uncommon. We are concerned with a jury trial, in which a retrial might be necessary

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21 *Paper Reclaim Ltd v Aotearoa International Ltd (No 2)*, above n 5, at [17].

22 Rule 11.9 is expressed in general terms but the criteria are well settled: *Horowhenua County Council v Nash (No 2)*, above n 9.

23 Rules 1.6 and 1.2. "Case" is undefined but the authorities treat it as any situation in which a question of procedure arises for decision: see A C Beck and others *McGechan on Procedure* (online looseleaf ed, Thompson Reuters) at [HR1.6.04].

24 Rule 1.3, definition of "interlocutory order".

25 Although we note that r 11.8 requires a retrial in circumstances where a trial judge sitting without a jury dies or becomes incapacitated.

for a range of reasons some of which the trial judge is best placed to evaluate. The obvious example is that of misconduct by a party or a witness or a juror at any time after the trial has commenced. But a retrial might also be necessary where the verdict was defective, or was founded on evidence that had been wrongly admitted, or was affected by some important error of law, or might have been different had new evidence been admitted. In any of these latter cases the trial judge might be satisfied that to enter judgment on the verdict would be contrary to the interests of justice and that a retrial was necessary.

[43] For these reasons, we conclude that Williams J was correct; he did have jurisdiction to order a new trial.

Matters of process

[44] We begin by rejecting several process complaints made by Mr McKnight. He said that he did not anticipate the retrial order, having been led to believe that the judgment would be confined to jurisdiction. We do not accept this view of the facts. As we have explained when outlining the narrative, the Judge held the second hearing to hear from counsel on jurisdiction, Mr Tennet having asked for a hearing, but the issues for decision were those addressed during the first hearing, when the Judge made it plain that he would decide whether the new evidence was admissible.

[45] The second complaint is that the Judge ought not to have decided without cross-examination that Witness Z's evidence was sufficiently credible to warrant admission. We reject that complaint too. Credibility and cogency were in issue, as experienced counsel appreciated, and it was for counsel to decide whether cross-examination was wanted and to give notice accordingly. It is apparent that counsel simply assumed that the evidence was manifestly lacking in credibility. He did not call for cross-examination. Nor did he attempt to revisit that decision when it became apparent during the 10 October hearing that the Judge did not necessarily share that view.

[46] The third complaint is that the application was out of time. The idea of a time limit stems from an assumption that the Judge was effectively applying the former rr 494 and 495, under which an application for a new trial had to be made

within 14 days. We reject this submission. There was no express time limit applicable, although applications would have to be made before judgment was sealed, and as noted the applications were made promptly, albeit (as a result of a registry error) informally.

[47] Finally, Mr McKnight complained that an application for retrial was beyond the scope of leave to apply given in the Judge's minute of 12 August 2013. This submission is misconceived. Judgment having been recalled, the parties were free to make any application that the Court could properly entertain.

The test

[48] On the assumption that the Judge had jurisdiction to order a retrial, counsel agree that he was right to follow *Paper Reclaim*. That case dealt with admission of new evidence on appeal in civil proceedings but also discussed retrials, with particular reference to the former r 494.[26] The Supreme Court adopted the following test:[27]

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

The test is of course familiar; it focuses on freshness, cogency or impact on the result, and credibility.

The merits

[49] Mr McKnight submitted that Williams J erred in his application of the *Paper Reclaim* test; the evidence was not fresh, nor would it have had any impact on the result – this was a defamation case, not a criminal trial, and the evidence did no more

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[26] *Paper Reclaim Ltd v Aotearoa International Ltd (No 2)*, above n 5.

[27] At [19]. The test is from the judgment of Denning LJ in *Ladd v Marshall* [1954] 1 WLR 1489 (CA) at 1491. It was adopted by this Court in *Dragiecevich v Martinovich* [1969] NZLR 306 (CA) at 308–309.

than lend some support to Ms London's credibility – and the evidence was not credible.

[50] We have already addressed the question of credibility.[28] We are not persuaded that the Judge was wrong to find Witness Z's evidence credible on its face, there having been no cross-examination. We agree that it could not be discounted summarily.

[51] So far as freshness is concerned, we accept that Mr Smallbone was able to contact Witness Z before the trial, but we do not accept that Mr Wishart should have been expected to make inquiries of Mr Smallbone, who had no reason to cooperate with him. A related point is that there was no particular reason to suppose, so far as Mr Wishart knew, that her evidence would be as significant as it was; she represented no more than a line of investigation. The Judge was satisfied that Mr Wishart made considerable efforts to find her via the internet.[29] We are satisfied that the evidence was fresh.

[52] As to cogency, we agree that Witness Z's evidence was relevant because it lent credibility to Ms London's account of Mr Smallbone's behaviour during their marriage. It pointed to a tendency or propensity to behave in the manner alleged by Ms London. Mr McKnight's main submission was that evidence of this kind is by its very nature insufficiently cogent to change the result. That is certainly not the experience of judges, who are familiar with the criminal jurisdiction in which propensity evidence is usually led. In a she-said, he-said case, where the only two eyewitnesses to an encounter give conflicting evidence about what passed between them, evidence of a third person that establishes a relevant propensity is unquestionably capable of satisfying the jury.

[53] Because it pointed to a relevant propensity, the evidence of Witness Z was probative of a similar allegation by Ms London that played a significant part in the trial. It was significant not only because it lent credibility to evidence tending to support the defence of truth and contradict Mr Smallbone's claim that Ms London

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[28] In the context of our outline of the High Court judgment at [19] above.
[29] High Court judgment, above n 4, at [31].

was motivated by malice, but also because he mounted a sustained attack on Ms London's credibility, seeking to make it the central issue in the case, and in that connection chose to highlight her sexual allegation against him. As the Judge put it when directing the jury, Mr Smallbone said that her allegation was "fantasy", designed to "kneecap his case".

[54] Mr McKnight also maintains that the propensity evidence could have made no difference because evidence of the many other disputed facts amply showed that Ms London lacked any credibility whatever. We observe that it cannot be known whether that was the view of the jury. It certainly was not the view of the trial Judge, who saw and heard Ms London and the other witnesses at trial. We were not supplied with the transcript of the evidence at trial, without which we cannot be satisfied that the Judge was wrong in this overall assessment. In any event, it was a judgement that the trial Judge was quintessentially best placed to make. It depends on an understanding of the case which cannot be replicated by reading the transcript.

[55] In the result, we are not persuaded that Williams J was wrong to find that the new evidence met the *Paper Reclaim* criteria and justified his decision to order a new trial.

The challenge to privilege

[56] On 9 September 2014 Mr Smallbone filed an application in this Court to adduce further evidence, in the form of an affidavit of his own, and for an order disallowing the privilege that Mr Wishart and HATM claimed in respect of communications between Mr Wishart and Witness Z. The affidavits concerned were then admitted by consent on the basis that the privilege issue would be argued.[30]

[57] It is not in dispute that litigation privilege under s 56 of the Evidence Act 2006 prima facie attaches to the communications. Mr Smallbone's complaint is that the privilege ought to be disallowed under s 67(1) of the Act on the ground that the communication was made for a dishonest purpose or to enable or aid Witness Z to commit what Mr Wishart knew or reasonably should have known to be the offence

[30] Court of Appeal minute, above n 8.

of perjury. As Mr McKnight conceded, this required that he show a prima facie case of dishonesty and/or criminal purpose on the part of Witness Z in respect of her communications with Mr Wishart. The threshold is high.[31] Counsel argued that Witness Z had been asked by Mr Smallbone to give evidence at the trial but, her efforts to extract money from him having failed, had no interest in giving evidence until afterward.

[58] We decline counsel's invitation to draw an inference of criminal purpose from the mainly circumstantial evidence before us. It is neither appropriate nor possible to do so in circumstances where, through counsel's choice, Witness Z has not given evidence viva voce and no attempt was made to challenge Mr Wishart's claim to privilege in the High Court. We observe, for example, that she openly acknowledged that she asked Mr Smallbone for money when he contacted her, but the money concerned is owed to her. She gains no apparent financial benefit from giving evidence now. Mr McKnight characterised her attitude to giving evidence as inconsistent, but it is not surprising that it would depend on who was asking and what they wanted her to say. In the circumstances, we are in no position to decide that she was motivated by improper purpose when she later agreed to give evidence for the defence, still less that it was her intention to commit the offence of perjury. To find that she was motivated by improper purpose would also be tantamount to deciding, contrary to the trial Judge's findings, that her evidence should never have been admitted because it was wholly lacking in credibility.

[59] The application for an order disallowing for the purposes of the appeal the claim to privilege in respect of communications between Mr Wishart and Witness Z is dismissed. This decision does not preclude reconsideration of privilege by the High Court in due course. We record that Mr Wishart filed a bundle of privileged material on the basis that it would be considered by the Court but not disclosed to opposing counsel, but we have not read it.

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[31] *Icepak Group Ltd v QBE Insurance (International Ltd* [2013] NZHC 3511 at [44]–[47], citing *Morgan & Banks Ltd v Gemini Personnel Ltd* [2001] 1 NZLR 672 (CA) and *Rollex Group (2010) Ltd v Chaffers Group Ltd* [2012] NZHC 1332, [2012] NZAR 746 (HC).

Decision

[60] The appeal is dismissed. The Londons will have one set of costs as for a standard appeal on a band A basis. All respondents will have usual disbursements as fixed by the Registrar.

Suppression

[61] In the interests of protecting the privacy of Ms London and Witness Z, we make an order prohibiting the publication of their allegations of sexual acts. For the same reason, we make a further order prohibiting the publication of the name or identifying particulars of Witness Z.

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