IN THE SUPREME COURT OF NEW ZEALAND SC 98/2016

BETWEEN **JANFERIE MAEVE ALMOND**
Appellant

AND **BRUCE JAMES READ**
First Respondent

ETHNE GLADYS READ
Second Respondent

CHRISTOPHER JOHN READ
Third Respondent

Hearing: 5 December 2016

Coram: William Young J
Glazebrook J
Arnold J
O'Regan J
Ellen France J

Appearances: S I Perese for the Appellant
J M Airey and A Dullabh for the First Respondent
N W Woods and P Amaranathan for the Second and Third Respondents

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CIVIL APPEAL

MR PERESE:

Would it please the Court, counsel's name is Perese, I appear for the appellant.

WILLIAM YOUNG J:

Thank you Mr Perese.

MR AIREY:

May it please the Court, counsel's name is Airey, I appear for the first respondent along with my friend Ms Dullabh.

WILLIAM YOUNG J:

Thank you Mr Airey.

MR WOODS:

May it please the Court, my name is Woods, I appear together with my learned junior Ms Amaranathan for the second and third respondents.

WILLIAM YOUNG J:

Thank you Mr Woods. Right Mr Perese.

MR PERESE:

E nga iwi, e nga mana, e nga reo
O nga hau e wha
Tena koutou, tena toutou, tena tatou katoa
Nga mihi nui kia koutou Rangatira o te Koti Manu Nui

With respect this appeal concerns access to justice. The Court of Appeal has held that it was not in the overall interests of justice for Mrs Almond to bring her appeal a day late, a day late. Notwithstanding the fact that the failure was due to her lawyer. Respectfully the Court of Appeal's decision will be wrong, will be considered wrong if Their Honours acted on a wrong principle or were plainly wrong. The appellant says the Court acted on a wrong principle and/or was plainly wrong to decide the issue's merits on the facts against the

appellant in a summary way and without the benefit of full argument and further evidence if that was necessary.

Acting in this way, in my respectful submission, is a miscarriage of justice. I don't propose to go through the first 10-odd pages of my submissions which are really to set the background unless Your Honours have any questions in relation to the facts. I get straight to the point in paragraph, at page 11 at paragraph 27 of my written submissions when I submit that the Court of Appeal erred on both principle and on the facts. The case did involve a dispute about the facts but in my submission it was for the Court to come to its own view of the facts rather than to simply the facts as presented by the learned High Court Judge, Justice Thomas. In this regard I rely on this authority, the authority of this Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. And at page 11 of my submissions I set out there the passage in particular that I rely on.

On a general appeal the Appeal Court has the responsibility of arriving at its own assessment on the merits of the case. I rely on that principle. In relation to the issues of credibility I rely also on the Court's observation at paragraph 13 of the judgment where the Court, this Court says the Appeal Court must be persuaded that the decision's wrong but in reaching that view no deference is required beyond the customary caution appropriate when seeing the witnesses provides an advantage because of credibility, because credibility is important.

In the most recent decision of the Court of Appeal in this area, this is the case of *Busch v Ireland* [2016] NZCA 391 which I have cited, that decision summarises the application of *Austin, Nichols* between paragraphs 20 and 29 and I particularly rely on the passage cited at paragraph 24 which I've included in my submission for convenience. And that is if those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. I also rely on

the observation in paragraph 26 of the decision. That's taken from the *QBE Insurance (International) Ltd v Pegasus Ltd* [2011] NZCA 268.

I've not been able to locate any authorities where the Court has declined to grant an extension because of the trial Judge's sustained findings against the appellant's credibility. Now that may well reflect the observation of the learned authors in McGechan, recognised by the Court of Appeal in *Sharda Holdings Limited v Gasoline Alley Services* [2010] NZCA 225, where the Court held but as the authors in McGechan note, there is very real limit as to how far an enquiry into the merits and prospects of success can be taken at this early stage, that is at the application for an extension stage of the proceeding. I submit that the prevailing view has been where merit turns on issues of fact, as opposed to law, the Court appears to take a cautious approach. The benefit of the doubt approach. It appears, in my submission, to be based on a judicial aversion to denying somebody their right to appeal.

This caution possibly extends to situations where the Court requires positive proof, or proof positive, that an appeal has no merit. In this respect I refer to the Court of Appeal's decision in *Robertson v Gilbert* [2010] NZCA 429 where His Honour Justice Hammond in delivering the decision of the Court noted, "But the interests of justice may require that leave be granted, not necessarily simply because the merits appear strong, but where there is insufficient material before the Court to exclude the possibility that there is merit."

I submit that where the application turns on the facts of the case, the practical realities of a truncated hearing, and limited information, places the Court of Appeal in an extremely vulnerable position. They likely thought that in these circumstances the safer course is to grant the extension, particularly where there's no prejudice, and the delay is not of the appellant's making.

Where the application turns on a question of law, the Court is unsurprisingly robust, and unlike factual disputes, these applications can be and are dealt with on a salary-type judgment basis. So therefore you see in *Khan v Reid* [2010] NZCA 391 the Court of Appeal declined to grant an extension of time to

appeal and claimed it was barred by the Limitation Act, and it also involves viewpoints of challenge, which was subject to the principles of res judicata. Furthermore the Court of Appeal in *Havanaco Limited v Stewart* CA 67/05, 17 June 2005 dismissed an application for extension upon the basis that the appellant was wrong in its interpretation of section 130 of the Property Law Act which was a key plank of its case.

So returning to my initial comments about the Court of Appeal's decision, in my submission, the Court erred in principle in rejecting Mrs Almond's appeal. But I also say that on the facts the Court of Appeal erred and this is at paragraph 13 of the Court of Appeal's judgment, where it considered Justice Thomas' many and carefully articulated reasons as to why Thomas J did not accept Mrs Almond's evidence. Which Justice Thomas said was inconsistent with key and uncontested facts, internally inconsistent, and consistent with a range of documentary material. Now in the case the Court of Appeal referred at footnote 9 to various parts of Her Honour's judgment and the Court of Appeal noted, "Thomas J made sustained findings adverse to Mrs Almond's credibility". I briefly analyse those very sections and they don't involve what I propose in paragraph 36 of my submission, a finding that Mrs Almond was dishonest, as occurs when the Court says the witness was not credible. Neither does Justice Thomas find that Mrs Almond was evasive, intentionally misleading, dishonest, unreliable, untruthful. What Justice Thomas says is that the evidence is not credible. Now in my submission that allows the appellant court to relook at the issue of the evidence and to come to its own view.

If, in my submission, the Court of Appeal considered the High Court impeached Mrs Almond's credibility, given it she was a witness who was evasive, intentionally misleading, dishonest, unreliable, untruthful or dishonest then such a conclusion does not appear to rise in terms of Her Honour's decision.

WILLIAM YOUNG J:

I understand what you're saying but a finding that the evidence was not true, in the context of this case where if it were not true Mrs Almond must have known that was really the finding directed to her credibility wasn't it?

MR PERESE:

Well as I read the judgment and I come to it from the same view as Your Honour having not participated at the earlier hearing but it seems to me that the emphasis of Justice Thomas' findings were about the credibility of the evidence as opposed the credibility of Mrs Almond. Now –

WILLIAM YOUNG J:

Well although that's sort of good practice, one looks at the I suppose the evidence as against the externalities rather than too much on the way it was given but they are fairly, for instance over the $60,000 those are pretty fundamental findings of credibility.

MR PERESE:

Yes.

WILLIAM YOUNG J:

Which, sorry pretty fundamental findings of fact which necessarily impeach her credibility.

MR PERESE:

Well what it does is it makes her evidence less plausible than it does the respondents' evidence or the plaintiffs in that case.

WILLIAM YOUNG J:

Okay.

MR PERESE:

That's all I mean to say is that I don't see Justice Thomas' decision as overtly undermining the credibility of Mrs Read as opposed to the evidence that she

led which was in many cases implausible for Justice Thomas. But that doesn't mean that therefore the Court of Appeal hasn't got a function in reviewing that evidence to come to its own view of the credibility of the evidence or otherwise. And that's my submission essentially at paragraph 38 and in relation to the factual matters that if the Court of Appeal meant that the sustained findings made against Mrs Almond's version of events impeaches Mrs Almond's credibility then I respectfully submit that the authority suggests that the Court of Appeal needed to come to its own view on, of the facts following its own assessment of the facts before it was able to make that call. And such an assessment, in my submission, may as a matter of principle be more than a review of the judgment which was under appeal. And leads me to my submission at paragraph 39 that taking a narrow view of the approved question, it appears to be the position in my submission that the Court of Appeal a) may have erred in its apparent failure to come to its own view of the merits in the appeal, b) in appearing to not come to its own view of the merits the Court of Appeal appears to have based its decision to decline an extension on the findings of the very decision that was being appealed. And c) by appearing to base its decision as suggested, the Court of Appeal may have not correctly applied the overarching principle of the overall interests of justice.

Now I make a point at paragraph 40 that essentially that's the nuts and bolts of Mrs Almond's appeal. The matters that I continue on with in paragraph 17 through to the end is to look at the what if scenario. What if the Court had taken a broader view of the appeal before it, because there is a challenge to the Court's finding of the constructive trust. And the critical question in this dispute is the basis or rationales for the advances made by Bruce and Chris Read and/or Mrs Ethne Read where the contributions loans and/or gifts or were they contributions towards proprietary interests. The High Court accepted the respondents' evidence that the advances go to the pro rata proprietary rights in the property. And I set that out at paragraph 42. What Her Honour says, gives rise to the institutional constructive trust is set out at paragraph 85 of the decision where Chris Read is reported as saying that, "My father had the calculations in his head. 130,000 from Bruce, 30,000

from me, 30,000 from my parents for the land. The money was going to be pooled, everyone was to receive their slice of the cake when it was to be divided up later after the mortgage was repaid. This is what we had all agreed, this is what we as a family were doing together. I felt my father would be bound by his word and he commanded our respect and trust such that we were also bound." That finding or that construction of the basis of the constructive trust refers only to the land, yes only to the land. And there's very good reason for that. Because at paragraph 76 of Her Honour's judgment, Her Honour found that the evidence supports the conclusion that notwithstanding Mrs Almond's assertions the big house on the property would belong to Mrs Almond. But of course we know that the various percentages that Her Honour came to in the end included that big property.

Counsel for Mrs Almond at the appeal stage took issue with the lack of certainty of the terms of the constructive trust and that's evident in Mrs Almond's appeal, notice of appeal at paragraph 3(H) which challenged the first respondent's concession in cross-examination that actually Chris Read who's been relied on to give evidence about the constructive trust is was not even a party to the purported agreement in relation to the acquisition of the property until much later. If this concession is correct then it's difficult to see how Chris Read was ever involved in any agreement concerning proprietary rights. It may of course be the case the Bruce and Chris Read have different classes of claim to an institutional constructive trust. Bruce arising by common intention and Chris by reasonable expectation. And that, I suspect, maybe a matter for further argument. The Court of Appeal in its leading, in the leading authority of the area of constructive trusts in *Lankow v Rose* [1995] 1 NZLR 277 (CA) held that the factors giving rise to constructive trusted contributions direct and indirect, expectation of an interest in the property, the claimant needs to show her interest was reasonable in the circumstances and the claimant must show that the defendant should reasonably expect a yield, the claimant in interest. None of those factors were ever considered, in my respectful view, by the Court of Appeal. It would have been fundamental to its decision to dismiss Mrs Almond's application for an extension for the Court to have looked at that.

Now Justice Thomas appears to countenance principles from *Lankow v Rose* but then modified them with observations from another Court of Appeal authority, that was the judgment of, as he was then, President Cooke in *Gormack v Scott* [1995] NZFLR 289 (CA). But just before going on there, the real issue that will arise if this goes to the Court of Appeal is does the *Lankow v Rose* test apply to these types of scenarios, because the contribution is not to the property but to the relationship and you've got here the scenario where Mrs Almond has paid for her own house. The parents have paid for their own retirement home, there are contributions in relation to the land. On the best case scenario for the respondents, Bruce Read pays 130,000 and Mrs Almond pays 60,000, but what about all the work she puts in to care for the parents because this was about setting up a scenario to enable Mrs Almond to care for elderly parents and that's why I reproduced in my submissions the one bit of evidence, and often in cases there'll be one or two key pieces of evidence that will be helpful, and that's the letter that was written by Mr Read on his own behalf and on behalf of his wife Mrs Read about why this land was purchased in the first place. Now the reason I set it out here, and I want to refer to it, is because this letter does not appear to have been referred to the Court of Appeal at any stage, because in my respectful submission had it been referred, the Court of Appeal might have come to quite a different view.

Now the letter was well in the evidence, there's no issue about that, and I set it out at page 5, paragraph 13 of my submissions. This letter was written after the property had been purchased and it's clear for all to see that the only reasonable inference to be drawn from this letter is that the land is purchased so that Mrs Almond could build on it and look after their parents. That's the only conceivable and reasonable inference to be drawn from that letter. But that is never taken into account by the High Court, except for an unrelated issue concerning the High Court's determination about whether Bruce Read had, in fact, had some connection with the property, and it was intended that he would live there.

Now it's instructive, and perhaps Your Honours can take it on board, that in order to make this happen Mr and Mrs Read sold their house to a car which is perhaps half an hour away, 20 minutes away from Ramarama and moved in with their daughter. They all enjoyed this. Two brothers, Mr and Mrs Read, Mrs Almond, they were all enjoying it. It was, and that's the issue that does not seem to have been taken into account by the Court of Appeal, much less the High Court. And that's one of the reasons why I submitted in my earlier memoranda about the need for a discussion about the application of *Lankow v Rose*, and does it apply to these sorts of scenarios.

Now back to *Gormack*. The decision in *Gormack* suggests that where there is common intention, and it's not too vaguely expressed, to receive implementation that the person in the position of Mrs Almond must expect to yield the claim made interest, which of course must be right if there's common intention, because it's common, and there's no difficulty with that. But the evidence is, and the challenge in the notice of appeal is that there was actually no common intention and that the Court of Appeal is, the High Court was incorrect in their finding.

Now the, I refer to, in paragraph 47 of my submissions to the obiter from President Cooke that the case, the *Gormack*, facts in *Gormack* came very close to one of expressed common intention, "Where there has been an express common intention applicable to the circumstances that have arisen, it is unnecessary to fall back on reasonable expectations." Now I invite the Court to look at the words "common intention applicable to the circumstances" as being perhaps instructive that although there may have been a common intention at some point, the Court is still bound to look to see whether that common attention is relevant at later times and whether it's still applicable in the circumstances that prevail at the time that the question is being asked. So is it reasonable for the respondents to expect a proprietary interest? In my submission it's not. In my submission it's not. That's because when, if one properly understands what was sought to be done here, it would be to say that you've got a family plan to look after, elderly patients, sorry elderly parents and everyone was to enjoy that so the issue then is, is it the case that at the

end of that everybody would be entitled to proprietary interests out of the their contributions leaving the person who has provided all of the work, all of the care with a quarter or a fifth of the total value of the property. So Mrs Read puts in close to $230–40,000, it's actually what she gets back in the division of the money at the end of the day if the property was valued at a million dollars. Contrast that with Mr Read, Bruce Read who puts in $130,000 and gets almost twice the amount. And that's why I've used *Hussey v Palmer* [1972] 3 All ER (CA) at the beginning of my submissions because I can't see how that satisfies justice and common sense.

Mrs Read is now 64. At the time this all happened she was –

O'REGAN J:
Mrs Almond you mean?

MR PERESE:
I'm sorry, yes I've got it down as Mrs Read, it's a typo on my part Sir. Mrs Almond was aged 50 at the time and she's now 64. There is and I note this from sort of the submissions made by my learned friends and queries and a challenge to the type of work that she did for her parents but it is clear that her parents have reached the point where they felt unable to live on their own, that's why they sold their house and moved to the retirement home, so that itself speaks volumes about the type of care that they were looking to receive. But she says that she provided them with a great deal of service and that's to be applauded. But what's to be queried is in her provision of that service do we countenance by applying rules of equity that she actually comes out worse off than everybody else. I can't see again the good conscience and justice in that.

So that's what Mr Bruce Read and Mr Chris Read ask this Court to do. There is a delay of one day and they've used that as an opportunity to shut her out by saying this Court should decline Mrs Almond's appeal to have her day in Court. It's clear from reading the judgment of the High Court that there are a lot of findings against Mrs Almond and it will be a difficult task to

challenge that. But she's entitled to do that. She's entitled to have a go because this is her home, this is her security at stake, it's not just money. And at the age of 64, having given up so much of her life to look after aging parents the least, in my respectful submission, the Court can do is see that it is in the interests of justice that she be allowed to bring that appeal.

I don't have anything further for Your Honours unless the Court has any questions.

WILLIAM YOUNG J:
No thank you. Mr Airey.

MR AIREY:
May it please Your Honours before I move into the submissions unfortunately a couple of typographical errors have slipped into my written submissions so if I could just correct those before they cause any further confusion. The first is on page 12 of the written submissions, paragraph 35 there is a footnote 27 has been put in the wrong place, it should be at the end of the previous sentence.

WILLIAM YOUNG J:
All right.

MR AIREY:
After the words, "Allowed to continue."

WILLIAM YOUNG J:
So this indulgence approach, do you say that applies where the appeal is one day out of time as a result of a lawyer's error and when everyone knew the appeal was going to be lodged?

MR AIREY:
Well it is essentially an indulgence because they're all provided a time limit. I'll obviously come to that later in the submissions but the delay is not, clearly

not the only factor that's of relevance, it's one of many but my submission is that the merits of the appeal are always going to be a strong factor and in the cases where there is no merit in the appeal they will be a decisive factor.

WILLIAM YOUNG J:
Sorry I've actually interrupted you, you've got another, a second typo you wanted to correct?

MR AIREY:
As a consequence of that one I missed out the, what should have been the correct footnote which was reference to a case called *Terry v Greymouth District Court* CA67/95, 6 November 1997 which unfortunately didn't make that into the bundle as a consequence either although I do have copies available for the Court.

WILLIAM YOUNG J:
Was that over its rating scale?

GLAZEBROOK J:
Yes, I was going to say.

MR AIREY:
I think it was, it – that's the only point of that entire case is the description of the onus.

GLAZEBROOK J:
Possibly a slightly different context?

MR AIREY:
It is.

GLAZEBROOK J:
And a slightly different litigant one might say.

MR AIREY:

I appreciate that Your Honours but I didn't want to be putting propositions without support.

GLAZEBROOK J:

No, that's fine. Did you have a paragraph number for that or a page number?

MR AIREY:

It is, I think it's page 10 of the –

GLAZEBROOK J:

Yes it will be pages, page 10 thank you.

MR AIREY:

For what it's worth I, and I'll come to this in the, later on in the submissions, I accept that there's been a shift for some time away from –

GLAZEBROOK J:

They're actually relying on *Avery v No 2 Public Service Appeal Board & Ors* [1973] 2 NZLR 86 (CA) to say that.

MR AIREY:

Yes but I didn't read *Avery* as actually saying that.

GLAZEBROOK J:

So it's slightly odd isn't it?

MR AIREY:

It is slightly odd.

GLAZEBROOK J:

All right.

MR AIREY:

It's not a strong point because I think that –

GLAZEBROOK J:
Yes I understand.

MR AIREY:
The second error that crept in unfortunately is a few pages later at page 15 at paragraph 46(B) I referred to the payments being referred to in paragraphs 27 to 32 above, that should have been 25 to 28.

GLAZEBROOK J:
Sorry I lost, I was just writing something down on a list, your?

MR AIREY:
Paragraph 46(B) of the written submissions. It's just an indirect reference to paragraph numbers that should be paragraphs 25 to 28 rather than 27 to 32 as written.

GLAZEBROOK J:
Thank you.

MR AIREY:
In terms of the written submissions I don't propose to deal with anything further on the first 10 pages of those submissions which are similar to my friend with essentially setting out the background unless there are any further issues that arise from that. What I was proposing to do was to start by talking briefly about the discretionary nature of rule 29A which of course is the approved question. As set out in the written submissions, once a party allows, consciously or otherwise for the time period, to apply the Court of Appeal has a discretion to allow an appeal to continue and –

O'REGAN J:
In 90% of the cases the respondent's consent to an extension being given, don't they, that's the reality.

MR AIREY:

That's the reality.

O'REGAN J:

And that's because the Court of Appeal has said on numerous occasions that where a lawyer makes a mistake their client shouldn't suffer as a result.

MR AIREY:

And similarly that would normally be the position except when there's no merit to the appeal, and that's really what this –

WILLIAM YOUNG J:

Have you got any cases where a delay of this sort was not, of the kind involved in this case, was not remedied by the Court on grounds of factual implausibility of the appeal.

MR AIREY:

No I haven't and my friend speculated it seems the proposition that where there's a legal issue they, the courts tend to take a more robust approach, but when it's a factual one it's a bit more relaxed but in my submission there's probably a very good reason for that, and that is that such cases don't simply tend to come to court because of the approach that the courts typically take to –

GLAZEBROOK J:

Well actually they don't now, that's the problem, because in the past that would have been the case, because in the past it was said well appellate courts don't look at factual matters, but that just isn't the case now, is it?

MR AIREY:

It's not the case they don't look at them but –

GLAZEBROOK J:

In fact they've been told explicitly that they have to come to their own view, so obviously somebody has to put something up to suggest that it would be wrong rather than just go, you know, you've got to look at an appeal court.

MR AIREY:

That's correct, Your Honour, as I say they, I think the explanation why there aren't very many cases is because they just don't tend to come before the courts at an appellate level. Once an application is made the Court of Appeal Civil Rules provide that it is to be dealt with as if it were an application for special leave. It doesn't obviously affect issues like the standard of proof or otherwise, but it does include Rule 27.3 which expressly states that the Court of Appeal's reasons for declining leave can be briefly expressed, and I think that's important in the context of my friend's submission, or criticisms of the Court of Appeal judgment, is that it's required to set out the essential substance of its reasons, but not every single point that it necessarily relies upon.

O'REGAN J:

But doesn't that indicate that it's not expected that the Court of Appeal will engage with the merits in any detail?

MR AIREY:

It's consistent with it being a screening process.

O'REGAN J:

But that doesn't indicate that it shouldn't be a decisive factor, if their delay is of such a small magnitude?

MR AIREY:

Not in my submissions because the, my friend referred to, I think it was *Robertson v Gilbert*, where the approach that's been suggested there, which is that leave should be granted even in cases where it's not clear that the appeal is hopeless. But in my submission that wasn't such a case here, but it

was a case where that because of the nature of this particular case, and the factual findings that were made below, it was clear to the Court of Appeal that when approaching the facts that, the factual findings that were made, were not of a nature that were likely to be overturned on appeal, and it has to be remembered that the appellant's case in the Court of Appeal, or in the application for leave, essentially involved factual findings, challenges to virtually every factual finding that was made against her.

GLAZEBROOK J:

Well I can understand the argument about the factual findings made against her, and the implausibility of her evidence, but there were quite strong findings in terms of the basis upon which money was provided by your clients and the other respondents. Now there is an issue in respect of that letter, whether in fact the exact findings that there was going to be a divvy up right at the end, are actually sustainable. Now I'm not saying that on reflection and on looking at the evidence that that would be the case, but whether you could say, well, obviously by rejecting the findings of the applicant, you therefore had to accept the findings in respect of the respondent, when in fact the, it might have been a very vague family arrangement with people dobbing things in, in order to sustain the elderly parents.

MR AIREY:

Well in my submission, Your Honour, there were essentially two mutually exclusive propositions that were before the High Court in relation to, particularly the money that came –

GLAZEBROOK J:

But neither side's evidence has to be accepted, does it, there could be a middle ground. That's what I'm putting to you. It doesn't mean one's accepted and the other – one's rejected, and the other one's necessarily accepted.

MR AIREY:

The difficulty I see with that, Your Honour, with respect, is that the version of events that was put forward by the appellant was one that it involved positive allegations of an arrangement made with their father, many years earlier. that these funds would be made available to Bruce Read, for him to invest in shares on her behalf, but without him knowing it. Whereas Bruce Read's position was that well these shares were mine, always were, nobody ever game me any money to put into the share market. If the appellant's position is not accepted, it's not of a nature that is, for instance, explainable by I misunderstood things or my memory wasn't so good. There wasn't really, in my submission, any middle ground. There was, one explanation was right and true, and the other one wasn't. And that, it was a stark conflict in credibility because, of course, the parties never put anything in writing in the way that they should in terms of documenting these detailed arrangements.

So in the case of Bruce Read's position, his position was, it was my money. I put it into the property on the basis that I was going to get a proportionate share of it. But even if –

O'REGAN J:

Rejecting the share investment scenario meant that the Judge was finding that he was his money. That didn't necessarily mean that he put it there on the basis that he had a reasonable expectation of getting a proprietary interest in the property.

MR AIREY:

Well again that's obviously depended on a finding.

O'REGAN J:

So that was a matter which still had to be decided and a legal test had to be applied to it.

MR AIREY:

That's correct.

O'REGAN J:

And there is room for argument as to whether it was correctly done, isn't it?

MR AIREY:

There is but I would also argue that once the, it was established that Bruce Read's $130,000 was put into the property, or the money from his shares were put into acquiring the property, and this is where Bruce Read's position was slightly different from the other respondent's, was that a presumption of a result in trust then arose, the onus then being on the, in accordance with –

GLAZEBROOK J:

Well certainly in terms of the 130 but we're talking about a proprietary interest in the property, aren't we, which is different.

MR AIREY:

It's not so clear in relation to the other two contributions but certainly in relation to the –

O'REGAN J:

But the resulting trust would be in relation to the money not the property, wouldn't it?

MR AIREY:

Well my understanding of the *Westdeutsche* principle, if you like, is that where one party puts money into the property, or a property is purchased using funds of one party, but title is taken in the name of the other, the party who takes title does so on trust for the party who provided the funds. It is a rebuttable presumption but in my submission because of the way this case unfolded, the presumption was almost –

O'REGAN J:

What do you say happened when she built the house on it? When value was added by other contributions from other people, did his interest, his resulting trust interest become defeased at that point, is that your argument?

MR AIREY:

It was a bit of a moving feast because of the way things unwound. But certainly the expectation, if you like, was that, and the general tenor of the whole arrangement, was that the parties would make contributions to the property, in varying forms.

GLAZEBROOK J:

Well look the trouble with a moving feast is it becomes difficult to say that was the intention at the beginning, doesn't it?

MR AIREY:

To work it out yes.

GLAZEBROOK J:

And I'm not making any comment on what the ultimate result would be, it's just indicating that for my part I'm not entirely sure that rejecting the applicant's evidence necessarily leads to the result that was arrived at.

MR AIREY:

I don't think it was a case where simply because the – Justice Thomas –

GLAZEBROOK J:

Well no there was a positive, there was a positive acceptance of your clients' evidence but the point really is should the Court of Appeal, I can understand the Court of Appeal maybe saying that, rejecting her evidence was possibly inevitable but that again it's not something that – whether that necessarily leads to the accepting of your clients and the other respondents' evidence was inevitable.

MR AIREY:

Well I don't, certainly don't think it was the case where the, Justice Thomas approached it on the basis that she –

GLAZEBROOK J:

No, no, I'm sure she, no she didn't, I agree with that. But it's just whether on an appeal accepting the respondents' evidence is as unchallengeable as perhaps might be said in terms of the rejection of the applicant's evidence.

MR AIREY:

I understand your point Your Honour so...

ARNOLD J:

Can I just clarify something? Mr Perese put this in terms of access to justice and there's no dispute that Ms Almond attempted to exercise her right of appeal, instructed her solicitors to take an appeal and I understand, correct me if I'm wrong but that the respondents knew that before the period expired, were the papers served prior –

MR AIREY:

The correct position that the appeal was served in time, or on the last day, but it was not filed in time.

ARNOLD J:

Right, so here we have a person has a right of appeal has plainly attempted to exercise it, has notified appropriately the other side but has failed to do so by one day because of a miscalculation by her solicitor and I have to say that I do not understand on what basis sensible counsel could oppose an extension of time. I understand that this has been a hard-fought dispute but it just seems to me to be a waste of everybody's time in not to allow her to exercise her right of appeal and get finality to this. It just doesn't seem to me to be productive at all this exercise.

MR AIREY:

Well Your Honour in terms of the interests of justice, it goes without saying that the interests of justice extend beyond the appellant's interests.

ARNOLD J:

I understand that. But the reality is she has a right of appeal, she has attempted to exercise it and if she had exercised it, neither you nor the Court of Appeal, you couldn't have applied to have it struck out –

MR AIREY:

No.

ARNOLD J:

– and the Court of Appeal couldn't have struck it out and I, myself don't see how by missing a deadline by one day suddenly it is appropriate effectively to strike out the appeal on a basis not that it's legally untenable but on a factual basis.

MR AIREY:

Well certainly that and indeed the principles by which these applications are dealt with do involve a balancing exercise.

ARNOLD J:

Well I, myself I've never heard of one which has been a day late being opposed on this basis.

MR AIREY:

Well the sole basis upon which the appeal was opposed was on the merits. We didn't challenge any of the other, the appellant's explanations for the delay, we didn't – as it happens no one was notified of her intention to appeal, from memory anyway prior to –

GLAZEBROOK J:

Well they were served within time though.

WILLIAM YOUNG J:
Until it arrived.

MR AIREY:
Prior to it being served. And –

GLAZEBROOK J:
Which is unusual in fact because normally you're served afterwards rather than within time so that's again an unusual feature of this case is that there is absolutely no way the respondents could say that they weren't aware of the appeal within the appeal period.

MR AIREY:
And we didn't.

GLAZEBROOK J:
And the grounds as well.

MR AIREY:
The grounds upon which the application for the extension was opposed were two-fold, firstly and most importantly the merits as we argued that the case was of such a nature that the prospects of the appeal succeeding in light of what it would had, the appellant would have had to have overturned what I would describe, and I think the Court of Appeal described as "sustained findings of factual incredibility findings averse to the appellant" in order to succeed. The case, this was a case that primarily dealt with the facts rather than the legal principles. My submission is essentially that once the factual findings were made in favour of the respondents, the legal consequences sort of almost, in terms of a finding of a constructive trust or in the case of Bruce Read result in trust were sort of almost followed as a natural consequence.

GLAZEBROOK J:
Well that wasn't applied to the –

ARNOLD J:
Well I thought you'd accepted that that wasn't quite right, that there is room for argument about, even on the factual basis, there is room for argument about what the legal effects of that are.

MR AIREY:
Well not when the High Court found that there was an agreed, an agreement, albeit not one in writing between the parties as to the basis upon which they would own the property, the property would be purchased and owned. Her Honour found that there was an express agreement and that's why she felt it unnecessary to refer to remaining *Lankow v Rose* criteria about reasonableness of expectation.

O'REGAN J:
But she might have been wrong, that's why you have a right of appeal.

MR AIREY:
But again that was a factor, a final factor Her Honour made based on the parties –

O'REGAN J:
But findings of fact get overturned by Courts of Appeal, that's what *Austin, Nichols* says, the Court has to come to its own view.

MR AIREY:
Well I'm going to come to *Austin, Nichols* shortly because I do, and it may be that's better that I do so now.

O'REGAN J:

I mean it's no point in citing pre *Austin, Nichols* cases about the Court's reluctance to make findings, interfere with findings of fact because *Austin, Nichols* changed the law on that.

MR AIREY:

Well *Austin, Nichols* doesn't say that, in my respectful submission, that the appellant should have no regard at all to the findings or facts below.

O'REGAN J:

No I know it doesn't, but it doesn't say the appellant court shouldn't bother to hear it because findings of fact are inviolable.

MR AIREY:

What, in my submission, my friend has done with *Austin, Nichols* is taking a final sentence out of that paragraph 5 I think it is from memory, in the *Austin, Nichols* decision and given that paramountcy over all of the preceding observations but the start of that paragraph specifically refers to situations where the Court may well hesitate to interfere with factual findings in the Courts below.

O'REGAN J:

It might hesitate but that doesn't mean it doesn't hear it.

MR AIREY:

Firstly in terms of *Austin, Nichols* that of course applies to a general appeal. This is an appeal against the exercise of judicial discretion.

O'REGAN J:

No, what we're talking about is the appeal that would have occurred between, against the High Court judgment to the Court of Appeal to which *Austin, Nichols* would have applied. The Court of Appeal would have been bound to come to its own view of the facts –

MR AIREY:

Yes I accept that.

O'REGAN J:

– with appropriate recognition of the advantages of the trial Judge and so on. But as Justice Arnold say, some of the factual findings are really based on deductions from the facts, not just factual findings and those are the very meat and drink of appellant challenges.

MR AIREY:

I accept that absolutely Your Honour in terms of if the Court of Appeal had heard this substantive application that would have been the approach that it would have been required to follow, there's no question about that. But the issue here is that we were dealing with an application for an extension of time under rule 29A which was necessarily a, the exercise of a discretion and this Court's confirming that even if it wasn't evident from it.

GLAZEBROOK J:

To be honest I'm not certain about that but let's assume it is for these purposes I suppose. Because what's been put to you is that there was an error in approach.

MR AIREY:

Well in my submission the, if we have a finding that rule 29A does not involve –

GLAZEBROOK J:

Well if you have a find that says it's hopeless when that finding should not have been made on a summary basis then there's an issue of approach.

MR AIREY:

Then there's a problem, yes.

GLAZEBROOK J:
And therefore discretionary or not it's wrong.

MR AIREY:
Well irrespective of which approach you took, yes if that finding was wrong then yes you get into even looking at the main criteria you've got a situation, well it wasn't open to the Judge on the evidence or it was plainly wrong, so it doesn't really matter which way you go I guess.

GLAZEBROOK J:
Well that's what I was saying so for these purposes I think that's what's being put to you that the Court of Appeal's approach was in error because it couldn't on a summary basis which it has to be in that, because I think, what do you have 15 minutes or something to argue it, and on summary basis the Court of Appeal couldn't have put its mind properly to the facts and as I say that's even assuming that it could put its mind to the facts on a summary basis to say the, it was very unlikely in the absolute extreme that the applicant's implausible evidence would be accepted on appeal.

MR AIREY:
But isn't that always going to be the case when you have what is essentially a screening process, that is why the –

GLAZEBROOK J:
Well, but that's why, well –

WILLIAM YOUNG J:
Well the issue really, should this be a screening process or how fine –

GLAZEBROOK J:
Yes.

WILLIAM YOUNG J:
– should the mesh be set on the screening process.

GLAZEBROOK J:

So should it be something that on a summary basis you could say well this is so absolutely clearly legally or factually unsustainable that I'm not going to grant leave and I'm just thinking there was a case that we had recently where somebody was, and this wasn't an extension of time but there was an acknowledgement of debt that had been signed and the person was trying to argue it didn't mean what it said, well one might be able to say on a summary basis well look why did you sign that document then, if it came to an extension because you might on a summary basis be able to say well it's so unlikely we'll come to a different view and accept a very implausible story but this isn't that case is it?

MR AIREY:

It's not as straightforward as that in the sense that that was, I'm not obviously familiar with the case you talked about –

GLAZEBROOK J:

No, no, I'm just putting it to you in terms of something that's clearly against a clear document. I mean if here, for instance, we'd had a document that said I'm putting money in on the basis that I have a proportionate share of the property and there was some attempt to go behind that, then one might say on a summary basis, well look there's no way this Court, the Court of Appeal's coming to a different view, that's the –

MR AIREY:

Well my submission is although that it's not as straightforward as the example Your Honour referred to, it is nevertheless a case where the Court of Appeal having reviewed the findings of the High Court, in my submission I don't, in my submission it's not clear that the Court of Appeal simply said well we're not going to form any view or otherwise about the correctness of the findings of Justice Thomas on the facts. In my submission it was a case where the Court of Appeal considered those findings of fact and formed the view that these were not the source of filings of fact and bearing in mind Your Honours that there wasn't, in my submission, one single finding that, of fact or credibility

that the High Court made that the appellant was argued, was not one that was open to the High Court on the evidence. It did, rather the appellant's position was simply that, well the Court of Appeal was wrong to accept the evidence of Bruce Read or whoever over mine, but she didn't say that no there was no evidence to support those findings. And in my submission that's the key issue here where the Court of Appeal was entitled, in my submission, still in compliance with the approach in *Austin, Nichols* to look at the evidence in the High Court and say, we've looked at that evidence but we have formed the view that there was nothing that would indicate to us that we should be overturning or finding any differently from how the High Court found on those issues. And that in my submission really is the key to it all, it doesn't follow from, necessarily from the fact that the Court of Appeal didn't go through and bearing in mind the rule 27.3 I think it was about the reasons being stated briefly, every single finding of fact to analyse –

WILLIAM YOUNG J:
Have we got the notice of appeal?

MR AIREY:
It is in the case on appeal.

WILLIAM YOUNG J:
We saw the notice of application for an extension of time.

MR AIREY:
I think that is in the, it forms part of it Your Honour.

WILLIAM YOUNG J:
Is the notice of appeal somewhere else?

MR AIREY:
Your Honour the notice of appeal, sorry the application for the extension on the grounds that are set out in there essentially mirrored are the notice of appeal.

GLAZEBROOK J:

So that's on page 4, isn't it, it starts on page 4?

MR AIREY:

I think from memory it was –

GLAZEBROOK J:

No, that's the appeal.

MR AIREY:

It's page 17 of the case on appeal.

GLAZEBROOK J:

Page what sorry?

MR AIREY:

Page 17 of the case on appeal.

GLAZEBROOK J:

17, okay.

MR AIREY:

And the specific grounds are set out on pages 18 through to 22.

O'REGAN J:

And are they the same as the ones in the actual notice of appeal?

MR AIREY:

Look I – essentially the same, there may possibly be some differences but for the present purposes...

GLAZEBROOK J:

Well the first one is that specific point about respondent's evidence in terms of the agreement isn't it?

MR AIREY:

Yes. Yes it is Your Honour. I've set out in the written submissions the approach which, in my submission, the Court should take in relation to, both this Court and the Court of Appeal in relation to their respective roles in the case so far. In my submission in terms of the application of *Austin, Nichols* to the extent that it applies, my submission is very much that the Court of Appeal did not absolve itself or fail to discharge the obligation on it in terms of the approach it was required to take in considering the extension of time. And in terms of the issue of the access to justice, well yes it's been accepted from the outset that the appeal was only a day late but as the Courts have noted previously when someone consciously or otherwise allows the time period to expire for appealing as of right, they do, their position does change, they find themselves in a situation where they now need to persuade, in this case, the Court of Appeal to exercise its discretion to grant the extension of time, the onus is on the appellant to do that. In doing that the Court of Appeal applied the relevant criteria, there's no challenge to what those criteria were, as I understand it. What this appeal falls down to is was the Court, was the Court of Appeal right to conclude that the merits of the appeal were insufficient to –

GLAZEBROOK J:

Can I just note that the Court of Appeal if you look at it, was really saying the findings on her credibility couldn't be impugned, thereby it seems to me assuming that it is a, either one's telling the truth or the other's telling the truth rather than a possible in the middle or a different approach.

1110

MR AIREY:

That was the reality of the position, was that because of the nature of the two arguments, there wasn't scope for middle ground.

GLAZEBROOK J:

Well yes just acceptance there may well be scope for middle ground earlier and that it wasn't as clear cut, that rejecting the applicant's case was immediately going to mean that the respondents' case was thereby accepted.

MR AIREY:

What I, well there was no middle ground, if you like, that was offered or that's immediately obvious in my submission because as I was saying or Bruce Read was saying one thing whereas Mrs Almond was saying –

GLAZEBROOK J:

But there are many cases where the Court says I don't accept either and on the basis of the contemporary documentary record, I'm finding something different.

MR AIREY:

But that wasn't such a case because in this situation Justice Thomas did accept –

GLAZEBROOK J:

But maybe she was wrong. What's being put to you is that maybe she was wrong and the applicant should have had the opportunity to argue that.

MR AIREY:

But the applicant hasn't said or that any of the findings that Justice Thomas did make couldn't point to any evidence –

GLAZEBROOK J:

The notice of appeal –

MR AIREY:

– that says they were plainly wrong, she just said –

GLAZEBROOK J:

Well but no that's not the test is it?

MR AIREY:

My understanding of the test is that whether the –

GLAZEBROOK J:

No, no in terms of whether she should have had an extension of time and in terms of whether the underlying appeal was hopeless, the test is not whether the Court of Appeal was plainly wrong in deciding it was hopeless, is it?

MR AIREY:

I'm sorry Your Honour –

GLAZEBROOK J:

Well in the sense that, well I think we've probably been over it.

WILLIAM YOUNG J:

Is Mrs Almond still in possession of the property I take it?

MR AIREY:

She is Your Honour.

WILLIAM YOUNG J:

Was there ever an agreement in relation to the terms on which that should occur? I see there was an offer about an extension of time providing she was prepared to put up, pay rent to a pending outcome of the, the outcome of the appeal?

MR AIREY:

The way things unfolded Your Honour was that the appellant went, because the High Court made an order directing the sale of the property as part of the judgment but also sought memoranda in relation to various ancillary orders to give effect to that and that process was ongoing. At the same time the appellant applied for leave to, before the extension of time so – and a stay and the respondents at that point took the pragmatic view, well let's – and I think at the time of the stay, within a very short period of time of the stay application being brought the Court of Appeal set a date for the hearing of the extension application so the pragmatic approach was taken, well let's see what the Court of Appeal's got to say and if they, obviously if the stay was, if

the extension was not granted the stay became apparent and it became obsolete and indeed the appellant herself consented to the stay being discharged. And then after that was dealt with, I think in about April, May, then the parties moved towards giving effect to the sale of the property which was scheduled for auction shortly, I think in early November from memory, and shortly before that occurred the appellant applied to this Court, initially to the High Court for a second stay so she could appeal and then to this Court. So the issue, if you like, of the terms upon which the appellant has remained in occupation have never really been –

WILLIAM YOUNG J:
An issue.

MR AIREY:
– addressed.

WILLIAM YOUNG J:
Might have been an issue but it's never been addressed in a –

MR AIREY:
That's correct so she's simply, I think the basis that she's paying the, her mortgage and the rates and the insurance.

O'REGAN J:
So is she paying the mortgage?

MR AIREY:
Yes well the mortgage was, $60,000 mortgage was taken out for, for we say is her contribution for the, her $60,000.

Your Honours I think in a roundabout way we've covered most of what I wanted to say about the approach as far as the courts, the Court of Appeal was concerned and it's obviously set out in the written submissions where the first respondent is coming from. In terms of the issue of whether the Court of

Appeal erred on the facts in finding that these were findings made by Justice Thomas were credibility findings, I just want to speak very briefly to that. In my submission it clearly was, notwithstanding what my friend has said, findings of credibility averse to the appellant. I've set out in the written submissions a number of comments –

GLAZEBROOK J:
I'm not sure you need to.

MR AIREY:
No, but the appellant herself acknowledges in her affidavit that the High Court effectively found that she was a liar, I think that's, those were what her words were saying, and in my respectful submission the appellant's submissions here say that these were not credibility findings are misconceived.

In terms of the issue that, I guess the second part of the appellant's argument relating to the constructive trust issues, the appellant's position as I understand it depends on this proposition that she's raised that this was all part of an arrangement whereby she was to look after Mum and Dad but in my submission that was simply not the case that she ran in the High Court. Her case in the High Court, at least, was very simply that the only arrangement that was reached with anyone in relation to the property was that Mum and Dad could build their house on the land and that they would pay me $200 and, I think it was $200 a week rent for the use of the land. So as far as Bruce Read was concerned her position was that it was effectively the money that came from his shares –

WILLIAM YOUNG J:
Her money, was her money.

MR AIREY:
– was her money so her case was there was no arrangement, there was no need for any arrangement with Bruce Read because it was her money.

WILLIAM YOUNG J:
And what about the money from Christopher Read?

MR AIREY:
I think her position was that that was an arrangement, and it's perhaps more appropriate that my friend address you on that, Your Honours on that but it was that essentially this was an arrangement between Chris Read and his parents where they were essentially helping, using the money to, for their own purposes. But the point I'm making is that whilst my friend raises all of these issues about this being a case where it was all part and parcel of a family arrangement whereby Mrs Almond was to look after her parents in return for her siblings, effectively making contributions to the property, it just wasn't a case where, that simply wasn't her case in the High Court and in fact she expressly disallowed any suggestion as far as Bruce Read is concerned, any suggestion that the money, that the situation was anything other than he handing her back her money and she putting it into the property.

So what I'm saying in a roundabout way, I guess, is that if there is a case for the sorts of arguments that my friend is raising, this isn't it because that wasn't the case in the Courts below and it's not just a case of refinement of an argument, these are two quite contradictory arguments that she's trying to run and effectively it's not far removed from a situation well, where she's effectively saying the case that I ran in the High Court didn't work so I'll put that one aside and have another go using quite a different argument, but one that was in fact inconsistent and the opposite of what she had, her own evidence in the High Court.

And in any – furthermore the, and again I'm conscious of Your Honours' likely observation of well that might, the High Court might have been wrong but the High Court did find that this arrangement, so to speak, was one as far as Mrs Almond and her parents was concerned was primarily one so that they could be on hand to care for, to assist Mrs Almond with the care of her daughter so again she's got that factual finding to deal with as well.

Your Honours I believe I've covered everything I had, between that and the written submissions so unless there's anything else Your Honours.

GLAZEBROOK J:
The elderly parents was pleaded, just looking at 159 – I mean I'm prepared to accept that it wasn't the basis of the argument but it was pleaded.

MR AIREY:
Well it was, if that's the case, then there's an inconsistency between what was pleaded in the statement of defence to the, that was filed on –

GLAZEBROOK J:
Is there another statement of defence, I must say I haven't looked at the pleadings before?

MR AIREY:
I think that's a reply Your Honour. She says at paragraph, this is on page 124 of the case on appeal, paragraph 7(d), so 7(a) and (b) she responds, the first plaintiff contributed no funds whatsoever to the property. (b) there was no discussion at any time about the first plaintiff having any interest in the property, let alone in the shares claimed. The first time the first plaintiff –

GLAZEBROOK J:
Well page 120, the same allegations made but you're saying it might be inconsistent but –

MR AIREY:
It is, she – I might find the correct reference in the written submissions but she specifically stated in the statement of defence that there was, that the only arrangement in relation to the property was –

ELLEN FRANCE J:

She does advance the only agreement was with her parents to the effect that they could build a house on it so that she could look after them in their old age –

MR AIREY:

She does.

ELLEN FRANCE J:

– she does advance that.

GLAZEBROOK J:

That's what I was referring to.

MR AIREY:

But she does it as between, what I'm understanding the submissions that are now being made are that this was part of a wider arrangement that encapsulated both Bruce Read and Chris Read and covered their contributions to the property.

GLAZEBROOK J:

That wasn't necessarily my understanding of the argument. I think that was the basis of it was that she would be caring for the parents and that that might then suggest that there was something other than a view that it would be a proportionate share, taking no account of that care arrangement.

MR AIREY:

But that's not what she said in the High Court as far as the appellants Bruce Read and Chris Read were concerned. In the case of Bruce Read she said there was no arrangement with Bruce Read at all for him to have any, to make any contribution to the property.

GLAZEBROOK J:

Well that, it's again just coming down to the same argument as to what was the basis of that contribution.

MR AIREY:

It is, isn't it.

GLAZEBROOK J:

Was it a contribution that meant, it was just a monetary arrangement and a split based on proportionate shares or was there to be some account taken of the fact that that arrangement for care, that's my understanding of the argument that is – and it seemed to me that that is probably available on the pleadings, that is what I was asking you because that's what the arrangement is said to be with the parents at least?

MR AIREY:

It is, I accept Your Honour's point, it is referred to in the pleadings but that wasn't the way – and this might sound a bit silly saying that it's not –

GLAZEBROOK J:

No I understand what, I understand what your point is.

MR AIREY:

– it's reflected in the pleadings but it's not the way the case was run but I can't sort of think of a better way of expressing it at the moment.

GLAZEBROOK J:

No, I understand the point, you say it wasn't run on that basis.

WILLIAM YOUNG J:

All right, thank you Mr Airey.

MR AIREY:

As Your Honours please.

WILLIAM YOUNG J:

Mr Woods.

MR WOODS:

May it please the Court. The applicant is seeking to really re-litigate the matters of fact. A notice of appeal to the Court of Appeal essentially attempted to put in issue all factual matters which were heard before Justice Thomas. The question when counsel came to consider to oppose or not to oppose the application such as it was for an extension of time, acknowledging that it is an error of counsel and only a day late and not giving rise obviously to any prejudice, therefore was a question to be reviewed in light of Mrs Read's circumstances, such as they were, her age, position in life and whether or not the notice of appeal gave rise to something, something that would give that appeal legs or may give that appeal legs. On reading that notice of appeal however it was apparent that just as a trial where everything, if you like, was put in issue, however implausible however obviously incontrovertible to evidence, once again the appellant came forward with Court of Appeal with the view to re-litigating those very same questions of fact to which there had been such powerful evidence against it. So powerful that the High Court Judge did not need to make compelling findings regarding demeanour or the plausibility of Mrs Almond herself, because on every material piece of fact which would have bearing upon the application of the principles laid down for a quasi contract if you like, a constructive trust, on every one of those material considerations there was such a weight of evidence that the finding could not have gone in favour of Mrs Almond. And when one looked, if you like, to the notice of appeal to see could any of those points have had legs, it was no better. Therefore the case such as it was before the Court of Appeal was rightly assessed by the Court of Appeal and independently assessed by the Court of Appeal when we go and look at the Court of Appeal's judgment. Because what that judgment says in simple terms in the counsel's submission is not only was Mrs Almond's evidence implausible and the findings of fact of Justice Thomas merited those conclusions so far as the evidence was concerned, not only that but if we go

to paragraph 12 of the judgment of the Court of Appeal which is in casebook 15, that the inverse was also true, that is that Mr and Mrs Read if you like, Bruce, Chris and Mrs Read's evidence was truthful.

ARNOLD J:

So your position is there is, even within the confines of the factual findings, there's no alternative legal consequence, there's no other way of characterising the legal outcome other than that adopted by the High Court?

MR WOODS:

Not on the particular facts of this case. Now if there had been a point or may have been a point where the Judge at first instance may have got a fact wrong or plainly wrong, then the position would be different but not in this case. This is not a case where what I labelled "the elder care proposition" could possibly have such a sway as to change the ultimate outcome.

WILLIAM YOUNG J:

It might result in it being buried though mightn't it, I mean the Judge's, the broad sweep of the Judge's conclusions might be very difficult to challenge but the actual detail of it might be fiddled around with, mightn't it but whether that's enough warrant for appeal might be open to question but I mean it would be hard to say that her conclusions are, as it were, set in stone in terms of the precise percentages?

MR WOODS:

Well it's difficult for me to speculate so far as that's concerned because that was not the way upon which the argument was advanced before the Court of Appeal. Now should different weightings have been put on different factors and could, the different weightings had different weightings in particular with regards to the elder care proposition, could that have influenced the shares or ultimate outcomes, well on counsel submission no. There's really no middle grounds so far as that's concerned, not in this case because –

GLAZEBROOK J:

Why – in a very summary basis why would that be the case?

MR WOODS:

Why, because so far as the contributions were concerned, contributions are a very significant factor here. When one looks at the contributions that are actually made to the land, we have a land value of $190,000 at the time of purchase, $130,000 of that comes from Bruce Read. It's of course utterly denied by Mrs Almond that that money was Bruce Read's but clearly that is an utterly implausible account. There's then $30,000 which comes from Chris Read, now that comes via a bach that had been sold and the proceeds effectively received by Mrs Almond.

WILLIAM YOUNG J:

She'd been, was the, the bach was on some sort of leasehold title wasn't it?

MR WOODS:

It was. And it was a pretty rustic kind of place, if I can put it that way. But nonetheless –

WILLIAM YOUNG J:

It hadn't found its way onto the Register of Land Titles, is that right, did she have a registered title in relation to it?

MR WOODS:

I can't recall Sir, I'm sorry I don't actually have a recollection of that level of detail I'm sorry. But I believe it was a leasehold estate from my recollection of it Sir. What I do know Sir is that there was the 30,000 effectively which was derived from it which was clearly Chris Read's, he admitted so. It's not a situation again where there is anything other than incontrovertible evidence on it.

WILLIAM YOUNG J:

I thought she had said, at least in her evidence-in-chief, that that was her property and that he owed her the 25,000 that he gave to her?

MR WOODS:

No, not that it was her property, the property was effectively that of Chris Read but so far as her explanation for the 25,000 was concerned is she was saying that was something which reflected service that she'd provided to Chris Read when he was at university studying some 20 years earlier and became a medical practitioner. Now that again was a very implausible account that a sister would have provided those kind of sums in support of a brother some 20 years earlier and was still to account for it.

WILLIAM YOUNG J:

No, no not an implausible account, I'm not still going into that but I'm just looking at her brief of evidence page 278, she says, "I purchased a bach for $30,000, Chris repaid me 25 and I put in the balance", so I assumed that she was saying it was her bach, her money?

MR WOODS:

Yes I think you're right Sir. Yes.

WILLIAM YOUNG J:

Anyway we'd better take the adjournment I think.

COURT ADJOURNS: 11.34 AM
COURT RESUMES: 11.52 AM

MR WOODS:

May it please the Court, before the break I was speaking to the Court with regards to the contributions for the initial land purchase and the only other matter that I wish to identify so far as that was concerned is that the balance of the 30,000 which made up the 190,000 if you like, did not come from Mrs Almond but in fact it was the case that it came from Mrs Read. The Court

took a generous approach to, for that question for Mrs Almond in finding that one of the $10,000 lots could not be proven to have been received by her and therefore so far as the proportions for the parties were concerned, that was excluded on the basis that there was insufficient evidence to establish that particular contribution. The long and the short of it though is that so far as the land purchase was concerned Mrs Almond did not contribute. So far as her contributions were concerned to the property itself, those were very confined, and they were able to be identified because of the fact that she had separated from her third husband, had sworn an affidavit in relation to those proceedings and thus it was clear as to what her assets and liabilities were at the given period of time when the purchase of the property soon occurred and that was essentially $105,000. Now $105,000 was clearly going to be an inadequate sum for her to have built the home upon which she did, she called upon resources held in trust in the sum of $60,000 for her children and even that would be insufficient.

My point is that the identification of the contributions of Mrs Almond to the property itself was on clear and unequivocal evidence and so far as Mrs Almond herself was concerned, she under cross-examination, came to the point where she accepted by admission that Mrs Read was entitled to an interest in the property and she pitched that on cross-examination as an interest at some $250,000 is what she perceived it to be at that point in time. That of course would have taken into account in her own mind many a factor and of course it's not a factor which is relevant to the objective assessment of the Court in finding a common intention but it is one of the factors that I go to in my written submissions at 21 to identify why it's submitted that this appeal was always hopeless and certainly is hopeless so far as Mrs Read, at her age and stage in life, she ought to enjoy the fruits of the judgment. There are two aspects of judgment for Mrs Read, the first of course is the judgment in relation to the common intention itself and the second relates to the power of attorney. So far as that is concerned, that of course, was a failure to account for her mother's funds. On the notice of ` any submission which would call into doubt that failure to account. This is a case which therefore includes an aspect of actual fraud, the misappropriation of those funds as well as a civil

fraud in the sense of the ongoing denial by Mrs Read of the interests of her family in the property. That of course being an equitable fraud.

Those are weighty factors and counsel's submission when it comes to determining the factors that the Court on appeal ought to be considering in an orthodox fashion, as it did, regarding, if I can cite *My Noodle Limited v Queenstown Lakes District Council* [2009] NZCA 224, (2009) 19 PRNZ 518 and obviously did play on the Court of Appeal's mind.

When one returns, if you like, to the submissions of my learned friend in this Court in respect of the approved question, the appeal is put on something of a different footing to that of – put before the Court of Appeal and in particular its focus now being on the purpose of the arrangement being for the care of elderly parents. I have in my submissions gone into the correctness or otherwise of the proposition such as are just put before this Court for the purpose really of identifying that again this is not a case that involved an agreement to purchase land or to make improvements thereon to assist the care of elderly parents. The dominant purpose in fact at the time of purchase was to assist the appellant whose financial position was strained and her personal circumstances also under pressure.

The appellant didn't present, if you like, any credible evidence in counsel's submission for making any greater provision of care for her parents than is normally expected of a loving child and parent relationship.

ARNOLD J:
Well except the letter that the father wrote.

MR WOODS:
If I could move to that letter –

ARNOLD J:
Well you're going to suggest that it didn't mean what it said because it was written to get a, effectively a concession?

MR WOODS:

Yes, and that is the short point of it. There are features within that letter which itself suggest that the truth and the contents of that letter are rather implausible for an elderly gentleman such as Mr Read requiring a exercise room on what was a lifestyle block where he could have and not doubt would have gone for like walks –

WILLIAM YOUNG J:

Was an exercise room built?

MR WOODS:

Yes, yes. There wasn't an exercise room, the answer to that was well there was an extra room built so that –

WILLIAM YOUNG J:

Was it equipped with sort of, with exercise equipment?

MR WOODS:

That's not a matter that I think I can actually go to evidence on.

ARNOLD J:

I mean in a situation where clearly there are different elements from different members of the family, one would have thought that a letter written by somebody who's deceased at the time of trial, to a planning authority, might have some significance because it is an objective, it is a statement written at the time before there's any dispute, before positions have hardened?

MR WOODS:

Indeed and the trial Judge did consider that letter and look at its purpose. It wasn't consistent with Mrs Almond's account which was to say there had been a complete division with her and Bruce Read and a loosening of ties, if you like, with Chris Read, quite inconsistent with Mrs Almond's case. As for the assertion that the letter somehow by identifying that there may have been in the future some provision for care for elderly parents by Mrs Almond but will

no doubt, there are always aspects of that but were those aspects greater than what would normally have been expected between loving parent and child, was it providing any indication, as it was, in 2003 that the grand bargain, if you like, the quasi contract as it evolved over that period of time was one which was materially influence by the thread, if you like, of a common intention for elderly and would that fact by and of itself be sufficient to justify, if you like, an appeal on that alone? Could that possibly have been of such importance to have swayed all of the other factual findings, in counsel's submission no. In actual fact –

O'REGAN J:
Isn't it better to let the Court of Appeal decide for itself in a proper hearing, that's what an appeal is for, isn't it?

MR WOODS:
It is and that is a threshold question. How closely does the net get set if you like. And counsel's submission here, if my learned friend was in a position to advance this Court that there was 24/7 care, seven days a week and that that had actually been provided and the Court had failed to put proper weight on the non-monetary contributions then perhaps there would be some room for saying the ultimate outcomes of the Judge on appeal could have been swayed by that. But this is not such a case.

GLAZEBROOK J:
Well not on the actual findings of the Judge because she found an institutional constructive trust that was related to financial contribution.

MR WOODS:
She did.

GLAZEBROOK J:
So there's no basis on – if that is an absolutely clear finding that can't be overturned, then you're right –

MR WOODS:

Yes.

GLAZEBROOK J:

– but if you accept that it could not necessarily have been that arrangement, i.e. an institutionalised against a remedial, then there is an issue isn't there?

MR WOODS:

But the Court of Appeal did consider that. The Court –

GLAZEBROOK J:

Well where?

MR WOODS:

Well the Court of Appeal at paragraph 12 –

GLAZEBROOK J:

Well according to that, you've just said, well as far as I read the Court fof Appeal it says there was credibility findings on both sides and they wouldn't be overturned.

MR WOODS:

In the Court of Appeal and counsel's submission –

GLAZEBROOK J:

– so we're going to accept there's an institutional constructive trust however actually slightly unlikely that is, given contributions came in at different times and presumably other contributions were going to override the constructive trust that had already been, the institutional constructive trust that had already been agreed in relation to Mr Bruce Read.

MR WOODS:

In relation to the future contributions of Mr Bruce Read towards the mortgage as forming part of –

GLAZEBROOK J:

Well future and past, it's a slightly odd arrangement isn't it?

MR WOODS:

Yes. Well nonetheless it was the arrangement which the, it was open to the trial Judge to find –

GLAZEBROOK J:

That's not enough is it, it may well have, well I'm sure it was open to her on the evidence to accept that evidence but – although I'm actually not sure that it makes terribly much sense given the differential contributions at different times but...

MR WOODS:

I would submit that in this case it is enough because unless there is something which triggers a concern for the Court on appeal, triggers a concern that perhaps a different approach ought to have been adopted on the facts, it may not be set as a very high threshold, that threshold may simply be to identify well this may have legs on appeal. But here there was no such fact; there was no challenge to any aspect which could have been advanced other than credibility findings. The two cases were black and white and the likelihood that one could overturn that whole body of credibility findings on this common intention aspect, as my learned friend now advances before this Court on the basis that more weight ought to be placed on the elder care, is in counsel's submission misconceived on the facts because this case doesn't trigger the care or provision for elderly persons. The letter is just one piece of that matrix, if you like, which the Court in High Court did consider. The High Court Judge looked at that correspondence and it's in counsel's submission obvious that that correspondence is written for a particular purpose not to record accurately the arrangements that's between the family but rather for a specific purpose in terms of planning arrangements. Now it's not to be denied that there was, if you like, some care and love and affection between the parents and Mrs Almond but can it be said to reach, if you like, so far as to call into question the ultimate finding of the Judge, is that

plausible. In counsel's submission it's not plausible here. And to unpick, if you like, the reason why it's not plausible here, I have had to go, if you like, to the evidence and to the findings of fact of the Court on appeal. And I'd like to do that again now.

O'REGAN J:
But you should have done it in an appeal, you did it in a miscellaneous motions hearings in the Court of Appeal and now you're doing it here where we're actually only concerned about whether the Court should have given an extension of time. If you wanted to run all this, why didn't you just consent and get the case before the Court of Appeal so it could have been dealt with properly and finally?

MR WOODS:
Well there reaches a threshold, if you like, as to when such an appeal as it was then being advanced, which –

O'REGAN J:
Well I think we've established that there aren't any cases up until now where the Court of Appeal has refused leave on the basis that the factual finding, that there are factual findings that can't be challenged. The only –

MR WOODS:
Yes.

O'REGAN J:
– cases that have been referred to have been ones where there has been an argument based on the law which is just obviously wrong at even a cursory glance but this is a – you've made legal history effectively on this case, haven't you?

MR WOODS:
Perhaps in that respect but I would submit in many other respects this case is rather unremarkable.

WILLIAM YOUNG J:
But in the only respect that matters it's rather novel and that is an appeal being in effect struck out because the Court of Appeal on what was a pretty quick survey, thought the factual findings were unassailable.

MR WOODS:
Well yes and was that open to the Court of Appeal. In counsel's submission it was open to the Court of Appeal who was dealing with a notice of appeal, if you like, which delve into each one of those factual findings, it's incumbent upon –

WILLIAM YOUNG J:
It was all done, sort of it's all done on the fly that's the problem. I mean there are, I mean I suspect that there are, I suspect that the appellant will face real problems challenging the overall findings of fact made by the Judge but even on those findings I would be surprised if there's not a bit of room to move.

MR WOODS:
Well I think it's best illustrated by the fact that on this appeal the appellant grazes a different proposition, if you like, which is relating to the elderly care which is something which wasn't a matter clearly before the Court of Appeal –

ELLEN FRANCE J:
It was pleaded.

WILLIAM YOUNG J:
But it was in front of the High Court though wasn't it?

MR WOODS:
Yes it was, yes.

GLAZEBROOK J:

Can I just note that the reason that we heard these matters was specifically to look at the approach in England and that if you look at the cases, particularly paragraph 37, which deals with failure to comply if it's trivial, which I think it must about as trivial as it could possibly be in this case –

MR WOODS:

Yes.

GLAZEBROOK J:

– in paragraph 37 but also the merits in terms of paragraph 46 which is really indicating that if you get into the merits too much we'll have exactly what we've got here, and you have this huge discussion about whether it's an ordinary looking after, or whether taking him to get his dialysis every week was what you'd normally expect someone to do, even if the other siblings are doing nothing whatsoever, et cetera, and that's not what we should be getting at. So that was the reason we heard this case and it might be we need to hear from the first respondent in respect of that. But just saying well you really don't look at the merits unless it's absolutely clearly one way or the other.

MR WOODS:

And I am pitching my submissions on the basis that is absolutely clear one way and not the other, and in counsel's submission that is the view of the Court of Appeal, because not only did it make the finding that that is an additional finding, independently considered by it, which the trial Judge did not make as to Mrs Almond being untruthful, but also the additional finding that Bruce Read, Chris Read and Mrs Read were persons of credit and did tell the truth, and that is a gloss, if you like, on what the High Court findings were on the material facts.

GLAZEBROOK J:

Well how could it really do that? Are you suggesting that you hadn't had full argument on that?

MR WOODS:

Well I think it can do that on the basis that if the appellant was in a position to present to the Court any feature that might, if you like, or may get legs, have some merit in it, then it's not to determine whether it does have merit or does not have merit, and the matter must proceed and not be pre-emptively dealt with at that stage. But this case had a number of features, in particular the overwhelming plausibility and the incontrovertible evidence on a lot of those material facts, which simply didn't raise a question which reached even that threshold if you like. And that being the case then counsel's submission no Court should allow a hopeless appeal to go forward, and I go one step further and say the appeal is no better today than what it was then.

There is one additional matter that the appellant puts before this Court, which is what I label the elder care proposition. But is that any better than any of the other points that had been earlier made. When one unpicks that proposition, no it's not. I'm aware that of course this does require an assessment of merits but in counsel's submission an assessment of merits is due here, where we have the circumstances that we do, particularly with regards to Mrs Ethne Read. We have admissions of an interest. We have a civil fraud against her. We have an actual fraud against her, and she is being denied the fruits of her judgments at the age and stage of life that she is –

O'REGAN J:

Yes, but she was engaged in a litigation process which had a right of appeal. That's just the way the process goes. She could have had it all over by now, if she'd had the appeal hearing. Now I just don't think that gets you anywhere really that's, yes it's unfortunate for her but the fact is the process allows people to appeal and the Court of Appeal has said on umpteen occasions that if counsel makes a mistake, and there's no prejudice to the other side, then the Court will allow the appeal to proceed. So this was wholly exceptional.

MR WOODS:

In that sense it is. In the sense, Sir, that the case turned on its own facts, if you like, it turned on the credibility of these two sides, to come to that common

intention, and if there isn't a middle ground between the two, then whether that court is going to be determining that after full argument, or whether the Court is going to be determining it on an application for an extension of time, is of no importance.

WILLIAM YOUNG J:

Well it is, it's a process issue. I mean this is presumably a half an hour hearing in the Court of Appeal in the miscellaneous motions list. It's not really practical for us to get into the merits of it in any detail because if we allowed the appeal that would completely pre-judge, that would tend to pre-judge what happens in the Court of Appeal. So in truth it hasn't really been a very good enquiry. Now myself I wouldn't be inclined to analyse the case closely and go through the transcript, form a view in detail as to whether the appeal has that sort of merit.

MR WOODS:

I would agree with Your Honour in normal circumstances that must surely be needed but –

WILLIAM YOUNG J:

Sorry, what must be needed?

MR WOODS:

Well to go through the file thoroughly as Your Honour has described.

WILLIAM YOUNG J:

But this process doesn't permit that to happen. The process you've embarked on, of opposition of the application for leave, or an extension of time, means that the case is being dealt with, as I said before, on the fly.

MR WOODS:

Well it is being dealt with, if you like, in the pre-emptive fashion.

WILLIAM YOUNG J:

And I know there are strong findings of fact but it's not really a case where, you know, the documents all go one way, or where even excepting where the findings, I mean you'd probably disagree with that, but it does seem to me that even accepting the thrust of the findings of fact there still might be scope for argument, albeit perhaps not advanced if the miscellaneous motions hearing took place in the Court of Appeal.

MR WOODS:

Well I'm still at a loss as to what the argument which is being advanced that has legs is, and if we can't put our finger on it now, and we couldn't put our finger on it then –

WILLIAM YOUNG J:

Well just explain this to me. Money came in at different stages, didn't it?

MR WOODS:

Yes.

WILLIAM YOUNG J:

Okay, so there must have been an evolving agreement. What was the agreement you rely on?

MR WOODS:

Well of course it's the common intention –

WILLIAM YOUNG J:

Yes, but what was the detail. The first common intention must have related simply to the money that went in at the start, plus the money that was going to be spend on the parents' house.

MR WOODS:

The common intention Sir was the simple proposition that what you put in is what you get out, and that there would be an accounting.

WILLIAM YOUNG J:

But was Christopher a party to that?

MR WOODS:

Yes.

WILLIAM YOUNG J:

Was he? Did he put any money in there?

MR WOODS:

He did via the bach and some other miscellaneous sums which totalled $30,000 to the initial contribution to the land, and he also did so by way of monies to the mortgage.

WILLIAM YOUNG J:

I thought the land was paid for by the $60,000 mortgage and the $130,000 from Bruce?

MR WOODS:

In terms of the actual –

WILLIAM YOUNG J:

That's what I meant. I thought the land was acquired in that way.

MR WOODS:

Yes, but Your Honour was – the common intention was different, that is what was intended to have been put in, and what was actually put in are two different things, which is the reasons why this is a civil fraud, because what was actually put in was, if you like, from different sources than what had been indicated would have been, or should have been.

WILLIAM YOUNG J:

So the parents contribution was putting up the house, the other house…

MR WOODS:

Well they sold their property Sir and then they built their own house, if you like, the second dwelling on the property and, Sir, they contributed the sum of $30,000, was the plan, if you like, to the initial purchase. We only got…

WILLIAM YOUNG J:

When you say the initial purchase you're confusing me.

MR WOODS:

Yes, they deposited, they paid the deposit, Sir, in relation to the purchase.

WILLIAM YOUNG J:

Did they get, I thought the purchase was $190,000?

MR WOODS:

It was Sir.

WILLIAM YOUNG J:

Well I thought $60,000 came from the mortgage and $130,000 from Bruce?

MR WOODS:

Yes, that's right Sir.

WILLIAM YOUNG J:

So where's the $30,000 from the parents?

MR WOODS:

Well the $30,000 effectively ended up with Mrs Almond Sir.

WILLIAM YOUNG J:

So she got repaid for the deposit?

MR WOODS:

Well the $10,000 was a deposit Sir. She received some $9000 or $8000 plus, on the settlement date, back into her bank account. That was, of course, the $10,000 less the legal fees for the transfer.

WILLIAM YOUNG J:

Thank you.

MR WOODS:

The Court helpfully provided counsel with the decision in –

O'REGAN J:

I think the copy is deficient, isn't it. I think it's only got every second page.

WILLIAM YOUNG J:

Or is it just the relevant bits.

MR WOODS:

Yes. On the merits of this appeal counsel would submit that the Court of Appeal could, without much investigation, perceive that the merits were very weak. That was a matter which was open to the Court of Appeal and therefore effectively fits, if you like, within the approach adopted in *Regina (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, and shouldn't be interfered, therefore, in this particular circumstance by this Court.

My learned friend raised at the outset of his submissions that this is a case which concerned access to justice. Of course the principle of access to justice is not something which is completely unfettered, if you like, there is a balancing exercise to be had –

ARNOLD J:

Well there isn't. With a right of appeal there is not a balancing exercise, and that is what Mrs Almond wanted to trigger, thought she had triggered, you got

served in time, her lawyer made a mistake, it was filed a day late, and suddenly there is a filter applied. Now for myself I don't see that Mrs Almond is seeking an indulgence at all. This is not like the normal case where somebody doesn't get around to filing it because they just don't get around to it and then three weeks later, or a few months later, or something like that. This is a person who wished to exercise her right of appeal and told her lawyers to do it.

MR WOODS:
Yes, and I accept each one of those propositions.

ARNOLD J:
Well isn't that the end of it?

MR WOODS:
No, no, it's not, because the balance to all of that is that we do have set a filter in such cases so that there isn't, and the cut-off, if you like, has to occur in one day, or another, filter must apply or not apply, and there is some arbitrariness to that –

ARNOLD J:
Well I'm sorry, for me that is far to formalist. You're saying the substance of it doesn't matter.

MR WOODS:
Well, in fact –

ARNOLD J:
The underlying substance.

MR WOODS:
– I'm trying to say the dead opposite.

WILLIAM YOUNG J:
You're trying to say the substance does matter.

MR WOODS:

It does, quite the opposite, and that on the substance of this matter if it is at that threshold it'd be hopeless if there's no point that can really be got into to say this appeal may have legs then surely the gate must remain shut. How could the Court permit that gate to be opened. To do so would create an unfettered access to justice, without consideration of the interests to justice of the other parties.

ELLEN FRANCE J:

Well would you accept there might be a different situation where the delay was lengthy, as opposed to the present case. I mean how do you factor in that different situation. Because on your approach the merits are always overriding, assuming one can assess them.

MR WOODS:

I accept that that would be a matter of the weight of prejudice that arises. It could, of course, be prejudice which arises in one given day, rather than a lengthy dely. As in counsel's submission, the real issue is not the length of the delay, the real issue the gravity of the prejudice.

O'REGAN J:

But you accepted there's no prejudice. There was no prejudice from the delay. You said that at the beginning.

MR WOODS:

Yes.

O'REGAN J:

So why are you trying to say she's prejudiced now? There was no prejudice to her in having the appeal dealt with in the normal way.

MR WOODS:

No specific prejudice Sir, yes.

O'REGAN J:

So that must be different than a case where there's a one day delay and in fact counsel have been served, as opposed to a six month delay where someone just didn't get around to determining whether they should appeal or not. They must be different, mustn't they? Surely those two cases must be dealt with differently by a Court faced with an application for extension of time.

MR WOODS:

Yes, on the presumption that the length of delay will naturally increase the length or the degree of prejudice caused. In counsel's submission, there is no special prejudice caused from this delay. There is only the normal prejudice that arises to a respondent in every such case.

O'REGAN J:

There's no prejudice to a respondent. When you engage in a litigation process where there's a right of appeal, the exercise of the right of appeal doesn't constitute a prejudice. It's just the rules of the game.

MR WOODS:

It is. Of course everybody's meant to comply with the rules of the game.

O'REGAN J:

True, true.

MR WOODS:

So that becomes an issue of compliance I suppose, which I think is probably the point which has also been raised in terms of the general approach in *Hysaj v Home Secretary*.

WILLIAM YOUNG J:

All right, Mr Woods, is that just about it?

MR WOODS:

Yes it is.

WILLIAM YOUNG J:

Thank you. Mr Airey, do you want to respond on that case, say anything about that case, or not?

MR AIREY:

Your Honour, in my submission it doesn't vastly alter the approach that the Court would take under the *Robertson v Gilbert* case which was that unless there is sufficient material to exclude the appeal on the merits, we should allow it to go ahead. That, in my submission, is effectively what that paragraph 46 says, and if a Court of Appeal here applies *Robertson v Gilbert* and in that case said, well, we can't exclude the possibility of the appeal having merit, so we're going to, there's no enough before us to enable us to exclude it, so we'll let it go on that basis, and I don't think that you get, even looking at paragraph 46 of the *Hysaj* decision, I don't think that leads to any vastly different approach.

GLAZEBROOK J:

Although paragraph 37 says if you've got a trivial failure they'll grant relief provided the application is made promptly, which it was here.

MR AIREY:

Well that is different to the current approach under the *Wardell v ASB Bank Limited* [2015] NZCA 344 where they talk about the merits of the proposed appeal, so if that particular principle, the Mitchell principle, is referred to there, you should probably exclude from the criteria being considered by the Court of Appeal, the merits of the proposed appeal, unless it –

GLAZEBROOK J:

I don't think it understand the submission.

MR AIREY:

If the position were that unless the, if the delay was trivial, that leave should be granted, then you would have a situation where there would be no need for the other criteria referred to in *Wardell* to even be considered. The other way

of looking at it, I guess, is that if we had a situation here where the delay was more than a day, say three months or six months, would you still, you would still then look at the merits of the appeal as a criteria.

GLAZEBROOK J:
Well I think what's being put to you is that then you might look at the merits of the appeal in perhaps a bit more detail, although within the strictures of 46, but if it's trivial then really it should just go ahead. Because what they're looking at is in a sanctioned basis, and in a sanctioned basis a trivial deviation from the rule should not have a consequence that is out of all proportion to its triviality.

MR AIREY:
The difficulty, you get to there, is at what point does a delay become trivial.

GLAZEBROOK J:
Well all we could say is in this case it must be as trivial as you could possibly get it, because the respondent knew within time, and it was one day later and not her fault, so if that's not trivial, I'm not sure what is.

MR AIREY:
I'm not arguing it wasn't a trivial delay at all and –

GLAZEBROOK J:
But that, and yes of course there'll be an issue with other things, but this must be about as trivial as you could possibly get, in terms of an approach that says we give sanctions, which is what the British approach seems to be for not following the rules.

MR AIREY:
Nobody argued that the delay was anything other than inconsequential, Ma'am, and the Court of Appeal noted at the very start of its judgment that, well, we would normally grant leave, grant the extension in a case involving

this sort of delay. That was, I think, right in paragraph 1. But, I'm possibly repeating myself here, but –

GLAZEBROOK J:
Because what they say here is it's a sanction for not following the rules and if you get a sanction for not following the rules in a trivial breach then that's likely to be out of proportion, that is what I was asking you about.

MR AIREY:
I understand the point Your Honour makes, but what I was saying here, is that at least, according to the way the Court of Appeal has been approaching applications for extension of time and applying those criteria referred to in *Wardell*, one of the matters that is considered not only the length of the delay, but the merits of the case, and in my submission, and this is where I'm probably repeating myself, is that –

GLAZEBROOK J:
Well you say that's the right test.

MR AIREY:
That's the right test.

GLAZEBROOK J:
However trivial the breach.

MR AIREY:
However trivial the breach.

GLAZEBROOK J:
And why?

MR AIREY:
Because, well, there is a right of appeal, as a right, as we all know, within that 20 working day time limit. But for whatever reason, and as the Courts have recognised for long periods of time, there are two types of situation which that

can lapse. One is where you have a conscious decision not to appeal and then reconsider that. There's no suggestion that that was the case here. The second type of case is like this one where there was a failure to apply in time due to some, there was an intention to appeal but a failure to perfect the appeal by filing it in time due to missing the deadline or something like that. But that distinction has been in the case law for some considerable time. I think I, not off the top of my head, recall the case, but its back in 1963, I think it was where the Court sort of dismissed the previous approach, which was much stricter, where it was well if you out of time you've got to show exceptional circumstances to grant an indulgence. That approach was cast away some time ago. *Thompson v Turbott* [1963] NZLR 71 (SC) was the case I was thinking of, in favour of the approach we have now, which is where it was well, it's the interests of justice that will decide it. So I'm not suggesting that there is a, the Court certainly isn't applying an approach where you have to show exceptional circumstances at all. It didn't do so in this case at all. What the Court of Appeal did do was exercise of looking up the, weighing up the various factors that it took into account. The Court of Appeal formed a view that the merits of this case were such that we simply should not grant an indulgence, and there certainly have been previous cases where the Court of Appeal has held that they, it's in page 9 of the appellant's authority, bundle of authorities there is a reference to a case *Creser v Creser* CA110/04, 2 September 2004 where the Court of Appeal, according to the commentary there, held that the Court should never grant an indulgence of circumstances where a proposed appeal which cannot be brought as of right is only meritorious. So in that sense the merits of the appeal, if there are none, in my submission will trump all else. And in my submission there's good reason for that because it's not in anybody's interests, including the appellants, to allow an appeal to go ahead that's not going to succeed. All that happens is that everybody incurs further costs. So no point.

WILLIAM YOUNG J:

Thank you. Mr Perese. What's the challenge to the finding about the money misapplied according to the Judge under the power of attorney?

MR PERESE:

To be frank, Sir, I've not really got to grips with that. It appears to me that certain money that was received from Mr Chris Read, there was some sort of a money go round and somehow or another Mrs Almond is said to have not accounted for all of the funds. It's one of those issues, Sir, that arises in the course of trials, and will go one way or the other, depending on where the substantive issue in a trial goes. So there were findings, for instance, against Mrs Almond of credibility or whatever. Then the findings in relation to that use of money tends to be coloured by that type of finding.

I don't want to take very long in my reply but to point to this very helpful case, and I apologise if my research hasn't gone wide enough to pick this up, but as I was reading it whilst my learned friend Mr Woods was giving his submissions, I was reading paragraph 46 which was exactly what was happening in this case at the time. If applications for extensions of time were allowed to develop into disputes about the merits of the substantive appeal they'll occupy a great deal of time and lead to the parties incurring substantial costs. I agree with the tenor of this decision, which really is about, as Your Honour Justice Glazebrook says, a proportionality response and perhaps our test needs to be re-tweaked, as it were, so that whilst we've got all of those various factors there, really the issue is about the overall interests of justice, and if I read Rule 3.9 from the Civil Procedure Rules that was given to us, that's really nothing more than an overall interests of justice test, and what the Law Lords have decided was to look at that test and say, well what is a proportional response to that, and so proportional responses, look, if it's trivial, then I suspect that we all know what trivial means, that things should be allowed to go through. In fact on the question of merits the Court of Appeal considered that in most cases the Court should decline to embark on an investigation of the merits and firmly discourage argument directed to them because the only real issue is what is the Court's proportional response to the failure, and in my submission the proportional response in this case was not to reject because there are middle ground arguments that can be made and depending on how a hearing before the Court of Appeal goes, it may be at the margins, and it could also be quite substantive, and so the proportional

response was to have given Mrs Almond the opportunity to file her appeal that she had served so that the parties could get on with it, and I'm pleased the Court takes on board that had that happened, back when, it would have been all over bar the shouting now. But here we are still arguing over a matter, really, that should have been agreed between counsel.

Unless the Court has any further questions, those are my respectful submissions.

ELLEN FRANCE J:
Did you want to ask about legal aid?

WILLIAM YOUNG J:
What's the position about legal aid?

MR PERESE:
Legal aid has been declined. The Legal Aid Board have, I've sent a copy of this Court's granting of leave to appeal and they said we'll get back to you and that's simply where it sits at present.

WILLIAM YOUNG J:
So it hasn't been declined, it hasn't been decided?

MR PERESE:
It hasn't been decided. It was initially declined but now they're reviewing it again.

WILLIAM YOUNG J:
I see. Thank you. We'll take time to consider our judgment and deliver it in writing in due course.

COURT ADJOURNS: 12.39 PM