IN THE COURT OF APPEAL OF NEW ZEALAND

CA107/2012
[2012] NZCA 600

BETWEEN	YOUNG KWAN KIM Appellant
AND	JUNG NAM LEE Respondent

Hearing: 12 and 13 November 2012

Court: Ellen France, Stevens and Asher JJ

Counsel: M W Ryan and S J Corlett for Appellant
G J Kohler for Respondent

Judgment: 19 December 2012 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The judgment in the High Court against the appellant is set aside. The claim against the appellant is remitted to the High Court for a rehearing.

C The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Ellen France J)

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Introduction

[1] In 1994, the appellant, Young Kwan Kim, donated $50,000 to help set up a Korean language newspaper in New Zealand. The newspaper was called *The New Korea Herald*. Jong Ok Yoo was the editor of the paper and a director of The New Korea Herald Ltd (NKHL), the company that published the newspaper. Mr Yoo gave Mr Kim a shareholding in the company and made him a director to recognise the donation. It was Mr Kim's evidence that he has had nothing to do with the running of the paper.

[2] In 2008, the newspaper published a number of articles about the respondent, Jung Nam Lee. Mr Lee brought defamation proceedings in relation to these articles in the High Court against NKHL, Mr Yoo and Mr Kim.

[3] The case in the High Court proceeded against Mr Kim by way of formal proof. That position came about because the lawyers who were to represent Mr Yoo and Mr Kim withdrew at the last minute. As we shall discuss however, they did so without complying with r 5.41 of the High Court Rules dealing with the withdrawal of counsel. The failure to comply with r 5.41 meant Mr Kim had no notice of the solicitors' withdrawal. He therefore had no idea that a hearing of the defamation claim would proceed without him being represented or present.

[4] Heath J found that the articles were defamatory.[1] He awarded Mr Lee $250,000 in damages plus costs and disbursements. Mr Kim, NKHL and Mr Yoo were held jointly and severally liable for payment of the judgment sum. An

[1] *Lee v The New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 9 November 2010 [*Lee v NKHL*].

injunction was granted requiring that the articles be removed from the newspaper's website.

[5] Mr Kim appeals against the High Court decision on the basis a miscarriage of justice has resulted from the way in which the case proceeded in the High Court in his absence. The appeal accordingly raises issues about the impact of a failure to comply with r 5.41. In particular, the question is whether something has gone wrong in this case and, if so, whether there should be a remedy. The latter question involves consideration of whether Mr Kim has any arguable defence to the claim.

Background

[6] It is necessary to set out something of the procedural history of the matter. The parties have agreed on a chronology and the summary which follows is based on that agreed chronology.

[7] NKHL was incorporated on 6 January 1995 to run the newspaper. Mr Yoo was appointed a director at that time and Mr Kim soon after, on 31 January 1995.

[8] Between 7 March 2008 and 2 May 2008, the newspaper published seven articles about Mr Lee. The articles were also available online on the newspaper's website.

[9] The defamation claim against NKHL, Mr Yoo and Mr Kim was filed in the Auckland High Court in August 2008. Mr Kim was personally served with the defamation claim on 11 September 2008. On 16 September 2008, Mr Kim engaged an Auckland law firm, Kenton Chambers, to act for him in the claim.

[10] In June 2010 the trial of the defamation claim took place. Immediately before the trial, Kenton Chambers withdrew as Mr Kim's counsel. As a result, the claim against Mr Kim proceeded by way of formal proof. Heath J proceeded on the basis that Mr Kim had made a deliberate decision not to attend or participate in the hearing. Mr Yoo appeared in person. As we have indicated, the High Court upheld

the defamation claim and Mr Lee was awarded damages plus costs and disbursements.

[11] Mr Kim says that he first became aware of the High Court judgment in December 2010. On 3 June 2011, this Court granted an extension of time within which Mr Lee could file his appeal against the High Court judgment.[2] In the judgment, the Court suggested a possible way forward was in effect to allow the appeal and refer the matter back for a rehearing in the High Court by consent. The parties could not agree on that course. Mr Kim, on 12 August 2011, applied to the High Court for a rehearing of his defence. That application was dismissed by Heath J on 9 November 2011 for apparent lack of jurisdiction.[3] Mr Kim filed an appeal to this Court against the dismissal of the rehearing application but ultimately, in July 2012, discontinued that appeal.

[12] Mr Kim was again out of time in terms of filing his appeal to this Court. Time to file the appeal was further extended[4] and, on 28 February 2012, Mr Kim filed the present appeal. On 14 June 2012, this Court granted Mr Kim's application for leave to adduce further evidence on the appeal.[5] We will come back later to the detail of that decision.

Has there been a procedural error?

[13] There is now no dispute between the parties that Kenton Chambers withdrew as Mr Kim's counsel in breach of r 5.41 of the High Court Rules. We agree with the parties. In order to explain our reasons, we first set out the relevant rules and the way in which Kenton Chambers purported to withdraw. We then discuss the application of the rules to this case.

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2 *Kim v Lee* [2011] NZCA 256.
3 *Lee v Kim* HC Auckland CIV-2008-404-5072, 9 November 2011 [the rehearing decision].
4 *Kim v Lee* [2012] NZCA 19.
5 *Kim v Lee* [2012] NZCA 248.

The rules about withdrawal of a solicitor

[14] Rule 5.41 deals with the withdrawal of a solicitor who has ceased to act for a party. The rule anticipates three ways in which a solicitor may withdraw. The first means is by applying by way of interlocutory application for an order of the court. Rule 5.41(1) provides that, if the solicitor on the record for a party has ceased to act for the party, the solicitor may apply to the court "for an order declaring that the solicitor has ceased to be the solicitor on the record" and the court may make the order. In terms of r 5.41(3), a notice of such an application must generally be served on the party for whom the solicitor acted.

[15] The second way in which a solicitor may withdraw is where the party has effected a change of solicitor in accordance with r 5.40. Rule 5.40 relevantly sets out what a party must file and serve on every other party if:

> (a) the party has acted in person and appoints a solicitor to act...; or
>
> (b) the party wishes to change that party's solicitor; or
>
> (c) the party for whom a solicitor has acted wishes to act in person.

The rule provides that, if the change in representation will mean a different address for service, notice of the change must be served. There are requirements for the notice.[6]

[16] Finally, withdrawal may occur in the circumstances set out in r 5.41(2)(b), namely, where the party:

> (i) has filed a notice stating that the party intends to act in person and the party's new address for service; and
>
> (ii) has served a copy of the notice on the solicitor on the record and on every other party to the proceeding who has given an address for service; and
>
> (iii) has filed an affidavit proving that service and attaching and verifying a copy of the notice served.

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6 High Court Rules, r 5.40(3).

[17] In this case, just before the trial was to commence, Mr Yoo filed a document headed up "notice of change of representation and change of address for service" purportedly under r 5.40 of the Rules. That document read:

> **This document notifies you that –**
>
> 1. The Defendants [for] whom a solicitor, Kenton Chambers Lawyers, has previously acted wishes to act in person.
>
> 2. The Defendants now intend[…] to act in person.
>
> 3. The address for service is ... .
>
> 4. The application is made in reliance on:
>
> (a) Rule[...] 5.40 of the High Court Rules;
>
> SIGNED: _____
>
> Jong Ok YOO
>
> Defendants

[18] Mr Yoo also filed an affidavit in support. In that affidavit he said he was the second defendant in the proceeding, a director of the first defendant and was also representing Mr Kim in the proceeding. He gave a new address for service and said that he had served the affidavit on counsel for the plaintiff.

[19] Mr Park from Kenton Chambers filed a memorandum dated 28 June 2010 which read as follows:

> The Former Counsel for the Defendant advise as follows:
>
> 1. The Counsel does not represent the Defendant for this proceeding any more.
>
> 2. The Defendant will uplift all the relevant documents from the Counsel and the Defendant advises that they will represent by themselves in this proceeding.
>
> 3. The Defendant advises that they will appear on 10am 29 June 2010.

It appears, therefore, that the intention was that withdrawal would be effected either through r 5.40 and/or by application of r 5.41(2)(b).

Application of the rules to this case

[20] We deal first with the purported reliance on r 5.40. That rule is not directed to the situation where the solicitor unilaterally has sought leave to withdraw. Rather, r 5.40 applies to the situation where the litigant has taken the initiative to change solicitors or his or her address for service.[7] Mr Kim knew nothing of Mr Park's intended withdrawal. Nor could what occurred fit within r 5.41(2)(b) as no notice had been given to Mr Kim.

[21] The authors of *Sim's Court Practice* note that r 5.41 was introduced following the decision in *Colonial Mutual Life Assurance Society Ltd v Welsh* (*CML)*.[8] In *CML*, this Court dealt with the requirements in the earlier rules about service of documents where the solicitor on record has been given leave to withdraw. Richardson J noted that unlike the position in England, the then High Court Rules did not deal directly with "the consequences for service of documents of the unilateral withdrawal of solicitors who are party to proceedings".[9] The Court drew attention to the "desirability" of making sure that when requests for leave to withdraw are made to the Court, "proper steps are taken by the solicitors concerned to satisfy the Court that the party concerned has the notice of the withdrawal of representation, of his or her obligation to provide an address for service and of the consequences of failure to do so".[10] Such notice to the party represented is critical to the change of representation process.

[22] Heath J in the rehearing decision fairly acknowledged "some fault" on the part of the Court and himself in "not ensuring that Mr Kim's solicitors were given leave to withdraw following the processes set out in the High Court Rules".[11]

[23] The risk of not meeting the requirements of r 5.41 is that a person in Mr Kim's position can be deprived unfairly of the right to be heard. We are satisfied that the requirements were not met and that there has been an error in process.

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7 *Colonial Mutual Life Assurance Society Ltd v Welsh* [1993] 1 NZLR 641 (CA) at 644–645 [*CML*], dealing with the predecessor to r 5.40.

8 *Sim's Court Practice* (looseleaf ed, Lexis Nexis) at [HCR 5.41.3] referring to both this Court's decision in *CML*, above n 7, and that of the High Court in *CML*: (1992) 5 PRNZ 354.

9 At 645.

10 At 646.

11 The rehearing decision, above n 3, at [43].

Should there be a remedy?

[24] Having established that something has gone wrong, the issue is whether Mr Kim should get the remedy he seeks. That is, allowing the appeal and remitting the matter for rehearing so Mr Kim can advance the defences he says he has.

[25] Mr Lee's case is that Mr Kim is the author of his own misfortune and to grant him a remedy would be to reward someone who elected not to be concerned about the litigation. That is because he took no steps in relation to the litigation over a lengthy period of time despite his knowledge of the proceeding. Mr Kohler on behalf of Mr Lee emphasises that the timetable for making available briefs of evidence expired some time prior to the trial date and Mr Kim's failure to be involved at that earlier point had nothing to do with the late withdrawal of Kenton Chambers. Any remedy for Mr Kim is confined to his ability to sue Kenton Chambers for negligence. Further, the submission is that Mr Kim has no defence. Finally, Mr Lee argues that he should not continue to be deprived of the fruits of his judgment through further delays when he has not been responsible for any of the procedural missteps.

[26] The parties' competing contentions require some consideration of the evidence about representation and then of the proposed defences.

The evidence about representation

[27] We heard evidence from Mr Kim and from Mr Yoo about representation in the defamation claim. Both men were cross-examined.

[28] There is no dispute that Mr Kim was personally served with the statement of claim on 11 September 2008. His evidence is that he read it in a perfunctory manner. Mr Kim rang Mr Yoo shortly thereafter and asked him what it was all about. Mr Kim then asked Mr Yoo to select a lawyer to act for him essentially because he thought it preferable to have a lawyer in Auckland, where the claim was being heard, instead of Christchurch (his home town).

[29] Mr Kim had one discussion with Kenton Chambers. He was told there would be a judicial telephone conference but he did not hear anything further about it. It was not until some time in December 2010 that Mr Kim heard about Heath J's judgment.

[30] Mr Kim assumed that Kenton Chambers would represent him. He was not handing over his defence to Mr Yoo. As Mr Kim told us, he "bought" a lawyer "to defend for [him]". Mr Yoo, he said, was not a person who could do that job for him.

[31] Mr Kim signed an acknowledgment sent to him by Kenton Chambers on 26 September 2008. In the acknowledgment, Mr Kim said he had declined to take independent legal advice, signed the acknowledgment voluntarily and:[12]

> … hereby delegate[d] my full authority in relation to the defending of the Case for myself as the third defendant and for [NKHL] as the first defendant to Jong Ok YOO, … .

However, we accept Mr Kim's evidence that he did not understand (and so did not agree) that "full authority" meant Mr Yoo was to have charge of the matter on his behalf. Rather, Mr Yoo was to select the lawyer who would represent them both. As Mr Kim put it, what occurred did not mean Mr Yoo was "his legal executor or something".

[32] There is an apparent oddity in Mr Kim's failure to take any action when Kenton Chambers did not contact him about the judicial conference or indeed any other matter at all. On its face, this fact may be seen to support the idea Mr Kim had delegated everything to Mr Yoo. That might then cast a different light on the purported withdrawal of counsel.[13] However, we found Mr Kim's account was credible. We accept that Mr Kim simply assumed that Kenton Chambers would contact him if there was something he needed to know, as presaged by the file note from someone at Kenton Chambers in September 2009 that records the intention to

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[12] The facsimile cover sheet from Kenton Chambers accompanying the acknowledgement noted two points. First, that Mr Kim was not a relevant defendant because he was not involved in the operation and printing. The second was that Mr Kim agreed to give full authority to Mr Yoo to "defend in the proceedings".

[13] The authors of *McGechan on Procedure* suggest that it appears that the requirements of r 5.40 were met in this case: *McGechan on Procedure* (looseleaf ed, Brookers) at [HR5.40.05]. That appears to be on the understanding as recorded in the commentary that "[Mr Kim] had expressly delegated full authority to conduct the proceeding on his behalf" to Mr Yoo: at [HR5.40.05].

update Mr Kim "constantly". Four factors support our conclusion about Mr Kim's assumption.

[33] First, Mr Kim early on in the process contacted his son who was practising as a lawyer in the United States. His son told him that things were different in the United States but that it would take a long time, about two or three years, for the case to finish. The delay in this case is consistent with what Mr Kim's son told him might occur.

[34] Secondly, although there is some dispute about the date, Mr Kim had a liver transplant which affected his health significantly for some time. Mr Kim says the transplant took place in July 2007, the year prior to the publication of the articles. He was, he says, unwell for the relevant part of 2008 and simply was not focusing on the litigation.

[35] Thirdly, Mr Kim's account is supported by the evidence from Mr Yoo. He says that he did not tell Kenton Chambers that he had full authority to act on Mr Kim's behalf. Mr Yoo put it in this way:

> I already decide to select Kenton Chambers, then the other party, Mr Kim Kwan Young, I think do not have another lawyers because we sort it out same times, through my lawyers, which – who I hired. So, I suggested to Mr Kim I got already Kenton Chambers, okay. So, I think it better to select my lawyers same time to proceed this matter and Mr Kim said, okay, I will authorise everything because he doesn't see those things, he thought. And Kenton Chambers also advised to the – Mr Kim directly these matters.

The reference to "full authority", Mr Yoo says, was not meaning a delegation of authority to Mr Yoo or to Kenton Chambers by Mr Kim.

[36] Finally, we place some weight on the fact nothing has been advanced from Kenton Chambers that questions Mr Kim's assumption. We were told that a waiver had eventually been obtained that would have enabled someone from Kenton Chambers to provide an affidavit. If necessary, the respondent could have subpoenaed someone from the firm.

[37] Our findings on these matters mean that unless it can be said Mr Kim's defence is hopeless, he should have the opportunity to put his defence. On the facts as we find them, Mr Kim expected his lawyers would defend the claim on his behalf. They did not and the manner in which they purported to withdraw deprived Mr Kim of notice of what was happening and therefore of the ability to take steps to rectify the situation such as engaging another lawyer, seeking an adjournment or appearing for himself.

The proposed defences

[38] Mr Kim says he is not liable for publication of the defamatory articles. First, the submission is that he cannot be liable because he had no personal or active involvement with the publication of the articles or with the posting of the articles online. Secondly, Mr Corlett who argued this part of the case for Mr Kim, says that directorship of NKHL, on its own, does not render him liable in defamation. Finally, it is contended that Mr Kim has a defence of innocent dissemination under s 21 of the Defamation Act 1992.

[39] Mr Lee's position is that Mr Kim was connected to the publication of the defamatory material and is liable as a publisher. Even if the High Court accepted Mr Kim's claims of non-involvement, as a director of a company running a small newspaper he would be liable. Mr Kohler also submits Mr Kim is liable because of his ongoing failure to take steps to stop publication of subsequent editions of the paper and/or of the website publication.

[40] It is common ground that the elements of the tort of defamation are as set out in *The Law of Torts in New Zealand* as follows:[14]

> (i) A defamatory statement has been made …;
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> (ii) The statement was about the plaintiff …; and
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> (iii) The statement has been published by the defendant … .

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[14] Stephen Todd *The Law of Torts in New Zealand* (5th ed, Brookers Ltd, Wellington, 2009) at [16.2].

[41] The focus of the present argument is on the third element, publication by Mr Kim. On this aspect, both counsel referred us to *Bunt v Tilley*.[15] In that case, Eady J said this:

> [22] … to impose legal responsibility upon anyone under the common law for the publication of words it is essential to demonstrate a degree of awareness or at least an assumption of general responsibility, such as has long been recognised in the context of editorial responsibility. …
>
> [23] Of course, to be liable for a defamatory publication it is not always necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility notwithstanding such lack of knowledge. On the other hand, for a person to be held responsible there must be knowing involvement in the process of publication of *the relevant words*. It is not enough that a person merely plays a passive instrumental role in the process. …

[42] In this case there is, first, a factual question about the extent of Mr Kim's involvement in, and knowledge of, publication. The statement of claim averred that Mr Kim was personally involved in the preparation of the articles and the publication and distribution of the newspaper. Heath J heard some evidence about that involvement. The Judge found it was "much more likely than not" that the content of the subject articles would have been drawn to Mr Kim's attention.[16] But, as the Judge also said, there was no evidence from Mr Kim to support a factual finding that he did not know of the intended publication. On a rehearing, Mr Kim can advance evidence on this issue.

[43] Mr Lee's argument is that, in any event, Mr Kim will be liable because he was a director of the company publishing the newspaper. However, Mr Kohler accepted that whether a person is sufficiently connected to a publication so as to be treated as "taking part" is a question of fact and degree. Further, neither party could point us to any binding or helpful authorities on a director's liability for his or her company's defamatory publications.[17] It follows from these points that we cannot

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15 *Bunt v Tilley* [2006] EWHC 407 (QB).

16 *Lee v NKHL*, above n 1, at [61].

17 David Price, Korieh Duodu and Nicola Cain in *Defamation Law, Procedure and Practice* (4th ed, Sweet & Maxwell, London, 2010) at [3–03] observe in this context that directors "are generally only liable where they have some personal involvement which amounts to authorising, directing or procuring the tortious act, i.e. the publication of the tortious act". The case cited for this proposition, *Evans v Spritebrand* [1985] 1 WLR 317 (CA), deals with the liability of a director for the tortious acts of the director's company but not in the context of a defamation claim.

say Mr Kim's proposed defences are so hopeless that he should not be permitted to have the matter reheard. Rather, it appears that the evidence as to Mr Kim's involvement and his credibility are likely to be crucial to the determination of this issue. We add that the issue of publication on the website may raise difficult issues of fact, and possibly law. The extent to which there was publication and of Mr Kim's knowledge at various points in time also appear likely to be relevant issues on a rehearing.

[44] Finally, we note that it may be that questions of contribution as between the defendants could have arisen. Mr Kim may have been able, if present at the hearing, to issue a cross notice.[18]

[45] It follows from these matters that there are arguable defences available to Mr Kim. It is fair that they should be heard. Therefore, the appeal will be allowed.

Costs

[46] Two issues arise in relation to costs. First, we need to deal with the submission Mr Kohler made about costs in the High Court on a rehearing. Secondly, we need to address the question of costs on this appeal.

[47] As to the first point, Mr Kohler submits that this Court should make it a condition of remittal back that costs, on an indemnity basis, in the High Court on any rehearing should be borne by Mr Kim. Mr Kohler says that the Court should follow this course because Mr Lee bore the full cost of running the case in the High Court, he did so in accordance with the rules and procedures and nothing can be said to suggest he has any responsibility for any error.

[48] We assume for these purposes that we have jurisdiction to make an order of this type as a condition of remittal back. However, we do not consider it would be appropriate to make such an order. We cannot foresee how matters may develop in the High Court and should not seek to tie that Court's hands. Further, there is no reason why the ordinary rules should not apply, that is, matters start again afresh on

[18] High Court Rules, r 4.18.

the remittal back. In that context it is relevant that what has occurred is not Mr Kim's fault either.

[49] As to costs in this Court, the respondent chose to oppose the appeal. He has been unsuccessful in his opposition and we consider that the normal consequences of that unsuccessful opposition should apply.

Postscript

[50] There are two matters of process on which we should record our views.[19] The first point relates to our decision to limit the evidence we heard to issues relating to the extent of the procedural error. Evidence was filed and submissions made which went to the detailed merits of the defamation claim and the defences, and which was put on the basis that we would determine the merits. In the face of this, we said the evidence should focus on the events that led to Mr Kim not being represented at the hearing and judgment being entered on the basis of formal proof. We said we would not allow evidence on the causes of action and the defences.

[51] The background to this decision is the judgment of this Court granting an application by Mr Kim to admit in evidence on the appeal three affidavits sworn by Mr Kim and an affidavit sworn by Mr Yoo.[20] However, matters advanced beyond this to the point where we were faced not only with briefs of evidence from Messrs Kim and Yoo, but also from three others. The briefs from the three additional proposed witnesses were directed to Mr Kim's defence that he was not involved in the publication.

[52] We heard argument from counsel as to the scope of the evidence we would hear at the start of the hearing. Mr Kohler for Mr Lee opposed any limitation on the evidence. He said that as matters had progressed, his client would be deprived of the

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[19] We record also that both parties said they had no difficulty with Stevens J being a part of the panel hearing the appeal. The issue was raised with the parties at the hearing because this Court in its initial judgment granting an extension of time said that none of the members of the panel hearing that application would sit on the appeal. Stevens J was a member of that panel. That observation was overlooked until just before the hearing of the appeal.

[20] *Kim v Lee*, above n 5. The affidavits from Mr Kim were those sworn on 12 February and 4 March 2011 and 25 February 2012. The affidavit from Mr Yoo was that sworn on 4 March 2011.

opportunity to say that the matter should not be remitted back to the High Court because Mr Kim could not succeed anyway.

[53] We were sympathetic to the position in which Mr Lee, through no fault of his own, found himself. However, we did not consider it would be appropriate for this Court to make factual findings on the substance of the defamation claim on appeal. We would not have the benefit of any findings in the High Court. Further, we would also potentially have had to somehow factor in the findings that had already been made in the High Court in Mr Kim's absence where they impacted on our findings. Finally, if the matter were to go to the Supreme Court, that Court would then be dealing with factual findings made in the first instance by this Court. For these reasons, we decided that it was not appropriate for the evidence before us to range as widely as the parties had intended. The parties were given time to adjust to this position. Counsel for each party filed amended submissions.

[54] The second matter of process arises from observations made in the rehearing judgment. Having concluded that there was no jurisdiction to order a rehearing, Heath J went on to make some brief observations about the merits in the rehearing decision.[21] In that context, the Judge said that were it necessary to do so, he would find in favour of Mr Lee on the merits of the claim and would have dismissed the application for a rehearing on that basis. How the rehearing is dealt with is a matter for the High Court. However, it may be preferable that consideration be given to having another judge deal with the matter, given the Judge's expression of a view on the merits.

Result

[55] For these reasons, the appeal is allowed. The judgment in the High Court against the appellant is set aside. The claim against the appellant is remitted to the High Court for a rehearing.

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[21] The rehearing decision, above n 3, at [43].

[56] The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
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