

McGechan on Procedure

1/5/15 Update Summary

SIGNIFICANT CASES

Commentary has been included on the following recent cases:

HIGH COURT RULES

Stylo Medical Services Ltd v Hum Hospitality Ltd [2014] NZHC 2723 – Rules of general application – Time – Extending and shortening time – Scope of rule – Whether r 1.19 includes power to extend time specified in final decision of court: [HR1.19.02].

SM v LFDB [2014] NZCA 326, [2014] 3 NZLR 494 – Rules of general application – Time – Extending and shortening time – “Unless” or conditional order to extend time – Sanctions for failure to comply with “unless” orders – Reinstatement of proceeding after it has been struck out will not be granted where Court’s processes being abused: [HR1.19.05].

Perriam v Wilkes [2014] NZHC 2192 – Jurisdiction and powers of Associate Judges – Review of decision – Approach to review – If AJ’s decision is reasoned one, following defended hearing, approach is essentially appellate: [HR2.3.02(1)].

Williams v Attorney-General [2015] NZHC 139 – Associate Judges – Review of decision – Time limits – Extensions of time – Ignorance of law no excuse for failing to pursue application for review within time: [HR2.3.03].

Elvidge v ASB Bank Ltd [2015] NZHC 44 – Associate Judges – Review of decision – Time limits – Extensions of time – Court made anticipatory extension of time to apply for review, as it considered five working days to be insufficient for a party to take advice fully and give instructions for a review application; Interlocutory orders – Order may be rescinded if fraudulently or improperly obtained – Application of rule – Standard and onus of proof; Security for costs – Relevant factors in exercise of Court’s discretion – Merits; Enforcement of interlocutory order – Scope – Practical operation: [HR2.3.03]; [HR5.45.03]; [HR7.48.01]; [HR7.48.02]; [HR7.51.01].

Spencer-Marti v Crouch [2014] NZHC 3069 – Change of parties by death – Procedure – Proceeding not to be continued after plaintiff’s death, until person applying to be substituted as plaintiff’s personal representative obtained grant of probate proving entitlement to relief claimed: [HR4.50.01].

La Famia No 1 Ltd (in liq) v Gan [2014] NZHC 3158 – New parties order – Although rule provides for court to make new parties order on application without notice, court may require application to proceed on notice where it is clear there is objection to making of order: [HR4.52.05].

Capital and Merchant Finance Ltd (in rec and liq) v Perpetual Trust Ltd [2014] NZHC 3205 – Striking out or adding parties – Non-parties or interveners seeking joinder – Principles: [HR4.56.13].

Ayers v LexisNexis NZ Ltd [2014] NZHC 2998 – Commencement of proceedings and filing of documents – Pleadings – Notice requiring further particulars or more explicit pleading – Special damages: [HR5.21.10(2)].

Reekie v Attorney-General [2014] NZSC 63, [2014] 1 NZLR 737 – Commencement of proceedings and filing of documents – Security for costs – Competing considerations in respect of orders for security against litigants in person on appeals: [HR5.45.05(4)].

Lee v Whangarei District Council [2014] NZHC 2989 – Commencement of proceedings and filing of documents – Security for costs – Leaking building cases – Applications for security for costs rare, as Council may be in better financial position to deal with costs of litigation than defendants in other cases: [HR5.45.05(14)].

Koroniadis v Fisk [2014] NZHC 2823 – Commencement of proceedings and filing of documents – Security for costs – Examples of security fixed: [HR5.45.10].

New Zealand Law Society v Deliu [2014] NZHC 2467, [2015] 2 NZLR 224 – Commencement of proceedings and filing of documents – Statement of defence and appearance – Appearance and objection to jurisdiction – Absence of jurisdiction – Rule 5.49 only concerns whether jurisdiction exists, not whether parallel jurisdiction better suited to determining issues: [HR5.49.03].

Zurich Australian Insurance Ltd t/a Zurich New Zealand v Cognition Education Ltd [2014] NZSC 18 – Commencement of proceedings and filing of documents – Statement of defence and appearance – Appearance and objection to jurisdiction – Jurisdiction precluded arbitration clause – In determining whether there is in fact a valid dispute, court will grant stay unless it is immediately demonstrable either that defendant not acting bona fide in asserting there is dispute or that there is, in reality, no dispute – If there is application for stay to permit arbitration to take place and application for summary judgment in respect of same matter, stay application should be determined first and only if that is rejected should application for summary judgment be considered: [HR5.49.06].

Body Corporate 348047 v Auckland Council [2014] NZHC 2971 – Service of statement of claim and notice of proceeding – Prompt service required – Effect – Rule 5.72(2) clarifies consequences of non-service within 12 months, but does not modify mandatory requirement imposed by r 5.72(1); “As soon as practicable” – Any sanction must be considered in terms of rr 1.5, 15.1 or Court’s inherent jurisdiction: [HR5.72.01].

Goodwin v Copland [2014] NZCA 568 – Substituted service – Substituted service order could be made under r 6.8 in respect of bankruptcy notice because it was, within meaning of r 6.1, a document “required by these rules to be served”: [HR6.8.08].

Wu v Moncur [2014] NZHC 2776 – Case management – Steps after close of pleading dates restricted – Leave to take steps after close of pleadings date – Court may award costs against successful applicant granted leave: [HR7.7.01].

Jeffreys v Morgenstern [2014] NZHC 2847 – Interlocutory orders – Order may be rescinded if fraudulently or improperly obtained – Standard and onus of proof – Inadvertently misleading material placed before Court sufficient to justify discharge on ground order improperly obtained, especially in relation to without notice application: [HR7.51.02].

Jones v Norterra Rural Resources Ltd [2014] NZHC 2855 – Filing of amended pleading – Costs on original pleading and application for leave – No presumption that costs fixed when application for leave determined, in contrast to r 14.8, and may be more appropriate to wait until after trial before fixing costs: [HR7.77.09].

Hager v Attorney-General [2014] NZHC 3293 – Discovery – Discovery orders to be made at case management conference – Judicial review – Expectation that public bodies will disclose all material relevant to decision being reviewed – Adverse inference may be drawn where decision-maker has failed to do so; Challenge to privilege or confidentiality claim – Protecting confidentiality of disclosed material – Controlling mode of discovery: [HR8.5.03]; [HR8.7.01]; [HR8.25.17(3)].

Manchester Securities Ltd v Body Corporate 172108 [2015] NZCA 29 – Discovery orders to be made at case management conference – Originating applications – Court generally adopts conservative approach to discovery in originating applications brought under pt 19: [HR8.5.06]; [HRPt19.01].

Domenico Trustee Ltd v Tower Insurance Ltd [2014] NZHC 2657 – Standard discovery – Scope of obligation to provide standard discovery – If interests of justice and proportionality so require, order for disclosure of documents required to impugn credibility of witness may be made under r 8.19 or r 8.8: [HR8.7.01].

Tierney v Earthquake Commission [2014] NZHC 2941 – Discovery and inspection – Schedule appended to affidavit of documents – Groups of documents – Description must be sufficient – Date ranges for each category of documents should be identified (as that may be relevant to whether litigation privilege may be claimed) and categories of documents should be separated out into documents for which legal professional privilege is claimed and documents in respect of which litigation privilege is claimed: [HR8.16.04(2)].

Vector Gas Contracts Ltd v Contact Energy Ltd [2014] NZHC 3171 – Discovery and inspection – Order for particular discovery against non-party after proceeding commenced – Jurisdictional requirement – Power to make order under r 8.21 discretionary – Implicit in r 8.21 that non-party discovery order be necessary – Other sources of evidence unlikely to be sufficient because they are materially incomplete or unreliable – Documents sought make real difference, and not merely marginal; Market pricing information: [HR8.21.02]; [HR8.21.10].

Business Distributors Ltd v SIA Abrasives Australia Pty Ltd [2014] NZHC 3365 – Challenge to privilege or confidentiality claim – Protecting the confidentiality of disclosed material – Controlling the mode of discovery – Court will not impose confidentiality restrictions without thoroughly examining whether they are needed, focussing on likely extent of any prejudice: [HR8.25.17(3)].

Erceg v Erceg [2014] NZHC 2601 – Evidence at trial – Evidence to be given orally – Directions otherwise by Court – Video-link: [HR9.51.02(2)].

Fisk v X [2014] NZHC 2797 – Originating applications – Part 19 procedure generally used for cases where it is not necessary to have full pleadings and interlocutory steps such as for proper determination of issues: [HRPt19.01]; [HR19.5.01].

Body Corporate 172108 v Meader [2014] NZHC 2794 – Originating applications – Procedure – Application of rules relating to interlocutory applications – Discovery: [HR19.10.04A].

Goodwin v Copland [2014] NZCA 568 – Insolvency – Bankruptcy notices – Issue of notice – Consequences of defects in bankruptcy notice (Insolvency Act 2006, s 418) – s 418 can't be used to establish act of bankruptcy where none otherwise exists; Service of bankruptcy notice in New Zealand – Substituted service: [HR24.8.06]; [HR24.9.03].

Robertson v ASB Bank Ltd [2014] NZCA 597 – Insolvency – Setting aside bankruptcy notice – Counterclaim, set-off, or cross-demand: [HR24.10.03].

Bryers v Official Assignee [2014] NZHC 2920, [2015] 2 NZLR 273 – Insolvency – Discharge of bankrupt – Opposition by creditor to discharge – Court's discretion –

Hearing of discharge application must be in accordance with s 177 Insolvency Act 2006 – Bankrupt permitted to file affidavit evidence: [HR24.39.01].

Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery [2014] NZHC 2810 – Judicial review – JR is supervisory review by superior courts of manner in which decisions are made – Focus is ostensibly on process, not outcome: [HRPt30.01].

Watts & Hughes Construction Ltd v Complete Siteworks Co Ltd [2014] NZHC 2600 – Companies: liquidation – Power to stay liquidation proceedings – Procedure for setting aside demand – Interest – Where court refuses to set aside demand and orders debt to be paid, it has no power to award interest on debt – Jurisdictional basis for order under s 87 Judicature Act not met in such circumstances: [HR31.11.11(6)].

Norris v Gemmell [2014] NZCA 490 – Search orders – Requirements for grant of order – Challenging order – Application for discharge: [HR33.3.06(3)].

JUDICATURE ACT 1908

Geary v Accident Compensation Corporation [2014] NZCA 534 – Court of Appeal – Civil jurisdiction – Appeals against decision of High Court on appeal – Leave in High Court – Practice in High Court for Judges to make determinations on applications for leave to appeal against their judgments “routine and longstanding”: [J67.06].

Watts & Hughes Construction Ltd v Complete Siteworks Co Ltd [2014] NZHC 2600 – Rules and provisions of law in judicial matters generally – Power of Courts to award interest on debts and damages – Applicability – Statutory demand under s 289 Companies Act 1993 – Under s 289(2)(a) statutory demand must “be in respect of a debt that is due”, whereas no award of interest is “due” under s 87 unless and until court exercises its discretion to make award – Court may not award interest if it refuses to set aside statutory demand under s 290 because application to set aside is not “proceeding ... for the recovery of any debt or damages” within s 87: [J87.03].

Siemer v Judicial Conduct Commissioner [2014] NZHC 2878 – Rules and provisions of law in judicial matters generally – Restriction on institution of vexatious actions – Section 88B(2) applications for leave: [J88B.08].

JUDICATURE AMENDMENT ACT 1972

Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery [2014] NZHC 2810 – Judicial review – JR is supervisory review by superior courts of manner in which decisions are made – Focus is ostensibly on process, not outcome: [JAIntro.01].

NR v District Court at Auckland [2014] NZHC 1919 – Judicial review – Intensity of review – Expertise of decision-maker – For policy reasons, power to review decisions of inferior courts to be exercised sparingly: [JAIntro.05(3)].

Jackson v Te Rangi [2014] NZHC 2918, [2015] 2 NZLR 351 – Judicial review – Grounds for review – Deliberative process – Taking into account irrelevant considerations or failing to take into account relevant considerations – If relevant factor is to be considered (mandatory), decision-maker under duty to be sufficiently informed on it insofar as it appears to be necessary from the statute – When those with interest have opportunity to present their views, decision-maker should be able to rely on them to adduce information regarding their respective positions – For decision-maker to show mandatory relevant consideration was taken into account: [JAIntro.06(5)(c)]; [JA4.13].

New Zealand Maori Council v Foulkes [2014] NZHC 1777 – Single procedure for judicial review of exercise of or failure to exercise statutory power – “Conferred ... by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate” – Unincorporated bodies – Crown Forestry Rental Trust not body corporate and does not exercise any “statutory power (of decision)”, so JAA can’t assist applicants for review – Trusts exercising public powers could potentially be amenable to judicial review under parallel common law judicial review path in Part 30 High Court Rules: [JA3.05.04(4)].

Wang v North Shore District Court [2014] NZHC 1385 – Single procedure for judicial review of exercise of or failure to exercise statutory power – Costs – In judicial review proceedings of inferior court, rare for costs to be awarded against judicial body: [JA9.08].

Keenan v Attorney-General [2014] NZHC 1649 – Single procedure for judicial review of exercise of or failure to exercise statutory power – Powers of Judge to call conference and give directions – Discovery and interrogatories (s 10(2)(i)) – Discovery available in applications for review but is matter of discretion for Court to be determined on case-by-case basis: [JA10.06].

SUPREME COURT ACT 2003

LFDB v SM [2014] NZSC 197 – Leave to appeal to Court – Revocation of leave – Act makes no provision for revocation of leave to appeal – Court has taken view that purpose of s 13 defeated if appeal allowed to continue although subsequent events had shown it to be inappropriate – In this case, leave revoked because Court considered, in light of new information, that appellant had been gaming the court system and was abusing its processes: [SC13.07].

Creser v Creser [2014] NZCA 359, (2014) 22 PRNZ 167 – Ending of appeals to Her Majesty in Council – Continuing right of appeal to Privy Council – Possibility of further civil matters being appealed to Privy Council virtually nil: [SC42.01].

SUPREME COURT RULES 2004

Wu v Body Corporate 366611 [2014] NZSC 178 – General matters – Directions – Directions power cannot be used to correct error discovered after judgment; Determination of appeal – Delivery of judgment – Recall – Recall application is

proper time to raise new points, particularly those that may require resolution of new factual and legal questions: [SR5.01]; [SR42.02].

LFDB v SM [2014] NZSC 197 – Applications for leave to appeal – Time for making application – Revocation of leave – Act makes no provision for revocation of leave to appeal – Court has taken view that purpose of s 13 defeated if appeal allowed to continue although subsequent events had shown it to be inappropriate – In this case, leave revoked because Court considered, in light of new information, that appellants had been gaming the court system and was abusing its processes: [SR11.04].

Environmental Defence Society Inc v New Zealand King Salmon Company Ltd [2014] NZSC 167 – Determination of appeal – Costs in the Supreme Court – Principles – Review of approach to costs – Court generally awarded costs at flat rate of \$25,000 for a one day appeal where counsel had not requested to be heard on cost – Flat rate can now be taken to be the norm, although daily rates will still be relevant where additional costs are appropriate – Where quantum of costs likely to be in issue, this should be flagged in written submissions; Public interest litigants – Pursuit of point of public interest for no commercial gain relevant factor in determining costs – Symmetry of treatment not a decisive consideration – Each case dealt with on its merits, and public interest litigant has no automatic indemnity against costs: [SR44.02]; [SR44.03]; [SR44.05].

SUGGESTIONS WELCOME

Thomson Reuters welcomes your comments on *McGechan on Procedure* and any suggestions you may have for improving this service. Please contact Sophie Dunn, at sophie.dunn@thomsonreuters.com.