NOTE: PURSUANT TO S 437A OF ORANGA TAMARIKI ACT 1989, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY/ABOUT/RESTRICTION-ON-PUBLISHING-JUDGMENTS

IN THE COURT OF APPEAL OF NEW ZEALAND

CA317/2017
[2017] NZCA 481

BETWEEN	W (CA317/2017) Appellant
AND	THE FAMILY COURT AT NORTH SHORE First Respondent
AND	THE CHIEF EXECUTIVE OF THE MINISTRY FOR VULNERABLE CHILDREN Second Respondent

Hearing:	16 October 2017
Court:	Kós P, Harrison and Gilbert JJ
Counsel:	C M Hutchinson and T C Burgess for First and Second Respondents
Judgment:	20 October 2017 at 2.30 pm

JUDGMENT OF THE COURT

A **The application for an extension of time is declined.**

B **The applicant is ordered to pay the second respondent costs as for a standard application for an extension of time on a band A basis together with usual disbursements.**

REASONS OF THE COURT

(Given by Harrison J)

[1] The applicant, Mr W, and his former wife have six children who lived with their mother at the relevant times. Mr W became concerned for his children's welfare after their mother started living with another man. In 2012 he applied to the Family Court for a declaration that the children were in need of care or protection.[1] He also sought interim and final restraining orders against the other man.[2] Mr W's application did not proceed to a hearing.

[2] However, on 2 December 2012 the Chief Executive of the Ministry of Social Development (CYFS) applied separately to the Family Court for a declaration that the children were in need of care or protection. CYFS initially applied for a restraining order only but sought an interim restraining order 17 days later. On 20 November 2012 the Family Court granted the interim restraining order and, on 30 January 2013, granted the declaration and support order.

[3] On 10 April 2014 CYFS advised the Family Court that it agreed with a recommendation by the children's lawyer that the restraining order be discharged. On 16 April 2014 Judge Druce in the Family Court issued a minute noting, among other things, that:

> 2. The only Restraining Order made was an interim order made 20/11/2012. Such order only continues pending determination of the Declaration Application.
>
> 3. The declaration was granted on 30/01/13. Accordingly it would appear no restraining order is in force.
>
> 4. The S.91 Support Order has lapsed.

[4] Mr W learned of Judge Druce's minute some months later. He applied to the High Court for judicial review of what he asserted was Judge Druce's decision. His essential allegation was that the Judge erred in law and that the interim restraining

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1 Children, Young Persons, and Their Families Act 1989 (since renamed Oranga Tamariki Act 1989), ss 67–68.

2 Sections 87–88.

order remained in force. He sought a declaration to that effect and an order directing CYFS to enforce the interim order. In a reserved decision delivered on 9 October 2014 Brewer J dismissed Mr W's application.[3] The Judge also dismissed Mr W's claim that the Family Court had breached his rights of natural justice by determining CYFS' application without giving him notice.[4]

[5] On 6 June 2017 Mr W applied to this Court for leave to appeal Brewer J's decision out of time. Mr W was required to file his appeal within 20 working days of Brewer J's judgment. His application was at least two and a half years out of time. He must satisfy this Court that it is in the interests of justice to grant leave.[5] We do not need to canvass the usual principles governing our discretion. Mr W's delay is extraordinary. We agree with Ms Hutchinson for the Crown that it overwhelms any merits of his application.[6]

[6] Mr W is seeking an indulgence from this Court. He seeks to explain his delay as the consequence of bouts of physical and mental ill-health. He says also that he felt demoralised. Mr W provides no independent evidence in support. Furthermore, he admits that he made a deliberate decision following receipt of Brewer J's decision not to appeal. Mr W's prolonged delay is fatal.

[7] However, to the extent that the merits may have any relevance, we are satisfied that Mr W's argument is hopeless. The interim restraining order only took effect "pending the determination of the application [for a declaration]". It lapsed by operation of law when the Family Court granted CYFS' application for a declaration and support order on 30 January 2013. Judge Druce did not make a decision on 16 April 2014 which was in any sense reviewable. There was no decision to review. His minute simply recited correctly that the effect of the declaration was to bring the interim order to an end; it was, as Brewer J noted, "merely declaratory of an existing state of affairs".[7] Judge Druce had no jurisdiction to treat the interim order as extant.

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3 *W v Family Court at North Shore* [2014] NZHC 2483 at [17]–[32].
4 At [33]–[35].
5 Court of Appeal (Civil) Rules 2005, r 29A.
6 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39(a)].
7 *W v Family Court at North Shore*, above n 3, at [33].

[8] Mr W's primary submission was that on 16 April 2014 the interim order was extant because the phrase "pending the determination" refers to a temporal marker and is not a statement of temporary life. In rejecting that proposition Brewer J correctly found that the phrase has its ordinary meaning as lasting until CYFS' application for a declaration is determined.[8] Furthermore, Brewer J was correct to find that there was no breach of natural justice or legitimate expectation. The decision did not affect Mr W's substantive rights — he was and remains entitled to apply for a declaration and interim orders in his own right.

[9] The application for an extension of time is declined.

[10] Mr W is ordered to pay the second respondent costs as for a standard application for an extension of time on a band A basis together with usual disbursements.

Solicitors:
Crown Law Office, Wellington for Respondent

8 At [32].