NOTE: LOWER COURT ORDERS PROHIBITING PUBLICATION OF THE NAMES AND IDENTIFYING PARTICULARS OF THE RESPONDENT AND THE BARRISTER REMAINS IN FORCE. SEE [2019] NZHC 3191.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA302/2020
[2021] NZCA 648

BETWEEN	RENNIE COX LAWYERS Appellant
AND	EA Respondent

Hearing:	12 August 2021
Court:	Gilbert, Collins and Goddard JJ
Counsel:	S P Bryers for Appellant R J Hollyman QC and A J Steel for Respondent
Judgment:	3 December 2021 at 11 am

JUDGMENT OF THE COURT

A The appeal is allowed. The timetable directions made by the District Court in *Rennie Cox Lawyers v EA* [2018] NZDC 21916 are reinstated as varied in accordance with [32] below.

B Costs are reserved. Absent agreement, submissions are to be filed in accordance with the timetable set out at [33] below.

REASONS OF THE COURT

(Given by Gilbert J)

Introduction

[1] In common with most civil procedural rules, the objective of the District Courts Rules 2009 (the Rules) was to secure the just, speedy and inexpensive determination of any proceeding.[1] That objective has failed spectacularly in this case.

[2] A proceeding for recovery of a barrister's fees in the sum of approximately $105,000 was filed by the appellant in the District Court in March 2012. The respondent has not yet filed a response to the claim, usually the first step when a claim is disputed as this one is, and the proceeding has progressed nowhere towards being heard on its merits. Instead, the parties have been locked in battle about whether there should be such a hearing. The procedural skirmishing has resulted in numerous interlocutory hearings and at least eight judgments not including this one, the third judgment delivered by this Court in the proceeding. Not only must the costs consumed in this exercise be out of all proportion to the costs that would be required to conduct a hearing on the merits, but they are also likely to be disproportionate to the amount in issue.

[3] So, in terms of the objective of the Rules, we have disproportionate expense, the commitment of considerable judicial and court resources, the passage of nearly a decade since the proceeding was filed, but still no determination of the comparatively simple and modest claim. The question on this appeal is whether the Rules, correctly interpreted and applied, now preclude a determination on the merits. In this judgment we explain why we consider the answer to this question is "no" — the proceeding should be heard and determined on its merits in the District Court without further delay.

Background

[4] In May 2009, Rennie Cox Lawyers (Rennie Cox) instructed a barrister to act for EA in unrelated proceedings in the High Court.[2] This was a formality to comply

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1 District Courts Rules 2009, r 1.3.1. The District Courts Rules 2009 were revoked and replaced by the District Court Rules 2014 as from 1 July 2014.

2 Orders for name suppression were made in the High Court in the proceeding in which the barrister represented EA. A further order was made in the District Court by Judge Gibson on 12 September 2016 in this proceeding to give effect to the High Court order. For the same reason, we do not name EA or the barrister in this judgment.

with the former requirements of the intervention rule which precluded a client such as EA from instructing a barrister directly. It was agreed that EA would pay the fees directly to the barrister on a monthly basis following invoice and Rennie Cox would not be liable for payment.

[5] EA duly paid the barrister's fees on a monthly basis for a period of two years until June 2011. These invoices totalled $116,611.26. However, EA did not pay the next six invoices for the period June to November 2011 totalling $105,014.86. EA says this was because the barrister did not explain (and has still not explained) why the monthly charges increased four-fold during this period. She claims there was no change in the workload or other reason that would justify the marked increase. EA also says she was prejudiced by the barrister's failure to particularise the costs as this meant she was unable to justify her claim for indemnity costs against the other party to the proceedings for which the barrister was engaged. As a result, EA says she was awarded scale costs only. Finally, EA claims an entitlement to a legal set-off for an amount of $21,143 for fees she rendered to the barrister on another matter. She says these fees were collected by the barrister from the client but have not been passed on to her.

[6] On 29 March 2012, Rennie Cox filed a notice of claim in the District Court on behalf of the barrister for recovery of the barrister's fees. Rennie Cox's participation in the proceeding is in name only (the barrister has retained other barristers to act for him in this proceeding). EA was served with the claim on 3 April 2012. She had 30 working days pursuant to r 2.12 of the Rules to file and serve a notice of response.

[7] EA did not file a response to the claim, but the proceeding was stayed by operation of law as a result of a complaint she made about the fees to the New Zealand Law Society on 11 May 2012.[3] Following investigation, a costs assessor reported to the Standards Committee on 4 October 2013 that the fees were fair and reasonable. The Standards Committee decided to take no further action on the complaint and the parties were notified of this determination on 14 February 2014.[4] EA applied for a review, but the Standards Committee's decision was upheld by a Legal Complaints

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3 Lawyers and Conveyancers Act 2006, s 161(1).
4 Section 138(2).

Review Officer (LCRO) on 23 February 2015. This had the effect of lifting the stay of the District Court proceeding. The time for filing and serving a notice of response recommenced running.

[8] EA still did not file a response to the claim. However, on 1 May 2015, her solicitors contacted Rennie Cox by telephone and followed up with an email later that day noting that the LCRO's decision was not binding on the courts and did not resolve the issues between the parties. After summarising EA's core complaints, the solicitors suggested that the claim should be discontinued or at least left in abeyance. If the claim was to be pursued, they sought confirmation that this would only be done on notice to them.

[9] Rennie Cox responded on 5 May 2015 explaining that Mr Werry, counsel then instructed to act for the barrister, had the carriage of the proceeding and suggested they take up any issues relating to the proceeding with him directly. They advised that they would leave it to Mr Werry to respond but, for the record, stated that the claim would not be discontinued, nor would it be pursued only on notice to them. EA's solicitors did not contact Mr Werry following this email, nor did Mr Werry contact them.

[10] On 16 June 2015, Mr Werry applied, without notice, for judgment by default. By this time, the time limit for filing a notice of response had expired, as had the time to apply for judgment by default. Mr Werry therefore sought an extension of time to make the application. Absent an extension of time being granted, the only way to pursue the claim would have been to start it afresh.[5] Mr Werry asserted that "the certificate of the Standards Committee or decision of LCRO" was "final and conclusive as to the amount due" and there was "nothing left to dispute", relying on s 161(3) of the Lawyers and Conveyancers Act 2006 (the Act). Mr Werry certified that the application was in compliance with the Rules.

[11] However, this ex parte application was seriously deficient. There was no justification for making this application without notice to EA. The correspondence referred to at [8] and [9] above was not disclosed to the District Court, a fundamental

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5 District Courts Rules 2009, r 2.17.5.

breach of the duty owed to the court on an ex parte application.[6] There was no certificate and no final or conclusive determination of the amount due as claimed. EA was not prevented from disputing the reasonableness of the fees, pursuing her complaint about the lack of particulars or advancing her partial defence by way of legal set off.

[12] Relying on the adequacy of the information placed before him and counsel's certification as to the correctness of the application in accordance with the Rules, Judge Harrison granted the application for an extension of time and entered judgment by default in the sum of $112,968.60 on 21 August 2015.

[13] EA applied to set aside the judgment, but that application was dismissed by Judge Gibson on 29 April 2016.[7] On appeal to the High Court, Lang J accepted that the judgment had been irregularly obtained.[8] However, the Judge allowed the judgment to stand, save in respect of the interest which the parties by then had agreed was not a claim for a liquidated sum.[9] The Judge subsequently granted leave for a second appeal.[10] This Court allowed the appeal and set the judgment aside on 5 March 2018.[11]

District Court judgment

[14] Rennie Cox then sought timetable directions from the District Court to progress the matter to a substantive hearing.

[15] EA opposed the making of any directions, contending:

(a) the June 2015 application for an extension of time to apply for judgment must have been set aside with the default judgment;

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6 See *Automatic Parking Coupons v Time Ticket International Ltd* (1996) 10 PRNZ 538 (HC) at 540.
7 *Rennie Cox Lawyers v EA* [2016] NZDC 7359.
8 *EA v Rennie Cox Lawyers* [2017] NZHC 5 at [39].
9 At [33] and [66].
10 *EA v Rennie Cox Lawyers* [2017] NZHC 770.
11 *EA v Rennie Cox Lawyers* [2018] NZCA 33, [2018] 3 NZLR 202.

(b) the proceeding was therefore to be treated in terms of the Rules as having been discontinued by Rennie Cox in May 2015;

(c) as a result of the deemed discontinuance, a new claim would have to be filed;

(d) any new claim was time barred under the Limitation Act 2010; and

(e) there was therefore no way the claim could now be pursued against her.

[16] Judge Harrison considered that, the judgment having been set aside, it was necessary to assess the position as at 16 June 2015 when the extension of time was sought to apply for the default judgment.[12] The Judge agreed with EA that the order granting an extension of time to apply for judgment in terms of that application must have fallen with the judgment:

> [22] The application for judgment was filed on 16 June 2015 and so was beyond the permitted time and an extension was required. That was granted to the date on which judgment was entered, but obviously with judgment having been set aside the order extending time to the date of the judgment must also fall.

[17] This meant there had been no "effective" application for default judgment within the time permitted under the Rules (EA having not filed any response to the claim) and the proceeding was brought to an end at that time.[13] The Judge reached that conclusion in reliance on r 2.39, which relevantly states:

> **2.39 Application for judgment in case of default, discontinuance, admission of facts, or lack of defence—**
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> 2.39.1 A plaintiff who is pursuing a claim under rules 2.10 to 2.17 may apply immediately for judgment if—
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> (a) the defendant does not, within the time allowed,—
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> (i) serve on the plaintiff the defendant's form 3 (response by defendant); or
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> …

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12 *Rennie Cox Lawyers v EA* [2018] NZDC 21916 [District Court judgment].
13 At [23].

…

2.39.4 When rule 2.39.1 applies,—

(a) the plaintiff's proceeding comes to an end if the plaintiff does not file the plaintiff's form 6A (application for judgment) within the time allowed; and

(b) rules 2.17.5 (starting claim again) and 2.17.6 (treated as discontinuance) apply as if the proceeding had come to an end under rule 2.17.

…

[18] Nevertheless, the Judge noted that r 1.18 permits an extension of time being granted even where a proceeding has come to an end under the Rules:

1.18 Extending and shortening time

1.18.1 The court may, in its discretion, extend or shorten the time allowed by these rules, or fixed by any order, for doing any act or taking any proceeding or any step in a proceeding on such terms (if any) as the court thinks fit in the interests of justice.

1.18.2 The court may order an extension of time although the application for the extension is not made until after the expiration of the time allowed or fixed.

1.18.2A To avoid doubt, a proceeding does not come to an end just because the time allowed by r 2.10, 2.14, 2.17, 2.39A, 2.47 or 3.40 or any other rule for taking any action in that proceeding expires, if that time is later extended under r 1.18.2.

…

[19] The Judge reasoned that, although a proceeding may be deemed to have been discontinued under r 2.17, it does not come to an end if the Court exercises its discretion in the interests of justice to extend time for the taking of any step.[14] The Judge took account of the following matters in concluding it was appropriate to exercise his discretion to grant an extension of time pursuant to r 1.18.1:[15]

(i) EA has never filed a response to the claim nor any form of defence, and yet she clearly disputes the amount claimed.

(ii) The standards committee dismissed EA's complaints in its decision of 14 February 2014 which was confirmed by the decision of the LCRO in a decision of 23 February 2015.

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14 At [27].
15 At [29].

(iii) The provisions of the Lawyers and Conveyancers Act 2006 prohibited the plaintiff from proceeding with the claim until the complaints procedure had been finalised.

(iv) The plaintiff is entitled to a proper hearing on the merits of the claim.

[20] The Judge accordingly extended the time within which EA was to file a response to the claim to 15 working days from the date of the District Court judgment on 1 November 2018.[16] The Judge also made the other timetable directions sought by Rennie Cox but reserved leave for either party to make a further application if required.[17]

High Court judgment

[21] EA did not file a notice of response as directed, but instead appealed to the High Court. Palmer J allowed the appeal on 15 December 2019, concluding that the District Court decision to extend time was plainly wrong.[18] The Judge considered that three of the four considerations taken into account by the District Court in granting the extension of time were "dubious" — (1) EA disputed the claim, (2) the decisions of the Standards Committee and LCRO did not finally determine EA's complaint, and (3) Rennie Cox was entitled to a proper hearing on the merits (which was conclusory).[19] The remaining consideration — the effect of the statutory stay — was relevant but was seen by the Judge to count against an extension being granted because, although the proceeding itself was stayed in May 2012, the limitation period was not suspended during the complaints process and accordingly had expired by the time the extension of time was granted in November 2018.[20]

[22] The Judge also considered there had been no adequate explanation for the delay and the effect of the extension of time application was to evade the purpose of the strict deadlines in the Rules and the purpose of the Limitation Act. The Judge therefore considered the interests of justice did not favour the grant of an extension of time:[21]

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16 At [30].
17 At [31].
18 *EA v Rennie Cox Lawyers* [2019] NZHC 3191 [High Court judgment].
19 At [23].
20 At [24].
21 At [26].

> The second application [for an extension of time] does not suffer from the same lack of notice or disclosure problems [as the earlier extension of time to apply for default judgment]. But no substantive explanation of the delay was provided. And the effect of the application is to evade the purpose of the strict deadlines in the rules and the purpose of the limitation period prohibiting new proceedings of this age. A procedural extension of time under the District Court Rules cannot be allowed to revive a proceeding in these circumstances. It is now too far out of time under both the rules and the Limitation Act 2010. Rennie Cox blew their chance to have the deadline extended, in 2015. The interests of justice do not require they get another one.

[23] The Judge subsequently declined leave to appeal to this Court.[22] However, leave to appeal was granted by this Court.[23] The issue is whether, the default judgment having been set aside, the District Court was able to make timetabling directions to enable the dispute to be heard and determined on its merits and, if so, whether it was in the interests of justice to do so.

Appeal

Submissions

[24] Mr Bryers' submissions for Rennie Cox can be summarised as follows:

(a) Although treated under the Rules as being at an end in May 2015, the proceeding was revived when the application for an extension of time to apply for a default judgment was granted in August 2015.

(b) This Court's decision setting aside the judgment in March 2018 did not result in the proceeding again being at an end and treated as having been discontinued as if nothing had happened since May 2015. EA's contention to the contrary requires pretending that none of the many steps taken by the parties in the proceeding since then had occurred.

(c) The Court therefore had jurisdiction to give appropriate directions for the future conduct of the proceeding.

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22 *EA v Rennie Cox Lawyers* [2020] NZHC 958.
23 *Rennie Cox Lawyers v EA* [2020] NZCA 348.

(d) Contrary to the High Court's assessment, the purpose of the application was not to evade the strict deadlines in the Rules or the purpose of the limitation period under the Limitation Act. Rennie Cox did not seek or require any procedural time extensions. Instead, it proposed an extension of time for EA to file a response to the claim.

(e) Judge Harrison's decision to make directions to enable the proceeding to be heard was a proper exercise of his discretion under the Rules and in accordance with their objective of securing the just determination of proceedings. It would be contrary to the interests of justice to deny a litigant access to the courts because of a procedural error, particularly where there is no irretrievable prejudice to the other party.

[25] Mr Hollyman QC, for EA, responds by making the following argument:

(a) By setting aside the judgment, this Court restored EA to the position she ought to have been in but for "the first extension", being the extension of time to apply for default judgment granted in August 2015. Apart from fixing costs, the Courts were functus officio and there was no jurisdiction to entertain the application for directions to take steps that could revive the proceeding.

(b) The District Court invoked r 1.18 of its own volition, Rennie Cox having "positively declined" to make any application for an extension of time under that rule.

(c) The High Court was correct to conclude that the limitation period had expired and that the principles of finality must prevail.

(d) Even if the time bar was not decisive, Rennie Cox cannot benefit from its own misconduct (in failing to disclose the May 2015 correspondence to the District Court). It cannot say, for example, that EA's application to set aside the default judgment and pursue her appeals had the effect

of reviving the proceeding or that the costs incurred in this process warrant a hearing on the merits.

(e) The High Court was correct to intervene because the only available conclusion was that it would be contrary to the interests of justice to allow Rennie Cox's claim to proceed.

Our assessment

[26] When EA did not file any response to the claim within the time specified, the next step contemplated under the Rules was an application for judgment by default.[24] Because the time required for taking this step expired in late May 2015 the proceeding was treated under the Rules as being at an end. In order to revive it, an application for an extension of time was required. Both applications were made by Rennie Cox on 16 June 2015, reasonably promptly after expiry of the prescribed date, and orders were made accordingly in August 2015. As a result, two things happened — (1) the proceeding was revived enabling it to be used as the vehicle to take the claim forward; and (2) judgment by default was entered.

[27] However, given Rennie Cox knew that EA intended to defend the claim and wanted to be advised of any steps taken to pursue it, it was inexcusable to apply for default judgment without notifying EA's solicitors and without disclosing to the Court the May 2015 correspondence between the solicitors showing that she wished to defend the claim. These fundamental omissions related to the application for judgment by default but had little or no bearing on the application for an extension of time. The practical effect of the latter application was simply to revive the existing proceeding, obviating the need for Rennie Cox to start again with a new proceeding advancing the exact same claim. No useful purpose would have been served by requiring the claim to have been started afresh.

[28] The order made by this Court in March 2018 was simply to set aside the default judgment. There was no application to set aside the order granting an extension of time to enable Rennie Cox to take the next step (and thereby revive the proceeding).

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[24] District Courts Rules 2009, r 2.39.1(a)(i).

No such order was made by this Court, nor was it necessary to do so. The effect of setting aside the default judgment was sufficient to restore EA to the position she ought to have been in before the default judgment was entered, namely, a defendant in a proceeding with notice of an application for judgment by default following her failure to file a response to the claim. Had the application for default judgment been on notice to EA, it is inevitable that she would have sought and been granted an extension of time to file her response so the proceeding could progress to a hearing and be determined on its merits in accordance with the fundamental objective of the Rules. That is precisely what Judge Harrison's directions allowed for.

[29] On this analysis, the proceeding came to an end in late May 2015 but was enlivened in August 2015 when the extension of time to apply for judgment by default was granted. Numerous steps were taken in the proceeding after that date. As noted, no fewer than eight judgments have been given in the proceeding since August 2015. It seems to us to be quite artificial to suggest that, despite all of these steps having been taken without pause in the intervening six-year period, the proceeding should now be regarded as having been at an end as from late May 2015. We do not accept EA's submission to this effect or that there was no jurisdiction for Judge Harrison to entertain Rennie Cox's application for timetable directions.

[30] It follows that we do not agree with Palmer J that the timetable directions made by Judge Harrison after the default judgment was set aside had the effect of reviving the proceeding. For the reasons given, the proceeding was revived in August 2015 and did not need to be revived for a second time. Nor do we agree that the effect of making the timetable directions was to "evade the purpose of the strict deadlines in the rules and the purpose of the limitation period prohibiting new proceedings of this age".[25] The delay between late-May 2015 and mid-June 2015 (when the extension of time was sought) was comparatively short and caused no prejudice to EA. As noted, it would not serve any useful purpose to require Rennie Cox to start all over again with a new claim. This would achieve nothing other than further delay and expense. Nor was the purpose of the limitation period evaded by making these directions. The purpose of the Limitation Act is to encourage claimants to make claims for

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[25] High Court judgment, above n 18, at [26].

monetary or other relief without undue delay by providing defendants with defences to stale claims.[26] Rennie Cox commenced the claim in March 2012, very soon after the invoices covering the period June to November 2011 fell due for payment. EA was promptly served. This was by no means a stale claim.

[31] It would have been open to this Court in 2018 to set aside the default judgment on terms, for example, that it would be set aside if, and only if, EA filed and served a response to the claim within one month. The parties did not ask for this and this Court made no such order. But any failure to spell out the consequences of setting aside the default judgment should not deprive Rennie Cox of the ability to have the claim determined on its merits. This would be a manifestly unfair and disproportionate response to the errors made by counsel when applying for the default judgment in June 2015. Those errors were addressed by setting the default judgment aside and awarding costs. Thereafter, there could be no suggestion of Rennie Cox taking advantage of its own wrongdoing in respect of the application for default judgment. The additional sanction of being deprived of the ability to have the claim heard on its merits is not compelled by the Rules and would not be consistent with their core objective.

Disposition

[32] The appeal is allowed. Subject to any variation directed by the District Court, we substitute the following directions for those made by Judge Harrison:

(a) Rennie Cox is to file and serve a statement of claim within 15 working days of the date of this judgment.

(b) EA is to file and serve any statement of defence and counterclaim within 15 working days of being served with the statement of claim.

(c) Rennie Cox is to file and serve a reply to any affirmative defence and a statement of defence to any counterclaim within 10 working days of being served.

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[26] Limitation Act 2010, s 3.

(d) EA is to file and serve a reply to any affirmative defence to the counterclaim within 10 working days of service.

(e) A fixture for the substantive hearing should be allocated as soon as reasonably practicable thereafter.

[33] We would normally have ordered EA to pay costs to Rennie Cox for a standard appeal on a band A basis and usual disbursements. We would also have directed that costs in the High Court be fixed by that Court in accordance with this judgment. However, Mr Bryers asked us to take the unusual step of reserving the question of costs. We understand this is because Calderbank offers may be relevant to the assessment of costs. Consequently, we will reserve costs. If the parties are unable to reach agreement, submissions on behalf of Rennie Cox should be filed within 20 working days of the date of this judgment. EA's submissions in response should be filed within 10 working days of receipt. Costs will then be determined on the papers.

Result

[34] The appeal is allowed. The timetable directions made by the District Court in *Rennie Cox Lawyers v EA* [2018] NZDC 21916 are reinstated as varied in accordance with [32] above.

[35] Costs are reserved. Absent agreement, submissions are to be filed in accordance with the timetable in [33] above.

Solicitors:
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