ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE APPELLANT AND ANOTHER PERSON.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-2580
[2019] NZHC 3191

BETWEEN	EA Appellant
AND	RENNIE COX LAWYERS Respondent

Hearing:	6 August 2019 with further submissions on 6, 9 and 19 September 2019
Appearances:	R J Hollyman QC for the Appellant S P Bryers for the Respondent
Judgment:	5 December 2019
Reissued:	6 December 2019

JUDGMENT OF PALMER J
[reissued with a redaction]

This judgment was delivered by me on Thursday 5 December 2019 at 4.30pm.
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors/Counsel:
R J Hollyman QC, Auckland
S P Bryers, Barrister Auckland
Rennie Cox Lawyers, Auckland

Summary

[1] Ms EA and Rennie Cox Lawyers had a dispute about legal fees. In March 2012 Rennie Cox filed proceedings in the District Court. They were automatically stayed when Ms EA complained to the New Zealand Law Society about the amount. The complaint was resolved in February 2015. In June 2015 Rennie Cox successfully applied to Judge G M Harrison of the District Court, without notice, for a retrospective extension of time under the District Court Rules 2009 (the Rules) to enter judgment by default. In March 2018, the Court of Appeal held Rennie Cox had inexcusably misled Judge Harrison in doing so and overturned the judgment. Later that month Rennie Cox applied to the District Court for further timetabling directions in the proceeding. Ms EA opposed that on the basis the proceeding was deemed to have been discontinued under the Rules. On 1 November 2018, Judge Harrison, in the North Shore District Court, granted a further extension of time to permit the proceeding to be heard, made timetabling directions and awarded costs to Rennie Cox. Ms EA appeals those decisions.

[2] The proceeding was deemed to have been discontinued under r 2.39 of the Rules, the purpose of which was to put pressure on parties to take action in legal proceedings or risk starting all over again. The limitation period to start a new such proceeding had expired by the time Judge Harrison considered the second extension. I consider the decision to extend the deadline retrospectively was inconsistent with the purpose of the Rules and the purpose of the Limitation Act 2010 and was plainly wrong. Rennie Cox blew their chance to have the deadline extended, in 2015. The interests of justice do not require they get another one. I uphold the appeal.

What happened?

A dispute over fees

[3] Rennie Cox, a firm of solicitors, acted for Ms EA in a legal proceeding. From 2009 to 2011, Rennie Cox instructed Mr M, a barrister. Ms EA's name was suppressed by Judge Gibson in the North Shore District Court on 29 April 2016. This was done so as not to undermine suppression orders, made under the relevant legislation, in the underlying legal proceeding. On appeal, Lang J in the High Court upheld the

suppression order.[1] On further appeal of other aspects of that judgment, the Court of Appeal did not disturb the suppression order.[2] The Court of Appeal also said that, in order to give effect to the orders and to meet the requirements of the Lawyers and Conveyancers Act 2006, Mr M would not be identified.

[4] By May 2011, Mr M had directly invoiced Ms EA for $116,611.26, which she paid. Ms EA also did work for Mr M, for which she invoiced him, but which he did not pay. From June to November 2011, Mr M invoiced Ms EA a further $105,014.86. Mr M's explanations for the fees were not detailed. He only released Ms EA's file to Rennie Cox on the condition it undertake to sue Ms EA for recovery of the fee. On 30 March 2012, Rennie Cox filed a proceeding against Ms EA for breach of contract in failing to pay Mr M. Ms EA received the claim on 3 April 2012. Rule 2.12 of the then District Court Rules 2009 provided that she had 30 working days to serve a response. Rules 2.39.1 and 2.39A provided that Rennie Cox had 90 working days to seek judgment by default if she did not do so.

[5] On 11 May 2012, Ms EA complained to the New Zealand Law Society. On 14 February 2014, a Standards Committee decided to take no further action. The parties portray its decision differently. Counsel for Rennie Cox submits the Committee endorsed the findings of the costs assessor and concluded Mr M had not breached any professional standards. Mr Hollyman QC, for Ms EA, emphasises the Court of Appeal's observation that it was important to note the Committee's decision was not a final determination of Ms EA's complaint because that would have required the Committee to certify Mr M's fees, which it did not do.[3] Mr Hollyman submits the Committee's decision meant the fee was not shown to be reasonable and it remained open to Ms EA to dispute the fee. On 23 February 2015, the Legal Complaints Review Officer confirmed the Committee's decision.

The District Court proceeding is revived

[6] Section 161(1) of the Lawyers and Conveyancers Act 2006 provided (and still provides) that notice by a Standards Committee of a complaint about costs prevents

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1 *EA v Rennie Cox Lawyers* [2017] NZHC 5 at [62]
2 *EA v Rennie Cox Lawyers* [2018] NZCA 33 at footnote 1.
3 At [30].

proceedings for its recovery proceeding until after the complaint has been finally disposed of. The statutory stay on the proceeding ended with the LCRO decision on 23 February 2015.

[7] In early May 2015, there was interaction between Ms EA's lawyers and Rennie Cox, which the Court of Appeal characterised as entitling Ms EA to expect opposing counsel would respond.[4] They did not. Six weeks later, however, on 16 June 2015, counsel for Rennie Cox sought, without notice to Ms EA, retrospectively to extend the time for entering judgment against her by default. This was on the basis there "is nothing left to dispute" about Mr M's fee because "the certificate of the Standards Committee or decision of LCRO is 'final and conclusive as to the amount due'". On 21 August 2015, Judge Harrison in the District Court retrospectively extended the time and also entered judgment by default.[5]

[8] Ms EA applied to set aside the extension and the default judgment. She eventually succeeded in the Court of Appeal. In its judgment of 5 March 2018, the Court of Appeal held Rennie Cox was not entitled to judgment, stating:

> [35] … Because [Ms EA] did not serve a notice of response to the claim and [Rennie Cox] did not apply for judgment, the proceeding was treated as having been discontinued by [Rennie Cox] and automatically came to an end at that time. The claim could be started again only be starting afresh with a new notice of claim filed and served under r 2.10.
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> …
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> [41] We accept that [Ms EA] could have applied for an extension of time to serve her response between receipt of the 5 May 2015 email and 19 May 2015, the date the proceeding was deemed to have been discontinued. However, the respondent had advised her that counsel had the carriage of the proceeding and indicated that he would reply separately to her email. [Ms EA] was entitled to expect that he would do so. Rather than engaging with [Ms EA] on the substantive issues she had raised, [Rennie Cox] took no steps and let the proceeding come to an end. Thereafter, from 19 May 2015, [Ms EA] was not required to take steps to protect her position. …
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> [42] … The present application … sought to revive a discontinued proceeding in a manner that was arguably contrary to the rules, dispense with service of the revived proceeding, and proceed immediately to judgment. The failure to serve the appellant with this application was a fundamental breach of the most basic principle of natural justice that a party has a right to be heard.

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4 At [41].

5 Order as to Judgment and Costs in *Rennie Cox Lawyers v EA* DC North Shore CIV-2012-044-491, 21 August 2015.

> [43] The procedure followed was even more concerning. Counsel applying to a court without notice to the other party has the onus of taking all reasonable steps to ensure that the court is advised of all material matters that may bear upon the decision whether to grant the application. [Rennie Cox] knew that the claim was disputed and that [Ms EA] wished to be notified of any steps taken to pursue it. It is inexcusable that Judge Harrison was not made aware of the May 2015 correspondence between solicitors which demonstrated that [Rennie Cox]'s claim was disputed and the grounds of that dispute. We agree with Lang J that the failure to disclose the correspondence demonstrating the ongoing dispute meant that the judgment was irregularly obtained.
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> [44] It was common ground by the end of the hearing before Lang J that, contrary to what Judge Harrison had been told, there was no final and conclusive determination of the amount due by [Ms EA] to [Rennie Cox]. Judge Harrison was thereby misled by counsel for [Rennie Cox]'s assertion that [Ms EA] could not dispute the claim. We agree with Lang J that this alone was sufficient to justify the conclusion that the judgment was irregularly obtained.
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> …
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> [47] For the reasons given, the judgment was irregularly obtained. [Rennie Cox] was not entitled to judgment by default without notice to [Ms EA] and without proving its claim. The judgment was procured by misrepresentation and through an inexcusable lack of disclosure. Had the Court not been misled, the judgment would not have been entered. It cannot be allowed to stand. To find otherwise would be to reward [Rennie Cox] for the improper conduct of its counsel and deprive [Ms EA] of her right to defend the claim on its merits. We are satisfied that the wrongful entry of judgment has resulted in a miscarriage of justice and the only proper course is to set the judgment aside.

[9] One might have thought the Court of Appeal's judgment put an end to the District Court proceeding.

But wait, there's more

[10] Less than three weeks after the Court of Appeal judgment, on 23 March 2018, Rennie Cox sought further timetabling directions from the District Court to progress the same proceeding. This was on the basis the Court of Appeal had set aside judgment but not the retrospective extension of time and it was in the interests of justice for the claim to be heard. Ms EA opposed the orders on the basis the proceeding had been discontinued and relied on the Court of Appeal's judgment. Rennie Cox submitted the Court of Appeal made no comment about the continuation of the proceeding and the rules did not provide for the situation where the strict time limit requirements could not be complied with because of the statutory prohibition. Mr M provided an affidavit

summarising the history of the proceeding but did not explain why judgment was not applied for within the time limits. There was a hearing on 15 October 2018.

[11] On 1 November 2018, Judge G M Harrison acknowledged, "with judgment having been set aside the order extending time to the date of the judgment must also fall".[6] He expressed uncertainty about whether the effect of the Lawyers and Conveyancers Act "stay" on proceedings would stop a limitation period running.[7] He noted the Court of Appeal "made no comment at all about the possibility of extending time pursuant to r 1.18.[8] The Judge said:

> [29] In my view it is appropriate in the interests of justice to extend time pursuant to r 1.18.1 to permit this proceeding to be heard. Matters which I take into account in the exercise of my discretion are:
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> (i) EA has never filed a response to the claim nor any form of defence, and yet she clearly disputes the amount claimed.
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> (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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> (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.
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> (iv) The plaintiff is entitled to a proper hearing on the merits of the claim.

[12] The Judge extended the deadline by which Ms EA had to respond to Rennie Cox's claim, made timetabling orders and indicated costs on the application would ordinarily be awarded to Rennie Cox.[9] On 18 March 2019, the costs and disbursements, quantified at $3,632.50, were awarded to Rennie Cox.[10] Ms EA appeals these decisions.

The relevant rules

[13] Rule 2.12 of the then District Court Rules 2009 gave a defendant 30 working days to respond to the plaintiff's notice of claim. If the defendant did not, r 2.39.1

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6 *Rennie Cox Lawyers v EA* [2018] NZDC 21916 at [22].
7 At [11].
8 At [28].
9 At [30]-[32].
10 *Rennie Cox Lawyers v EA* [2019] NZDC 4501.

allowed a plaintiff to apply immediately for judgment within 90 working days. Rule 2.39.3 provided:[11]

> When rule 2.39.1 applies, the plaintiff's proceeding comes to an end if the plaintiff does not file form 6A within the time allowed and then rules 2.17.5 (starting claim again) and 2.17.6 (treated as discontinuance) apply as if the proceedings had come to an end under rule 2.17.

[14] Rules 2.17.5 and 2.17.6 provided that:

> The plaintiff may start the claim again, subject to any relevant limitation period, only by starting afresh under rule 2.10.
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> A proceeding that comes to an end under this rule is treated as having been discontinued by the plaintiff.

[15] Into that legal mix is added a further ingredient, r 1.18:[12]

> **1.18 Extending and shortening time**
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> 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 an proceeding or any step in a proceeding on such terms (if any) as the court thinks fit in the interests of justice.
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> 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.
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> 1.18.2A To avoid doubt, a proceeding does not come to an end just because the time allowed by …. r 2.17 … or any other rule for taking any action in that proceeding expires, if that time is later extended under r 1.18.2.
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> 1.18.3 The court or a Registrar may order an extension of time on application made by written notice instead of by interlocutory application, if the parties consent.

[16] Rule 1.16.3 provided that nothing in r 1.18 "affects the reckoning of a period of time fixed by the Limitation Act 2010 or any other statute…".[13] As Smellie J held in *Russell v Attorney-General*, such a rule relates only to time appointed by the rules

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11 The text quoted for r 2.39.3 applied as at 3 April 2012 and until 13 June 2012. The text quoted for r 2.17.5 and 2.17.6 applied until 30 June 2014.

12 As at 14 June 2012 until 30 June 2014. Rule 1.18.2A was not in force before then.

13 As at 1 January 2011 until 30 June 2014.

or fixed by the Court but "there is no jurisdiction to enlarge time limitations fixed by statute".[14]

[17] And the effect of r 3.52.34 is that, where a party had failed on an interlocutory application, the District Could may only grant leave to apply again for the same or a similar order if there are "special circumstances".

Submissions

[18] Mr Hollyman QC, for Ms EA, submits the District Court fundamentally erred, and undermined the Court of Appeal's decision, in extending the time and allowing the proceeding to continue when it has been discontinued. He submits the District Court had no jurisdiction to consider Rennie Cox's application to continue the proceeding, let alone to do so because the limitation period had expired. Even if it did, he submits Rennie Cox was required to, but did not, provide a reasonable explanation for its failure to comply with the time limit. He submits the District Court's decision was plainly wrong because its conclusion was incompatible with its analysis, it failed to apply the law correctly and failed to weigh relevant considerations. He submits costs should have been awarded to Ms EA, not Rennie Cox, even if the application was granted, because it was granted an indulgence.

[19] Mr Bryers, for Rennie Cox, submits the District Court did have jurisdiction because the Court of Appeal did not hold the claim had come to an end or how the proceeding should be dealt with. He submits the proceeding had not come to an end or, alternatively, if it had that was subject to the power retrospectively to extend time or, alternatively again, the statutory stay simply suspended the running of the limitation period. He submits the court had a wide discretion under r 12.34 as to what should happen if a judgment is set aside or under rr 1.11 or 1.13, which give the court powers to make directions in cases of doubt or to deal with cases not provided for. He submits the case has suffered from unique procedural delays, Ms EA should not be permitted to take advantage of the procedural situation created by her not attempting to protect her position, Rennie Cox would be potentially prejudiced by the Limitation Act and there is no good reason to interfere on appeal with the Court's exercise of

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[14] *Russell v Attorney-General* [1995] 1 NZLR 749 (HC) at 760.

discretion to give directions. And he submits there was no appeal of the costs decision and no reason to set it aside.

Should the extension of time have been granted?

[20] In its 2018 judgment, the Court of Appeal held that the District Court proceeding had been automatically discontinued before Rennie Cox applied for a retrospective extension of time.[15] The Court observed that the application "sought to revive a discontinued proceeding in a manner that was arguably contrary to the rules".[16] But it naturally focussed most closely on the grant of judgment by default, which it overturned. My reading of the judgment is that the Court of Appeal did not contemplate that a further application to revive the discontinued proceeding might be made, let alone granted. But it did not explicitly rule out such a possibility.

[21] Judge Harrison considered it to be in the interests of justice to extend the time, retrospectively, a second time, to allow the proceeding to be heard. This sort of procedural decision to extend time is commonly considered to be an "exercise of discretion" which is subject to lighter scrutiny on appeal than an ordinary appeal. That is the implication of the language Judge Harrison used and the assumption of the parties. Personally, I doubt the existence of such a category of decision.[17] A decision is either made according to law or it is not. The notion of "discretion" introduces an undesirable potential for sloppy arbitrariness that is inconsistent with the rule of law (though that is not present here). A decision on whether to extend a deadline is not untrammelled by law, as the Court of Appeal's decision in this proceeding vividly demonstrates. A decision made under court rules must be exercised within the boundaries of the power conferred by the rules and consistently with their purpose. And the rules cannot and do not purport to override the statutory provision for this sort of appeal, ss 124 and 127 of District Courts Act 2016, which is expressed to be "by way of rehearing".

[22] Even if the category exists, the practical difference on appeal of a discretionary decision that is "plainly wrong", and an ordinary decision that is "wrong", is

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15 See [35], [41], [42].
16 At [42].
17 *R v New Zealand Police* [2019] NZHC 2901.

vanishingly small. And the authorities which uphold the category acknowledge such a decision can be unlawful on standard administrative law grounds including taking irrelevant considerations into account or not taking relevant considerations into account.[18]

[23] Here, it does not matter which approach I take on appeal. I consider the Judge's decision was wrong and plainly wrong. Of the four considerations on which the Judge based the extension of time, three are dubious:

(a) The fact Ms EA disputed the amount claimed does not support the proposition that an extension should be granted.

(b) The decisions of the standards committee and LCRO did not finally determine Ms EA's complaint, as the Court of Appeal noted.

(c) The plaintiff being "entitled to a proper hearing on the merits of the claim" is conclusory and assumes the answer to the question in issue.

[24] The remaining consideration, the effect of the statutory stay, was relevant. The Judge expressed uncertainty about, but did not decide, whether the statutory stay stopped the limitation period running. Mr Hollyman's submissions are convincing on the effect of the statutory stay on limitation. He relied on the New Zealand case law applying the venerable authority of *Coburn v Colledge*, for the proposition that limitation continues to run despite a similar sort of procedural bar on attorneys pursuing claims.[19] And Parliament did not adopt the Law Commission's recommendation to extend limitation periods where statutory or procedural bars have materially affected a plaintiff's ability to bring or progress a claim.[20] Accordingly, I consider the limitation period had expired before Judge Harrison contemplated the second application to revive the proceeding. That is not to say the application could not be considered, but it was a highly relevant consideration.

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18 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [31]-[33].

19 *Pacific Coilcoaters Ltd v Interpress Associates Ltd* [1998] 2 NZLR 19 (CA), citing *Coburn v Colledge* [1897] 1 QB 702 (CA).

20 Law Commission *Limitation Defences in Civil Cases: Update Report for Law Commission.* (NZLC MP16, 2007) at [154].

[25] Other context of the second application was:

(a) The proceeding was filed in March 2012.

(b) The District Court Rules which applied at the time contained strict deadlines requiring action. Their purpose was to put pressure on parties to take action in legal proceedings or risk starting all over again. Under the rules, Rennie Cox was required to apply for judgment by May 2015, even if the statutory stay period was excluded from the calculations under the rules, as I agree it should have been.[21] Accordingly, by operation of the rules, the proceeding was effectively discontinued in May 2015.

(c) Rennie Cox's without notice application for a retrospective extension of time under the rules, on 15 June 2016, proceeded by way of misrepresentation and inexcusable lack of disclosure.

(d) Having had that pointed out by the Court of Appeal, in no uncertain terms, within three weeks, Rennie Cox applied for further timetabling directions and, in effect, another extension.

[26] Given the context, I do not consider the interests of justice favour granting the extension of time under appeal, let alone that there were "special circumstances" requiring that. The second application does not suffer from the same lack of notice or disclosure problems. 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 those 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.

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[21] The Court of Appeal calculated this to be 19 May 2015. Judge Harrison calculated it to be 26 May 2015. Either way, the application was too late.

[27] I uphold the appeal and quash the extension of time and timetabling orders.

Costs

[28] It follows from my conclusion that the costs award in favour of Rennie Cox must also be quashed. I order costs and reasonable disbursements be awarded, on a 2B basis, to Ms EA in respect of this application in the District Court and this appeal in the High Court. I do not consider there is sufficient reason to order increased costs.

Palmer J