

**ORDER PROHIBITING PUBLICATION OF THE NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE APPLICANT UNTIL FURTHER ORDER OF THE COURT.**

**ORDER PROHIBITING PUBLICATION OF THE NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF S.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA361/2022  
[2023] NZCA 88**

BETWEEN

DS  
Applicant

AND

BARBARA CHRISTINE MARIE COOKE  
First Respondent

THE CORONERS COURT  
Second Respondent

CHIEF EXECUTIVE OF THE MINISTRY  
OF SOCIAL DEVELOPMENT  
Third Respondent

Court: Cooper P and Collins J

Counsel: K H Cook for Applicant  
B J Peck for First Respondent  
No appearance for Second Respondent  
V A Howell and H L S Bergin for Third Respondent

Judgment: 30 March 2023 at 9.30 am  
(On the papers)

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**JUDGMENT OF THE COURT**

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- A The application to extend time under r 43 is granted.**
- B Costs are reserved.**
- C Order prohibiting publication of the name, address or identifying particulars of the applicant until further order of the Court.**

**D Order prohibiting publication of the name, address or identifying particulars of S.**

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**REASONS OF THE COURT**

(Given by Collins J)

**Introduction**

[1] DS applies for an extension of time for him to apply for the allocation of a hearing date and file the case on appeal. The application is brought pursuant to r 43(2) of the Court of Appeal (Civil) Rules 2005 (the Rules). The application is opposed by Ms Cooke, who is a relative of S, was the subject of an inquest and subsequent application for judicial review brought by Ms Cooke. It is the judicial review decision which DS wishes to appeal.

[2] The application is required because DS did not apply for the allocation of a hearing and file the case on appeal within the timeframe prescribed in r 43 (in this case three months plus a one-month extension).

[3] DS filed the application for an extension of time four days after the appeal was deemed to be abandoned under r 43.

[4] The criteria that govern an application for an extension of time are the same as those set out by the Supreme Court in *Almond v Read*.<sup>1</sup>

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<sup>1</sup> *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

[5] The Supreme Court explained the ultimate question when considering the exercise of the discretion to grant or decline an extension of time is the interests of justice.<sup>2</sup> Factors that may be engaged include:<sup>3</sup>

- (a) the length of the delay;
- (b) the reasons for the delay;
- (c) the conduct of the parties, and in particular the applicant;
- (d) any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome; and
- (e) the significance of the issues raised by the proposed appeal, both to the public and more generally.

[6] The merits of an appeal may be relevant in cases where the merits, or lack thereof, are clear-cut. A decision to refuse an extension of time based on the absence of merit should only be reached when the appeal is clearly hopeless.

### **Background**

[7] In 2010, DS informed the Ministry of Social Development (MSD) that S was receiving a sickness benefit for a single person when she was effectively living with him.

[8] S took her own life on 3 April 2011, the day after she was advised by MSD that it intended to prosecute her for benefit fraud.

[9] Two coronial inquests were required as the first coroner passed away before delivering his decision. Coroner Tutton conducted the second inquest and rejected arguments advanced by Ms Cooke that S's death was caused by DS, and not suicide. The coroner also made an order suppressing publication of DS's name.

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<sup>2</sup> At [38].

<sup>3</sup> At [38].

The suppression order was primarily based on the coroner's acceptance that DS was an informer, and therefore entitled to the protection of "informer privilege".<sup>4</sup>

[10] Ms Cooke sought to judicially review Coroner Tutton's decision, including the suppression order made in favour of DS. For reasons that are not clear to us, DS was not named as a respondent to the application for judicial review even though he was clearly an affected person.

[11] The application for judicial review was heard in two stages by Isac J. In the first stage the Judge dismissed the arguments advanced by Ms Cooke concerning the cause of S's death.<sup>5</sup> The Judge also provisionally ruled that DS was not entitled to the benefit of informer privilege because:

- (a) DS's identity as the informer had come out in the course of the coronial inquest because he did not claim privilege at the time.
- (b) Informer privilege is not intended to extend to civil proceedings.
- (c) DS waived any informer privilege he might have been entitled to when he gave evidence before the coroner.

[12] Mindful of the need to afford DS an opportunity to be heard before making a final decision in relation to suppression, Isac J asked for DS to receive a copy of the Judge's provisional judgment from Mr K Murray, counsel assisting the Court. Mr Murray made contact with Mr K Cook, who had represented DS in the Coroner's Court and who was assisting DS on a pro bono basis. DS was unable to formally instruct counsel to represent him in the judicial review proceeding, but email correspondence from DS to Mr Murray was placed before Isac J.

[13] In the second phase of the judicial review proceeding, Isac J made DS a respondent to the proceeding and confirmed his provisional judgment that DS was not entitled to the benefit of informer privilege. The Judge released his final judgment on

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<sup>4</sup> Final Ruling on Publication Orders CSV-2011-WGN-000149, 18 September 2018.

<sup>5</sup> *Cooke v The Coroner's Court* [2021] NZHC 3594 [Interim judicial review judgment].

28 June 2022.<sup>6</sup> Isac J made orders extending name suppression in favour of DS, pending the determination of any appeal he may bring.

### **Appeal**

[14] On 14 July 2022, DS filed an appeal against both the interim and final judgments of Isac J. This occurred at about the same time Mr K Cook was assigned as counsel for DS under legal aid.

[15] On 28 September 2022, Mr K Cook provided a draft index to the case on appeal to counsel for the respondents and on 20 October 2022 the Registrar extended until 17 November 2022, the time for DS to apply for a hearing date and file the case on appeal.

[16] On 17 November 2022, Mr K Cook emailed counsel for the respondents seeking agreement for a further extension under r 43.

[17] On 18 November 2022, the Registry advised counsel that the appeal had been abandoned under r 43 as at 17 November 2022. On 22 November 2022, Mr K Cook filed the current application for an extension of time under r 43.

### **Opposition**

[18] Ms Peck, counsel for Ms Cooke submits:

- (a) The proposed appeal has little merit. It touches on a narrow and unique fact-specific question. The outcome of any appeal is unlikely to provide precedent for other cases or be of general significance.
- (b) Isac J carefully ensured that DS's interests were taken into account.
- (c) Although the delay is not significant, no reasons have been given why an extension was not applied for before the existing extension ended on 17 November 2022.

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<sup>6</sup> *Cooke v The Coroner's Court* [2022] NZHC 1515 [Final judicial review judgment].

- (d) Mr K Cook has access to documents required to create the case on appeal.
- (e) Ms Cooke has endured significant grief following the death of S. She is entitled to finality.

[19] The second respondent (the Coroner's Court) and the third respondent (MSD) abide the decision of this Court.

### **Analysis**

#### *(a) The length of the delay and reasons for the delay*

[20] The length of the delay is very minor and appears to have been primarily caused by an inadvertent oversight by Mr K Cook in not seeking a further extension of time under r 43 before the existing extension expired.

#### *(b) Conduct of the parties*

[21] DS appears to have prosecuted the appeal with reasonable diligence. It is in his interests to pursue the appeal as promptly as possible.

#### *(c) Prejudice*

[22] Whilst it is unfortunate that Ms Cooke will continue to be involved in litigation arising from the death of S, it is important for DS's interests to also be properly assessed through enabling him to pursue his appeal.

#### *(d) Significance of the issues raised*

[23] The issues raised by the proposed appeal may be relevant to other parties. We will refrain from commenting on the merits. Suffice to record, it cannot be said that the proposed appeal is obviously hopeless or completely devoid of merit.

## **Result**

[24] The application to extend time under r 43 is granted.

[25] Costs are reserved.

[26] Order prohibiting publication of the name, address or identifying particulars of the applicant until further order of the Court.

[27] Order prohibiting publication of the name, address, occupation or identifying particulars of S.

### Solicitors:

Hansen Law, Christchurch for Appellant

John Miller Law, Wellington for First Respondent

Crown Law Office, Wellington for Third Respondent