

McGechan on Procedure

3/12/21 Update Summary

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PRACTICE NOTES

SENIOR COURTS CIVIL ELECTRONIC DOCUMENT PROTOCOL 2019 – UPDATED SEPT 2021

References to synopses of argument have been deleted for clarity. Examples given in the schedules have been amended to make clear that documents in the table of contents, including exhibits, must have a description. The table of contents should also have tab numbers, which allows counsel to use those during oral argument. See chapter 8 for the updated Protocol.

SIGNIFICANT CASES

Commentary has been included on the following recent cases:

HIGH COURT RULES

Siemer v Registrar of the Supreme Court [2021] NZHC 1604: Registrar may refer plainly abusive proceeding to Judge before service – “plainly abusive proceeding” – Court rejected an argument that a proceeding that was struck out under r 5.35B was not a proceeding because it had not been accepted for filing and was never served (and therefore could be duplicated and filed again) – acceptance of a proceeding for filing is a precondition of the exercise of powers under rr 5.35A and 5.35B, language of rules makes it clear that they apply to proceedings (otherwise there would be nothing for Court to strike out): [HR5.35A.02].



Turnover Ltd v Buy Right Cars (2016) Ltd [2021] NZHC 2217: requirements of statement of defence – affirmative defences – affirmative defences, raising factual material additional to that otherwise contained in the statement of claim and statement of defence, must be pleaded specifically to avoid surprise, and to enable the plaintiff to prepare evidence in rebuttal in advance of trial: [HR5.48.15(2)].

Jeram v Rush [2021] NZHC 2082: appearance and objection to jurisdiction – jurisdiction precluded by statute – Family Court is the court intended by the legislature to deal, at first instance, with applications made under the Family Violence Act 2018, precluding first instance applications under that Act to the High Court: [HR5.49.06(1)].

Singh v Chief Executive of the Ministry of Business, Innovation and Employment [2021] NZHC 2471: steps after close of pleadings date restricted – leave to take steps – requirement for leave to take further step after setting down date also applies to judicial review proceedings: [HR7.7.01].

Body Corporate 366567 v Auckland Council [2021] NZHC 1481: steps after close of pleadings date restricted – Leave to take steps – pleadings come before evidence, soundness of pleadings does not turn on adequacy of evidence to prove them – pleadings decision goes to whether party should be given opportunity to prove matters they wish to put in issue – earlier decision upheld on review: [HR7.7.01].

Commissioner of Police v Clarke [2021] NZHC 1981: statements of belief in affidavits – discretion in practical operation – hearsay statements of belief are potentially admissible in support of applications for forfeiture orders under ss 50 and 55 Criminal Proceeds (Recovery) Act 2009 at restraint stage – however, at forfeiture stage, Commissioner is required to prove allegations by admissible evidence: [HR7.30.03].

Re Baigent [2021] NZHC 2478: determination of application without notice – circumstances in which application without notice may be made – Court observed that it would be unusual to extinguish a property right (easement registered over a title) without giving notice to the beneficiary of that right: [HR7.46.02].

SPAK (1996) Ltd v Leroy [2021] NZHC 2398: orders that may be made in event of failure to comply – r 7.48(3) does not give an Associate Judge power to commit person to prison, as s 24 Senior Court Act 2016 limits jurisdiction of Associate Judge to commit, attach or arrest a person: [HR7.48.01(2)].

O’Keefe v Flaxmere (2008) Liquor Ltd [2021] NZHC 1982: enforcement of interlocutory order – examples – strike out applications – proceeding struck out after failure to comply with costs order, compounded by counsel’s “significant discourtesy” to the Court: [HR7.48.06(1)].

Waikato District Health Board v Radio New Zealand Ltd [2021] NZHC 2002: application for injunction – the public interest – a claim that public interest outweighs interests of privacy and confidentiality in respect of stolen data difficult to establish – will be necessary to establish not only that information is a matter of public interest but that, in all circumstances, it is in public interest that duty of confidence should be breached: [HR7.53.03], [HR7.53.07(2)].

Ryan v Lobb [2021] NZHC 2219: obligation of party ordered to make tailored discovery – categories and proportionality – Court not required to accept uncritically

assertions of relevance of documents sought by way of tailored discovery; it is not proportionate to require party to discover documents that are plainly irrelevant: [HR8.10.01A].

Pacific Pearl Accommodation Ltd v Zhou [2021] NZHC 2187: challenge to privilege or confidentiality claim – litigation privilege – communications between opposing parties not privileged – records of conversations with a lawyer acting for the other side of a transaction or dispute are not normally subject to privilege unless they are exploring settlement: [HR8.19.02], [HR8.25.07(4)].

Victoria Lane Remuera Ltd v White [2021] NZHC 2228: further submissions after end of hearing but before judgment – criteria for accepting further submissions – Court declined to take into account submissions that were filed in breach of r 11.8A: [HR11.8A.01].

Lusty v Thorburn [2021] NZHC 2045: recall – third category, “some other very special reason” – Court not obliged in its reasons for judgment to discuss every aspect of argument: [HR11.9.01(5)(a)].

Hawken Lane Development LP v Property Sales Direct Ltd [2021] NZHC 2051: recall – situations not warranting recall – time to challenge an opposing party’s calculation of scale costs is before the costs judgment is given, not afterwards by way of recall application: [HR11.9.01(6)].

Jackson v Bell Gully [2021] NZHC 2173: certain directions may be sought by originating application – originating proceeding for directions by liquidators, receivers, and others – application by receivers of a company for documents and records held by company’s former lawyers was successfully brought as an originating application under r 19.4(b): [HR19.4.01].

Nyhoff v Atkins [2021] NZHC 2238: certain directions may be sought by originating application – applications under Trustee Act 1956 or Trusts Act 2019 – Court refused leave to commence a proceeding to remove a trustee by way of originating application, in the absence of any explanation as to why leave had been sought to proceed in that way: [HR19.5.03].

Toogood v Fairfield Trustees Ltd [2021] NZHC 2568: certain directions may be sought by originating application – examples of successful applications – applications under Trustee Act 1956 or Trusts Act 2019 – for an order that trustees provide beneficiary with copies of documents relating to the trust, under ss 49–55 Trusts Act 2019: [HR19.5.03].

Roe-Shaw v Body Corporate 81340 [2021] NZHC 2114: directions as to parties and conduct of applications – discovery and interrogatories in originating applications – Court can direct that interrogatories be administered in pt 19 proceedings, if there is potential for them to facilitate the just determination of a proceeding in the manner referred to in r 1.2 – but process of interrogatories does not appear consistent with normal procedures contemplated by pt 19 – not only are procedures designed to be more streamlined, but evidence proceeds by way of affidavit, albeit with a potential for cross-examination: [HR19.10.04], [HR19.11.01].

Commissioner of Police v Bracken [2021] NZHC 2597: cross-examination of person making affidavit – unrestrained cross-examination not permitted – as pt 19 proceedings are designed to provide relatively speedy and inexpensive mechanism

for applications which need to be made to Court under specific statutory provisions, unrestrained cross-examination is not contemplated under r 19.14 – Court is able to control existence and extent of cross-examination to ensure it remains relevant: [HR19.14.01].

Re King, ex parte Smith [2021] NZHC 2089: service of bankruptcy notice in New Zealand – substituted service – Court granted an order for substituted service of bankruptcy notice, but not other documents in the proceeding, by way of combination of email and permitting notice and substituted service order and reasons to be left inside K’s gate: [HR24.9.03].

JUDICIAL REVIEW PROCEDURE ACT 2016

Rider v District Court, Auckland [2021] NZHC 1967: relief Court may grant – “the High Court may ... by order grant” – inconsistency with purpose of a statutory regime – judicial review of pre-trial decisions under Criminal Procedure Act 2011 will be sparingly exercised, Courts noting that the Act provides avenues for appeal at what are considered to be fair and appropriate points in the process: [JR16.02(7)].

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