

McGechan on Procedure

8/11/22 Update Summary

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LEGISLATION

EXPIRATION OF EPIDEMIC NOTICE

During the COVID-19 pandemic, a state of national emergency existed and an epidemic notice under the Epidemic Preparedness Act 2006 took effect from 25 March 2020. Since 20 October 2022, when the epidemic notice expired, no emergency has existed. The precondition for a Judge to direct a particular type of filing under r 5.1A(6) no longer exists. See updated commentary at [HR3.4A.01], [HR5.1A.04], [HR5.1B.01].

SIGNIFICANT CASES

Commentary has been included on the following recent cases:

HIGH COURT RULES

Boult v Crux Publishing Ltd [2022] NZCA 473: Associate Judges – jurisdiction and powers – no power to make determinations under Senior Courts (Access to Court Documents) Rules 2017: [HR2.1.03].

Moda Systems NZ Ltd v McLaren Smart Processing Ltd [2022] NZHC 1743: statement of claim to show nature of claim – factual particulars, instances – breach of confidence/misuse of confidential information – claims for misuse of confidential information need to give particulars of what is alleged to be confidential, how it was



obtained by the defendant, what was misused, when and how, and what loss or damage the misuse caused to the claimant: [HR5.26.08(9)].

Spring v Williams [2022] NZHC 2165: special damages – defamation proceedings – if it is clear the plaintiff has suffered monetary loss, but cannot prove special damages with any precision, plaintiff may be entitled to an increased sum by way of general damages: [HR5.33.04].

James v District Court Whanganui [2022] NZHC 2309: plainly abusive proceeding – jurisdiction to strike out or stay before service – Registrar required to refer proceeding to a judge under r 5.35A “as soon as practicable” after it is accepted for filing – after delay of several months Court determined it could no longer strike proceeding out under r 5.35B, instead doing so under inherent jurisdiction and r 15.1: [HR5.35A.01].

Warahi v Chief Executive of the Department of Corrections [2022] NZCA 105: plainly abusive proceeding – categories of proceeding considered plainly abusive – “dual persona” – discussion of arguments relating to dual persona theory associated with Sovereign Citizen movement: [HR5.35A.02(2)(vi)].

Flow Control Ltd v Il Forno Ltd [2021] NZHC 946: discretion to allow non-lawyers to appear on behalf of companies – considerations for exercise of Court's discretion adopted, together with further consideration whether application is made in an emergency situation: [HR5.36.02A].

Criffel Deer Ltd v ANZ Bank New Zealand Ltd [2022] NZHC 2175: withdrawal of solicitor – no legislative instrument deals squarely with withdrawal of counsel – practice has developed for counsel to seek leave to withdraw – counsel owe duties to Court to complete retainer unless good grounds exist to allow withdrawal – grounds set out in r 4.2 Conduct and Client Care rules: [HR5.41.05].

Deliu v Johnstone [2022] NZHC 1893: enforcement of interlocutory order – purpose and scope – Court granted leave to appeal its decision dismissing an application under r 7.48 that a sum held on trust in Court in separate proceeding be paid in partial satisfaction of costs award: [HR7.48.01].

Andrews v Lomax [2022] NZHC 2244: enforcement of interlocutory order – other orders – order made requiring independent computer specialist to search Dropbox account for documents that should have been discovered under a tailored discovery order and to investigate an allegation of deletion of discoverable documents: [HR7.48.06(3)].

Andrews v Lomax [2022] NZHC 2244: tailored discovery – scope of tailored discovery – factors identified in *Assa Abloyas* relevant to application for further discovery under r 8.19, whether documents relevant, whether they exist, whether discovery proportionate and whether order appropriate, are overtaken where parties have agreed to tailored discovery orders: [HR8.10.01].

Godfrey Hirst NZ Ltd v Bremworth Ltd [2022] NZHC 1944: tailored discovery – categories and proportionality – where case does not involve matters of significant public interest but merely private rights of parties concerned, and not of existential significance to parties, discovery likely to be comparatively limited: [HR8.10.01A].

Everest Serviced Apartments Ltd v Body Corporate 511909 [2022] NZHC 1925: challenge to privilege or confidentiality claim – waiver of privilege – waiver by

voluntary disclosure of privileged information – principles to be applied in determining an application for collateral waiver set out: [HR8.25.13(1)].

McMichael v Attorney-General [2022] NZHC 2119: interrogatories by notice – what are interrogatories – well-established principles summarised and set out – Court absolved defendant from answering interrogatories seeking contextual information that could potentially be obtained under Official Information Act: [HR8.34.01], [HR8.34.03(2)].

Metlifecare Retirement Villages Ltd v James Hardie New Zealand Ltd [2022] NZHC 2380: protocol for experts' conference – in practice parties frequently agree on protocol for experts' conferral – r 9.44(4) may prevent Court from ordering inclusion of particular matters in such protocols – expert protocol in *Cridge v Studorp Ltd* has found favour: [HR9.44.01].

Dovey Aviation Consulting Ltd v Attorney-General [2021] NZHC 1224: costs – categorisation of proceedings – skill and experience category – re-categorisation permitted where special reasons: [HR14.3.01(e)].

Edubase Ltd v Minister of Education [2022] NZHC 2427: costs – categorisation of proceedings – allowance for second and subsequent counsel – relevant factors may include how many counsel appeared for other party: [HR14.3.02(f)].

Picklepie Ltd v Attorney-General [2022] NZHC 2148: originating applications – examples of successful application – applications under s 324(4)(a) Companies Act 1993 to vest land: [HR19.5.03(a)(vii)].

Jackson v Grant [2022] NZHC 2113: directions as to parties and conduct of applications – discovery and interrogatories in originating applications – questions that Court considers set out: [HR19.11.01].

Keller v Daisley [2022] NZHC 2080: setting aside bankruptcy notice – counterclaim, set-off, or cross-demand – cross-claim must be a money claim – shareholding giving right to distribution if there are surplus assets when company wound up did not qualify as cross-claim: [HR24.10.03], [HR24.10.05].

JUDICIAL REVIEW PROCEDURE ACT

Reihana v Foran [2022] NZHC 2425: meaning of statutory power – “conferred ... by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate” – review of decisions of private bodies – courts slow to find basis to review private corporation that does not carry out public or quasi-public functions, even where in case of Air New Zealand, government has majority shareholding: [JR5.04(4)].

Wallace v Chief Executive of the Department of Corrections [2022] NZHC 2464: interim orders – public and private repercussions of granting relief – logistical complexities – Court held it must exercise caution before intervening in administrative or management decisions of government agencies or departments involving logistical complexities, particularly when staff and prisoner safety, and possibly that of public, may be put at risk: [JR15.05(2)].

New Zealand Animal Law Assn v Attorney-General [2022] NZHC 1844: discretion of court to refuse to grant relief for defect in form or technical irregularity – power of validation, technical irregularities – Court found unlawful process of revoking and

reissuing Rodeo Code constituted defect in form or technical irregularity given that only minor amendments to Code were made, which would have been permissible under Minister's power to make amendments of minor nature: [JR19.01(2)].

SENIOR COURTS (ACCESS TO COURT DOCUMENTS) RULES 2017

Boult v Crux Publishing Ltd [2022] NZCA 473: "Judge" – rules expressly define "Judge" – does not include Associate Judge, an application under rules must be determined by a Judge – non-party application under rules an originating application, not an interlocutory application: [SCD4.10.01].

HABEAS CORPUS ACT

Adamson v Oranga Tamariki [2022] NZHC 2153: determination of applications – not appropriate procedure – where there were matters that would require considerable evaluation and which were already before Court, or another Court, in other proceedings: [HC14.01].

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