IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 21/2018
[2019] NZSC 60

BETWEEN	COLIN GRAEME CRAIG Appellant
AND	JORDAN HENRY WILLIAMS Respondent

Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	J G Miles QC, J W J Graham and T F Cleary for Appellant M P Reed QC and B J Marten for Respondent
Judgment:	25 June 2019

JUDGMENT OF THE COURT

A The application for recall of this Court's judgment of 11 April 2019 (*Craig v Williams* [2019] NZSC 38, [2019] 1 NZLR 457) is dismissed.

B The respondent must pay the appellant costs of $3,500.

REASONS

Introduction

[1] This is an application by Mr Williams for the recall of a judgment issued by the Court on 11 April 2019.[1] The judgment concerned an appeal and cross-appeal arising out of a defamation trial. By a majority (Elias CJ, Ellen France and Arnold JJ), the Court allowed Mr Craig's appeal and ordered a retrial. The cross-appeal was dismissed. The decision to allow the appeal reflected the conclusion that it was not

1 *Craig v Williams* [2019] NZSC 38, [2019] 1 NZLR 457.

possible to have confidence the jury approached its task in the correct way. A minority (William Young and Glazebrook JJ), while agreeing with the majority the jury had been misdirected, did not consider there was a risk of a miscarriage of justice. In doing so, the minority placed some weight on the failure of Mr Mills QC, trial counsel for Mr Craig, to object to the summing up at trial.

The application for recall

[2] The application for recall[2] and directions for a rehearing of the appeal and cross-appeal (the appeal) is made on the basis a fair-minded observer might reasonably consider that Arnold J might not have brought an impartial mind to the resolution of the appeal.[3] The applicant relies on events arising after the hearing on 4 and 5 September 2018 but before judgment was issued, as we now describe.

[3] A sailing trip was planned in which both Arnold J and Mr Mills would be participants.[4] It appears that, aware of issues that might arise as to the appropriateness of that contact at that time, inquiries were made of Mr McKnight, counsel for Mr Williams. As Mr McKnight in his affidavit filed in support of the present application explains, he was contacted by Mr Mills on 25 January 2019 to ask about Mr Williams' attitude to an intended sailing trip that he would be taking with Arnold J and which had been planned for some time.[5] Mr McKnight further deposes he discussed the matter with Mr Williams who was troubled by the request but "in the end", Mr McKnight says "it was felt … only one answer" could be given. Mr Williams in his affidavit explains his discomfort at being put in the position he was and says he "felt compelled to not object".

[4] Ultimately, Mr McKnight's email of 25 January 2019 to Mr Mills recorded Mr McKnight had "conferred" with Mr Williams who had "considered the request

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2 The present application is being dealt with by five permanent members of the Court.

3 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 [*Saxmere (No 1)*] at [3] per Blanchard J, [37] per Tipping J, [56] per McGrath J and [127] per Anderson J. See also at [121] and [124] per Gault J.

4 The evidence before us includes an affidavit from the third person present on the trip, Hon Tony Randerson QC.

5 A letter dated 16 April 2019 from Chapman Tripp, solicitors for Mr Craig, annexed to the affidavit of Mr Williams filed in support of the recall application records that the approach was made by Mr Mills to Mr McKnight on the basis that if there was objection, Mr Mills would not go on the trip.

carefully". The email went on to note counsel's belief that the Judge would not discuss the case while it was reserved and Mr Mills' "very clear undertaking as Senior Counsel that [he] would not do so either". The email concluded in this way:

> In such circumstances, while it will be appreciated our client had some concerns of the proposal at face value, after careful discussion, Mr Williams offers no opposition to the suggestion of the February trip.

[5] The sailing trip went ahead.

[6] Relying on these events, recall and a rehearing of the appeal is sought. The application for recall is dated 13 May 2019, just over a month after the delivery of the Court's judgment. Counsel for Mr Williams submits that the recall application should be dealt with in accordance with the provisions of the *Guidelines for Judicial Conduct* (the Guidelines) which address the care to be taken to avoid direct social contact between a judge and counsel when both are engaged in a current case.[6] It is submitted that what occurred here did not comply with the Guidelines particularly where the contact was such that counsel and the Judge were in close quarters over a week-long period. In addition, reference is made to the informality of the process followed. Counsel also notes that Mr Mills' tactical decisions at trial were in issue on the appeal.

[7] In these circumstances, the submission is that there is an appearance of partiality when measured by the appropriate standard. It is also submitted that, given the public interest in preserving impartiality, Mr Williams' consent is irrelevant. Further, if it was possible to consent, the consent given was not an informed consent because Mr Williams was not aware of the Guidelines.

[8] In opposing the application for recall, counsel for Mr Craig submits there is no logical link between the trip and the possibility the case may have been decided on an improper basis. Further, it is argued that the Guidelines are not a code and that the authorities confirm breach of the Guidelines does not create apparent bias.[7] In any event, the submission is that there was compliance with the Guidelines because

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6 *Guidelines for Judicial Conduct* (March 2013) at [91].

7 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 [*Saxmere (No 2)*] at [11]. See also *Saxmere (No 1)*, above n 3, at [29] per Blanchard J and [113] per McGrath J.

Mr Williams' consent was obtained and there was no discussion of the case. Finally, it is submitted the delay in raising this matter is tactical and contrary to the authorities which suggest questions of apparent bias should be raised promptly.[8]

Our assessment

[9] Before we assess the present application, we set out the relevant principles governing the recall of a judgment and explain why we have dealt with the application on the papers rather than having an oral hearing, as sought by counsel for Mr Williams.

The principles governing recall

[10] These principles are settled. In general, "a judgment once delivered must stand for better or worse subject, of course, to appeal".[9] The case law has however identified three categories of case in which a judgment may be recalled. These are an amendment after the hearing to relevant legislation or a new judicial decision of "high authority", where counsel has failed to draw the Court's attention to a relevant legislative provision or decision and "where for some other very special reason justice requires that the judgment be recalled".[10] The present applicant relies on the third of these categories, that is, where for a "very special reason justice requires" recall.

Need for an oral hearing?

[11] In considering whether recall is appropriate, we have not found it necessary to hold an oral hearing. There are some disputes on the evidence before us as to some of the detail of the conversation between Mr McKnight and Mr Mills but none of those differences are material. Rather, in terms of the essential points of the narrative, there is no substantive dispute and, in any event, as will be seen we consider that taking the evidence filed on behalf of Mr Williams at its highest, the basis for recall has not been

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8 *Vakauta v Kelly* (1989) 167 CLR 568 at 572–573 per Brennan, Deane and Gaudron JJ; and *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 (CA) at [26] and [68].

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

10 *Saxmere (No 2)*, above n 7, at [2], citing *Horowhenua County v Nash (No 2)*, above n 9, at 633. This test has been applied more recently by this Court in *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 115 at [20].

established. In addition, the publication of these reasons is sufficient to meet the public interest in the matter.[11]

Application of the principles to the present case

[12] Against this background, we turn first to the provisions of the Guidelines. As a preliminary point we note that non-compliance with the Guidelines does not necessarily comprise apparent bias.[12] That reflects the fact these principles are intended to provide guidance.

[13] The provision from the Guidelines relevant to this application recognises that there is a "tradition" in New Zealand of social contact between bench and bar[13] but emphasises the need for "[c]are … to avoid direct social contact with practitioners who are engaged in current cases before the judge".[14]

[14] Whether an appropriate level of care has been adopted in a particular case will generally be a factual inquiry. In terms of the present application, where what is in issue is post-hearing conduct, it is both relevant and significant that Mr Williams' views on what was proposed were sought and that Mr Williams did not object to what was proposed. Moreover, the decision not to object was a considered one, expressed after conferring with his lawyer. We see no reason why a party could not consent, so long as it is informed, to such contact.[15]

[15] Further, the events to which Mr Williams consented were in fact what occurred and in accordance with the conditions which Mr McKnight says he stipulated. This is not a situation where there was, for example, confusion as to what was proposed. Nor did the nature of the event change in some way, for example, from a trip with a much larger group of people to the small group involved here. Rather, the trip went ahead

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11 There is no fixed process for dealing with recall applications. Sometimes the Court will hold an oral hearing but on other occasions the application will be dealt with on the papers.

12 That point is confirmed in both of the *Saxmere* judgments as noted, above n 7.

13 Close friendship, without more, does not give rise to the appearance of bias and Mr Williams does not suggest otherwise: *Saxmere (No 1)*, above n 3, at [20]–[24] per Blanchard J.

14 *Guidelines for Judicial Conduct*, above n 6, at [91]. See also *Saxmere (No 1)*, above n 3, at [23] per Blanchard J, [39] per Tipping J and [101]–[102] per McGrath J.

15 See Matthew Groves "Waiver of the Rule Against Bias" (2009) 35 Mon LR 315 at 322–324; and Grant Hammond *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, Portland (Oregon), 2009) at 93–95; and see *Saxmere (No 1)*, above n 3, at [35] per Blanchard J.

as foreshadowed with no suggestion on the evidence before us that, contrary to the undertaking given by Mr Mills, any discussion about the appeal took place on the trip.[16]

[16] Mr McKnight states in his affidavit that if he had been aware of the Guidelines, there could have been a different response to the request. Mr Williams similarly says lack of knowledge of the Guidelines coloured his approach. However, that care was required was apparent by the very fact that the inquiry was being made as to Mr Williams' views. Further, to the extent the Guidelines could have provided relevant information to Mr Williams and his counsel, they are in any case publicly available. We see nothing in this point.

[17] In terms of the other matters raised by counsel, Mr Williams complains about the process followed. However, in this case there can be no doubt about the critical events that occurred and Mr Williams cannot point to any other prejudice caused by the absence of a formal process. As to the significance of the fact that Mr Mills' conduct of the trial was of importance, that was a matter the parties were well aware of when the inquiry was made. The issue had been discussed in open court over the course of the hearing of the appeal.

[18] Finally, there is force in the submission made on behalf of Mr Craig that the delay in raising this matter is both tactical and disqualifying. The point made in the authorities cited by Mr Miles QC is that a party who is legally represented, as here, cannot "stand by" until judgment and then, "if those contents prove unpalatable", complain about the appearance of lack of partiality.[17] The reason advanced for the delay, that is, lack of knowledge of the Guidelines, is not relevant. Viewed in this light, the concerns now advanced by Mr Williams are at best technical.

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16 Given that there is no real dispute as to the critical events, we have not found it necessary to seek a statement from the Judge, a matter raised by Mr Reed QC in support of a submission further time was required for submissions. Such a course may be followed in cases involving allegations of apparent bias on the part of a judge. See *Man O'War Station Ltd v Auckland City Council* [2001] 1 NZLR 552 (CA) at [14]; and *Saxmere (No 1)*, above n 3, at [14] per Blanchard J and [114] per McGrath J.

17 *Vakauta v Kelly*, above n 8, at 572 per Brennan, Deane and Gaudron JJ; and *Locabail (UK) Ltd*, above n 8, at [26]. The position is no different here from that where the potential issue as to partiality arises in the course of the hearing.

[19] In these circumstances, we have concluded there is no basis for recall of the judgment.

Result

[20] The application for recall is accordingly dismissed. Mr Craig seeks costs. We see no reason why costs should not follow the event in the usual way. There will be an order that the respondent pay the appellant costs of $3,500.

Solicitors:
Chapman Tripp, Auckland for Appellant
Izard Weston, Wellington for Respondent