



[2022] 1 F.C.R. D-20

PRACTICE

VARIATION OF TIME

Appeals from three unreported speaking orders issued by Federal Court dismissing applications for extensions of time brought by appellants Kevin Koch, Damien de la Guardia in Federal Court File No. T-558-21, by Ireneusz Brudek in Federal Court Files Nos. T-558-21, T-198-21 — Collision between two boats on lake in Ontario giving rise to motions, resulting orders — Litigation in Ontario Superior Court of Justice ensued against Mr. Borgatti’s estate — Subsequently, Kochs, Borgattis bringing actions in Federal Court seeking declarations that their liability be limited pursuant to *Marine Liability Act*, S.C. 2001, c. 6 — In July 2021, orders established certain deadlines for steps in limitation actions — Paragraph 7 of July orders providing, *inter alia*, that defendants missing filing deadlines forever barred from claiming against plaintiffs — Appellants failing to file defence, notice of claim or supporting affidavit in the Borgatti limitation action before deadline — On discovering missed deadlines, appellants brought motions for relief to Federal Court — Appellant Ireneusz Brudek relied on *Federal Court Rules*, SOR./98-106, r. 8, which permits Court to extend or abridge period provided in Rules or fixed by order — Appellants Kevin Koch, Damien de la Guardia relied on r. 399, which permits Court to set aside or vary order in certain circumstances — At Federal Court motions hearing, appellants Koch, de la Guardia advised that they also sought to rely on r. 8 — Respondents objected to r. 8 argument, asserting too late to make it, prejudicial to raise it at hearing — Federal Court dismissed motions, concluding July orders could not be varied pursuant to r. 399 — Federal Court not convinced that doctrine of relief from forfeiture applying in case of non-compliance with time limit fixed by Court in order — Federal Court not agreeing with appellant Brudek’s submission that paragraph 7 of July orders not peremptory — Concluding that test in *Canada (Attorney General) v. Hennelly*, 1999 CanLII 8190 (F.C.A.) for extension of time not applying — Whether Federal Court erred (1) in characterizing paragraph 7 as peremptory; (2) in concluding that relief from forfeiture not available in these circumstances; (3) in concluding that r. 399(2)(a) did not apply to permit July orders to be varied to extend time — Federal Court erred when determining paragraph 7 of July orders peremptory — Nothing in its speaking orders suggesting Federal Court considered the circumstances in which July orders issued or language of July orders as whole — Peremptory order an order of last resort — Peremptory orders typically made only after repeated failures to meet deadlines established by Court or Rules — Context in which deadlines in July orders established, in which orders were issued relevant — Nothing in circumstances surrounding issuance of July orders suggesting that parties understood or intended them to be peremptory — No one, including responding party, suggested that dates in July orders peremptory — Absence of word “peremptory” in order strong indication that order not peremptory — Federal Court not applying correct test to determine whether it should exercise its discretion to extend time — Determinative factor for Federal Court appearing not to have been justice between parties, but rather stability, finality of court decisions — While this principle important, in context of timetable order that is not peremptory, cannot be determinative — *Hennelly* factors, overarching principle that justice be done between parties supporting no other conclusion than that appellant Brudek should have been granted extension of time — Federal Court erred in not considering r. 8 — Here, no doubt that appellants Koch, de la Guardia seeking extension of time — Federal Court should have dealt with substance of their request — Should have asked itself whether any objection to “new argument” on r. 8 could have been addressed by providing responding party with opportunity to make submissions after motions heard — Should have applied *Hennelly* factors, overarching principle of justice between parties in assessing whether appellants Koch, de la Guardia should be granted extension

of time — In the interests of not prolonging matter further, motion decided on merits, extension of time requested by appellants Koch, de la Guardia granted — Appeals allowed.

KOCH V. BORGATTI ESTATE (A-18-22, A-22-22, 2022 FCA 201, Monaghan J.A., reasons for judgment dated November 22, 2022, 27 pp.)