IN THE SUPREME COURT OF NEW ZEALAND

SC 98/2016
[2017] NZSC 80

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
Court:	William Young, Glazebrook, Arnold, O'Regan and Ellen France JJ
Counsel:	S I Perese for Appellant J M Airey and A Dullabh for First Respondent N W Woods and P Amaranathan for Second and Third Respondents
Judgment:	30 May 2017

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The application for an extension of time to appeal to the Court of Appeal is granted.**

C **The stay will remain in effect until the determination of the appellant's appeal in the Court of Appeal.**

D **The respondents are jointly and severally liable to pay costs of $13,000 to the appellant, plus reasonable disbursements.**

REASONS
(Given by Arnold J)

Introduction

[1] Ms Almond, the appellant, has been involved in a dispute with her mother, the second respondent, and her two siblings, the first and third respondents, about their respective entitlements to a property on which Ms Almond lives. Ms Almond is the sole registered proprietor of the property. The respondents issued proceedings claiming that, when the property was purchased in 2002, there was an oral agreement between all members of the family to the effect that they would each own shares in it, based on their respective contributions to the initial purchase price and to subsequent improvements. They sought orders declaring that Ms Almond holds shares in the property on trust for them. Ms Almond's position was that the property was held in her name because it was hers; she built her home on what had been bare land and cared for her elderly parents, who lived in a separate dwelling on the property.

[2] In the High Court, Thomas J found in favour of the respondents.[1] The Judge held that the various parties were entitled to specified shares in the property and made an order for the sale of the property so that the shares could be realised.[2] Thomas J also found that Ms Almond had breached her duties under a power of attorney she held from her mother and ordered her to pay compensation of $29,176 plus interest.[3]

[3] Ms Almond instructed her solicitors to file an appeal against Thomas J's decision. Although they served the notice of appeal on the respondents within the mandated 20 working day time period,[4] the solicitors filed it in the Court of Appeal one day late. This was because they miscalculated the last day of the 20 day period. When they were advised by the Court of Appeal Registry that the application was out of time and that an extension of time to appeal was needed, they filed an

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1 *Read v Almond* [2015] NZHC 2797 [*Almond* (HC)].
2 At [251] and [276].
3 At [273]–[275] and [277].
4 Court of Appeal (Civil) Rules 2005, r 29(1)(a).

application for an extension promptly. The respondents opposed the application, on the basis that the appeal was without merit.

[4] The Court of Appeal refused to extend time.[5] The Court said that normally they would have exercised their discretion to grant an extension of time but, because they were satisfied that the appeal was hopeless, no purpose would be served by "granting an indulgence".[6] This Court gave leave to appeal against that decision[7] and granted a stay of execution of Thomas J's judgment until further order of the Court.[8] In issue on the appeal are the principles to be applied in relation to applications for an extension of time to appeal.

Court of Appeal decision

[5] The Court of Appeal identified the principles that have emerged from the cases in relation to extending time to appeal as follows:[9]

> The overarching consideration is the interests of justice. The factors relevant to that inquiry are the length of the delay and its reasons; the parties' conduct; the extent of the prejudice caused by the delay; the prospective merits of the appeal; and whether the appeal raises any issue of public importance. The first three factors favour Ms Almond. The second two factors favour the Reads. Our function is to determine which factors, in the interests of justice, should be given predominant weight.

[6] The Court then considered the trial Judge's decision, noting that she had set out in a comprehensive way the relevant evidence and her findings on the contested issues.[10] The Court viewed the case as involving an "outright credibility conflict", which the trial Judge determined against Ms Almond and in favour of the respondents, for reasons which she had explained fully in her judgment.[11] The Court said that the Judge's "sustained findings adverse to Ms Almond's credibility could not possibly be impeached on appeal"[12] and concluded:

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5 *Almond v Read* [2016] NZCA 147 (Harrison, Wild and Kós JJ) [*Almond* (CA)].
6 At [1].
7 *Almond v Read* [2016] NZSC 145.
8 *Almond v Read* SC 98/2016, 13 September 2016.
9 *Almond* (CA), above n 5, at [9] (footnotes omitted).
10 At [12].
11 At [12].
12 At [13].

> [15] This dispute between Ms Almond on the one side and her siblings and their mother on the other has been protracted, divisive and costly. The amounts at issue are not such as to justify further litigation. At this stage of her life Mrs Read should be spared the further ordeal of defending an appeal by her daughter which has no merit. The appeal does not raise any question of public importance. The relevant discretionary factors weigh decisively against granting leave.

Submissions

[7] For Ms Almond, Mr Perese did not argue that the well-established principles guiding the discretion to grant an extension of time as articulated by the Court of Appeal in this case should be reviewed. Rather, he submitted that the Court had erred in principle, essentially because its analysis was inconsistent with the approach to appellate review required by this Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.[13] In considering the approach to be taken by appellate courts on a general appeal, this Court said:

> [16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters … . In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

The Court acknowledged, however, that appellate courts must exercise caution where findings of fact turn on issues of credibility.[14] Mr Perese submitted that Ms Almond did have a viable argument in relation to the facts and the legal result flowing from those facts.

[8] For the first respondent, Mr Airey emphasised that that applications for an extension of time involve the exercise of discretion. Accordingly, an appeal against a refusal to extend time will only succeed if at least one of the grounds identified in *May v May* is made out, namely that the Court applied a wrong principle, took account of irrelevant factors or overlooked relevant ones, or was "plainly wrong".[15] He argued that the merits of a proposed appeal will often be decisive in the sense that

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13 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
14 At [5] and [13].
15 *May v May* (1982) 1 NZFLR 165 (CA) at 169–170.

it will seldom, if ever, be in the interests of justice to grant an extension where the proposed appeal has no prospect of success. He also drew attention to the Court of Appeal's view that the outcome at trial was entirely dependent on the trial Judge's determination of contested factual and credibility issues against the appellant. He submitted that none of the criteria in *May* were made out.

[9] For the second and third respondents, Mr Woods focussed on the factual background. He submitted that there were two incompatible theories of the case and that advanced by the respondents prevailed. There was no substantial support in the factual material for Ms Almond's theory.

The framework

[10] We begin by setting out r 29A of the Court of Appeal (Civil) Rules 2005 (the 2005 Rules) in full. Rule 29A provides:[16]

> **29A Extension of time for appealing**
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> (1) If the appeal period prescribed by an enactment or the period prescribed by rule 29(1) or (2) has expired, a party who wishes to appeal may apply for an extension of time in which to appeal.
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> (2) If the other party consents to an extension of time and signifies that consent on an application to extend time, the Court or a Judge may—
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> (a) grant an extension of time in which to appeal; or
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> (b) direct that the application be dealt with as if it were an application for leave to appeal under Part 2 to which consent has been given in terms of rule 26.
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> (3) If the Court or a Judge grants an extension of time under subclause (2)(a), the party wishing to appeal must bring the appeal—
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> (a) within the time specified by the Court or the Judge when granting the extension; or
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> (b) if no time is specified by the Court or the Judge, within 20 working days after the day of the decision granting the extension of time.

[16] We note that r 29A is subject to any express provision in the enactment under which a particular appeal is brought or sought to be brought: Court of Appeal (Civil) Rules 2005, r 4(2).

(4) If the other party does not consent to an extension of time, the party wishing to appeal must apply under Part 2 for an extension of time in which to appeal.

(5) An application under subclause (4) must be made and treated as if it were an application under Part 2 for leave to appeal, and Part 2 applies with all necessary modifications.

[11] It is useful to say a little about the background to r 29A. Briefly, r 27 of the Court of Appeal Rules 1955 (the 1955 Rules) provided for two different time periods for appealing, either 28 days or three months from the trigger date, depending on the type of case. Under r 27(1), no appeal could be brought after the expiration of the time fixed by the Rules except by special leave of the Court of Appeal or the court below.[17] Rule 27(4) provided that the power to grant special leave could be exercised "in such cases and on such terms as the justice of the case may require".[18]

[12] In *Thompson v Turbott*, the Court of Appeal made several points about the discretion conferred by r 27.[19] In particular:

(a) Adopting the analysis of the English Court of Appeal in *Gatti v Shoosmith*,[20] the Court held that the discretion was in wide terms.[21] Accordingly, it was not desirable that the Court attempt to lay down general rules which would tend to fetter the discretion in other cases.[22] In *Gatti*, the English Court of Appeal made it clear that time to appeal might (but not must) be extended in cases where the failure to file within time was the result of an error by a legal adviser.[23] This

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17 Given that the Permanent Court of Appeal was not established until 1958, there may have been practical reasons for trial judges to have the power to grant special leave to appeal. The Judicature Amendment Act 1957 created the Permanent Court and came into force on 1 January 1958: s 1(2).

18 This provision was first introduced in the Court of Appeal Amendment Rules 1940, r 3.

19 *Thompson v Turbott* [1963] NZLR 76 (CA).

20 *Gatti v Shoosmith* [1939] Ch 841 (CA).

21 *Thompson*, above n 19, at 80.

22 At 80.

23 *Gatti*, above n 20, at 845–846.

departed from earlier authority to the effect that the discretion was not available in such circumstances.[24]

(b) The Court said that, in exercising the discretion, it was necessary to distinguish between two different classes of case. The first was where the failure to give notice within time was due to "mistake, inadvertence, sickness, or some cause which operated to prevent or make difficult action being taken in time".[25] The second was where there had been "a definite decision not to appeal", but then a change of mind after the expiration of the appeal period.[26]

(c) The Court noted that, in the second class of case, considerations of public importance are likely to be much reduced in significance[27] and it would be rare that developments subsequent to the expiration of the appeal period will be such as to justify leave being given.[28]

[13] Later, in *Lange v Town and Country Planning Appeal Board*, the Court of Appeal reiterated that the discretion under r 27 was "very wide" and confirmed that it did not wish to lay down general rules that might be read as limiting or restricting the discretion in future cases.[29] The Court said that following *Thompson, Gatti* was to be regarded "as an authority applicable to New Zealand practice".[30]

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[24] The view in New Zealand had also been that a timing error by counsel, a solicitor or a solicitors' clerk was not a ground for granting special leave: see *Wilson v New Zealand Loan and Mercantile Agency Co Ltd (No 2)* [1934] NZLR s 115 (CA); and Wilfred Sim *The Practice of the Supreme Court and Court of Appeal of New Zealand* (9th ed, Butterworths, Wellington, 1955) at 436.

[25] *Thompson*, above n 19, at 80.

[26] At 80.

[27] At 81.

[28] At 82.

[29] *Lange v Town and Country Planning Appeal Board* [1967] NZLR 915 (CA) at 920.

[30] At 919.

[14] Apart from the fact that *Gatti* held that there was a wide discretion to extend time under the English rule then in force,[31] an interesting feature of the case is that Sir Wilfred Greene MR (with whom the other members of the Court agreed) said:[32]

> The discretion of the Court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised. If ever there was a case in which it should be exercised, I should have thought it was this one. We are not, I think, concerned here with any question at all as to the merits of this case or the probability of success or otherwise. The reason for the appellant's failure to institute his appeal in due time was a mere misunderstanding, deposed to on affidavit by the managing clerk of the appellant's solicitors – a misunderstanding which, to anyone who was reading the rule without having the authorities in mind, might very well have arisen. The period involved is a very short one, it is only a matter of a few days, and the appellant's solicitors, within time, informed the respondent's solicitors by letter of their client's intention to appeal. That was done within the strict time, and the fact that the notice of appeal was not served within the strict time was due entirely to this misunderstanding. On the facts of this case, it appears to me that the case is one where the discretion of the Court ought to be exercised, and accordingly, leave will be given.

The feature of this extract which is interesting for present purposes is the observation that the merits of the case or the probability of the appeal succeeding or failing were not relevant considerations.

[15] Rule 27 was again at issue in *Avery v No 2 Public Service Appeal Board*.[33] The case involved a public service appeal in which Mr Avery had appealed to the Public Service Appeal Board against the appointment of another person to a position for which he had applied. When Mr Avery's appeal was unsuccessful he issued judicial review proceedings seeking to have the Board's decision set aside. His challenge was unsuccessful. Under the relevant rules, Mr Avery had a period of three months within which to file an appeal as of right. As a result of a misunderstanding on the part of his legal adviser, the appeal was filed 11 days out of time.

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31 Rules of the Supreme Court (UK), order 58, r 15. As it appeared in *The Annual Practice 1939* (57th annual issue, Sweet and Maxwell, London, 1939), the rule provided that no appeal could be brought to the Court of Appeal after the expiration of the relevant time period "unless the court or judge at the time of making the order or at any time subsequently or the Court of Appeal shall enlarge the time".

32 *Gatti*, above n 20, at 846.

33 *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 (CA).

[16] The principal judgment was delivered by Richmond J. Having referred to *Gatti*, *Thompson* and *Lange*, Richmond J said:[34]

> When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of an indulgence by the Court. The onus rests on him to satisfy that in all the circumstances the justice of the case requires that he be given the opportunity to attack the judgment from which he wishes to appeal.

Richmond J went on to emphasise that the discretion under r 27 was wide and said:[35]

> In order to determine the justice of any particular case the Court should I think have regard to the whole history of the matter, including the conduct of the parties, the nature of the litigation and the need of the applicant on the one hand for leave to be granted together with the effect which the granting of leave would have on the other persons involved.

[17] In the event, the Court declined to extend time, essentially because Mr Avery had had plenty of time to make up his mind whether or not to appeal (the appeal period being three months) and because of the effect on the person who had obtained the position at issue, who by this time had moved to Wellington, purchased a new house and had occupied the position for some time. The Court did not address the merits of the proposed appeal.

[18] The Court of Appeal reiterated its approach in subsequent cases, emphasising the breadth of the discretion and the fact that the onus was on the applicant.[36]

[19] The 1955 Rules were replaced by the Court of Appeal (Civil) Rules 1997 (the 1997 Rules). As introduced, these provided that no appeal could be brought after the expiration of 28 days of the relevant trigger date except by special leave of the court below or the Court of Appeal.[37] They did not, however, contain an equivalent provision to r 27(4) in the 1955 Rules. The rules were later amended in 2004 to modify the period for appealing from 28 days to 20 working days, but still did not

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34 At 91.
35 At 92.
36 See, for example, *Hetherington Ltd v Carpenter* (1995) 9 PRNZ 1 (CA); and *Belling v Belling* (1996) 9 PRNZ 469 (CA).
37 Court of Appeal (Civil) Rules 1997, rr 5 and 6.

contain an equivalent to r 27(4).[38] Nevertheless, the Court of Appeal adopted the same approach under the 1997 Rules as it had under the 1955 Rules.[39]

[20] We pause at this point to identify the relevance, if any, of the merits of a proposed appeal in the approach of the Court of Appeal as it had developed under the 1955 Rules and was carried over under the 1997 Rules. In summary, the position appears to be that the merits could be relevant but were not always considered if other factors strongly pointed one way or another. As the Court of Appeal said in *Grey v Elders Pastoral Holdings Ltd* when dismissing an application for special leave to appeal out of time:[40]

> [20] The Court has a wide discretion and, in appropriate cases, can take into account the merits of the appeal. That is not necessary in this case but we do note that the grounds relied upon to contest the judgment appear to rest primarily on disputes of fact and, on their face, do not appear strong.

[21] In cases where there was a short delay as a result of a legal adviser's error and no prejudice, the Court did not generally give any detailed consideration to the merits of the proposed appeal. For example, in *B Bullock & Co Ltd v Matthews*, the appellant had filed its notice of appeal within time.[41] Under the rules as they then stood, the appellant had to apply for a fixture and file the case on appeal within six months; if it did not, the appeal would be deemed abandoned. The appellant did apply for a fixture within the six month period but failed to file the case on appeal, as a result of a "genuine slip" on the part of its solicitor.[42] Its appeal was accordingly deemed abandoned. To meet this difficulty, the appellant applied for special leave to appeal out of time – in effect, leave to bring a second appeal. The Court considered that the interests of justice favoured the grant of special leave. Matters identified as relevant were the inadvertent nature of the error, the steps taken by the appellant to pursue the appeal and the lack of any prejudice to the respondent. The merits of the

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38 Court of Appeal (Civil) Amendment Rules 2003, r 5 which came into force on 1 January 2004.

39 See, for example, *B Bullock & Co Ltd v Matthews* (1998) 13 PRNZ 505 (CA); *State Insurance Ltd v Brooker* (2001) 15 PRNZ 493 (CA); and *Lawrence v Bank of New Zealand* (2001) 16 PRNZ 207 (CA).

40 *Grey v Elders Pastoral Holdings Ltd* (1999) 13 PRNZ 353 (CA). In that case there was an error as to the appeal period by a legal adviser. However, the application for an extension of time was not filed until three months after the mistake was discovered. During this period the applicants attempted to divest themselves of their assets. The Court considered that the delay was unacceptably long, particularly when the attempted asset divestment was taken into account.

41 *Bullock*, above n 39.

42 At 506.

proposed appeal were not mentioned. The same problem arose in *Board of Governors of Wesley College v Richardson*, although this time the solicitors had filed the case on appeal within the six month period but had not applied for a fixture.[43] Again, the Court determined that the interests of justice required that leave to bring a second appeal be granted. The Court stated that it made no comment on the merits of the appeal.[44]

[22] In other cases, however, the Court did identify the merits of the proposed appeal as being relevant. For example, in *Hetherington Ltd v Carpenter* the Court granted an application for special leave to appeal.[45] An appeal had been filed but as a result of an oversight by the solicitors, security for costs was not paid and the appeal was deemed abandoned. As a consequence, the applicant sought special leave to appeal. In dealing with the application the Court said:[46]

> Generally it is preferable for applications for special leave to appeal to be dealt with at the same time as the substantive appeal because … it is appropriate on the leave application to take into account all the circumstances including where possible the likely merits of the appeal.

In the event, however, the Court did not consider the merits of the proposed appeal because the matter was complex and it was difficult to make any reliable assessment of the merits.[47]

[23] The Court's observation that it is preferable to deal with leave applications at the same time as the substantive appeals may have reflected the thinking of the day. But whatever the position in the past, that has not been the practice in the Court of Appeal in civil cases for some years. Applications for extension of time are routinely heard separately from any substantive appeal.

[24] A further example is *Lawrence v Bank of New Zealand*.[48] Summary judgment had been entered against Mr Lawrence on a claim brought by the Bank of

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43 *Board of Governors of Wesley College v Richardson* (2000) 15 PRNZ 490 (CA).
44 At [8].
45 *Hetherington*, above n 36. This was a case under the 1955 Rules.
46 At 5–6.
47 At 6.
48 *Lawrence*, above n 39. The merits were also relevant in *Terry v Greymouth District Court* CA67/95, 6 November 1997.

New Zealand on a personal guarantee which he had given, along with other directors, of a development company's borrowings. He filed an appeal but it lapsed as a result of his failure to provide security for costs. He then sought special leave to appeal out of time. In the course of addressing this application, the Court of Appeal said:

> [11] When considering an application for special leave to appeal under r 5 of the 1997 Rules, this Court has a wide discretion to do justice in an individual case: *Thompson v Turbott* [1963] NZLR 71, 80. However, the Court will attach weight to the merits of an intended appeal: *Hetherington Ltd v Carpenter* (1995) 9 PRNZ 1. Leave will not be granted where an intended appeal is frivolous, vexatious or entirely lacking in merit. It is apparent that Mr Lawrence feels very deeply about this case. But we have reached the view that, even if the additional material filed in this Court were admitted, there would simply be insufficient evidence for Mr Lawrence to be able to establish that he has an arguable defence.

The Court felt able to conclude that the appeal was without merit. Mr Lawrence had made unsubstantiated allegations of fraud and theft against his fellow directors. Moreover, there was no basis on which knowledge (actual or constructive) of any such activities could be sheeted home to the Bank.

[25] Finally, we mention *Ngati Tahinga and Ngati Karewa Trust v Attorney-General*.[49] In that case, the Court of Appeal dealt with an application for special leave to appeal by going straight to the merits of the proposed appeal. The Court said:[50]

> The discretion to grant special leave to appeal out of time under R 5 of the Court of Appeal (Civil) Rules 1997 is very wide and flexible. The overall consideration is the justice of the case. It is within the scope of that discretion to determine that the appeal would be hopeless (see eg *Prudential Building and Investment Society Canterbury (In liquidation)* v *Hankins* (1991) 5 PRNZ 160, 162, and the authorities referred to there). For the reasons we now give we consider that this appeal would be hopeless and against the interests of justice.

In the case referred to, *Prudential Building and Investment Society Canterbury (in liq)* v *Hankins*, Barker J had observed (in the context of dealing with an application for leave to appeal to the Court of Appeal) that in some cases courts had

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[49] *Ngati Tahinga and Ngati Karewa Trust v Attorney-General* CA73/02, 27 June 2002.
[50] At [3].

looked at the merits of an appeal, but this could only be done in a superficial fashion and it was, in any event, simply one of many factors to be placed in the balance.[51]

[26] It is noteworthy that the Court's acceptance in *Ngati Tahinga* that the merits of the proposed appeal may be relevant to the exercise of the discretion related to an appeal that "would be hopeless". In that particular case, the issues were such that the Court was readily able to determine on the available material that the appeal had no prospect of success.

[27] Returning to the narrative, the 1997 Rules were replaced by the 2005 Rules. Rule 29A was introduced into the 2005 Rules as from 1 July 2008.[52] It replaced r 29(4),[53] which had carried on the approach in the 1997 Rules of requiring that a person who had missed the deadline for an appeal and wished to have the period extended had to seek special leave to appeal out of time.

[28] A feature of r 29A is the role that the attitude of the other party to the appeal plays in it. If the other party consents to the extension, the court[54] may grant the extension, although it still retains a discretion whether or not to do so.[55] Typically, though, if the other party consents in circumstances such as the present, where the delay is both minimal and inadvertent and the other party had notice of the appeal before the appeal period expired, it is likely that an extension would be granted as a matter of course. By contrast, if the other party does not consent, the court must treat the application for an extension of time as if it were an application for leave to appeal under pt 2 of the Rules,[56] and that part applies, subject to any necessary modification.[57] The fact that the application is heard under pt 2, however, does not alter the substance of the application but, rather, means that the pt 2 procedure is utilised.[58]

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51 *Prudential Building and Investment Society Canterbury (in liq) v Hankins* (1991) 5 PRNZ 160 (HC) at 163.

52 Court of Appeal (Civil) Amendment Rules (No 2) 2008, rr 2 and 7.

53 Rule 6.

54 For ease of presentation, we use the term "court" to include a single judge.

55 Court of Appeal (Civil) Rules 2005, r 29A(2).

56 Rule 29A(4).

57 Rule 29A(5).

58 See *My Noodle Ltd v Queenstown Lakes District Council* [2009] NZCA 224, (2009) 19 PRNZ 518 at [15], where the Court emphasised the words "as if it were" in r 29A(5).

[29] The approach to applications under r 29A for an extension of time articulated by the Court of Appeal in the present case has become the orthodox approach.[59] In a frequently cited decision, *My Noodle Ltd v Queenstown Lakes District Council*, the Court of Appeal outlined the position as follows:[60]

> [19] A number of factors are relevant to a decision as to whether time to appeal should be extended, including the reason for the delay, the length of the delay, the conduct of the parties and the extent of any prejudice caused by the delay: *New Plymouth DC v Waitara Leaseholders Association Incorporate* [2007] NZCA 80, at para 22. The overall test, however, is whether granting an extension would "meet the overall interests of justice": *Havanaco Ltd v Stewart* (2005) 17 PRNZ 622, at para 5 (CA).
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> [20] We accept that the cause of the delay in this case was a genuine mistake on the part of the applicants' legal advisers. Once the error was discovered, their counsel immediately sought the respondents' consent to an extension of time for appealing. This Court has made it clear that it is normally sympathetic to an extension of time in such circumstances, particularly where counsel has acted expeditiously to remedy the oversight after it has been discovered: see, eg *Grey v Elders Pastoral Holdings Ltd* (1999) 13 PRNZ 353 (CA), at para 15 and *Havanaco*, at para 7.
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> [21] Although the delay in this case was significant, being approximately 3½ months (including the Christmas vacation), it has not produced any real prejudice to the respondents. Prior to the oversight being discovered, it was clear that all parties assumed the appeal was on foot. There was no doubt that the applicants intended to prosecute their appeal, and arrangements were well in hand: … . In fact, the applicants have now been in a position for some months to file a case on appeal and seek a hearing date from the Registrar. Had the respondents consented to an extension of time, it is unlikely that the delay in filing the notice of appeal would have caused any delay in the setting down of the appeal.
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> [22] In his written submissions, Mr Todd argued that this Court should refuse to grant an extension of time in which to appeal because the merits of the proposed appeal are weak and the issues raised are not of public importance. Given leave to appeal has already been granted, we see no need to revisit the merits of that decision. It is true that this Court will be reluctant to grant an extension of time where the proposed appeal appears hopeless: *Ngati Tahinga & Ngati Karewa Trust v Attorney-General* 27/6/02, CA73/02, at para 3. We are satisfied, however, that the issues raised in the proposed appeal are not hopeless: the High Court would not have given leave if they were.

[30] A review of recent cases in which applications to extend time have been dismissed indicates that there have been other instances of cases where a notice of

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59 See the extract above at [5].

60 *My Noodle*, above n 58. The applicants had been granted leave to appeal on four questions of law by the High Court but failed to meet the deadline for filing their appeal. Accordingly, they required an extension of time to appeal.

appeal was filed one or two days late, but an extension of time was refused on the ground that the proposed appeal was without merit. Some examples are discussed below;[61] other examples are *Ward v Cockrell*[62] and *Hampton v Official Assignee*.[63]

[31] The authorities indicate that lack of merit of a proposed appeal is likely to be a decisive consideration where there is an obvious problem with the proposed appeal, such as:

(a) *A jurisdictional difficulty*. In *Mawhinney v Commissioner of Inland Revenue* the Court of Appeal denied an extension of time in a case where the delay in filing the appeal was minimal because the proposed grounds of appeal were directed at challenging what were "disputable decisions" in terms of s 3 of the Tax Administration Act 1994 and such decisions were required under s 109 to be dealt with through the dispute and challenge processes contained in the Act.[64]

(b) *A legally untenable claim*. In *Mathiesen v Mathiesen* Ms Mathiesen sought to appeal against an order adjudicating her bankrupt on the basis of her non-compliance with a final order of the Family Court to make certain payments to Mr Mathiesen as part of relationship property proceedings.[65] The delay was slight (seven days), there was no prejudice to Mr Mathiesen and there was nothing disqualifying in Ms Mathiesen's conduct.[66] Nevertheless, the Court dismissed the application. The lack of merit of the proposed appeal was decisive. The grounds of appeal indicated that Ms Mathiesen wished to argue that the High Court lacked jurisdiction to adjudicate her bankrupt in the circumstances. The Court considered that this contention was untenable as a matter of law.[67] Similarly, the Court may have no difficulty on an application to extend time in determining that a

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61 At [31].
62 *Ward v Cockrell* [2014] NZCA 14 at [16].
63 *Hampton v Official Assignee* [2015] NZCA 264 at [21].
64 *Mawhinney v Commissioner of Inland Revenue* [2014] NZCA 450, (2014) 26 NZTC ¶21-101.
65 *Mathiesen v Mathiesen* [2015] NZCA 92, (2015) 30 FRNZ 181.
66 At [22].
67 At [25].

proposed argument as to the meaning of a particular section is untenable and can be rejected summarily.[68]

(c) *An abuse of process*. In *Slavich v Judicial Conduct Commissioner* Mr Slavich wished to appeal against a High Court judgment striking out seven applications for judicial review and a proceeding alleging misfeasance in public office.[69] All of the applications were challenges to criminal processes that had culminated in Mr Slavich's conviction for fraud, against which Mr Slavich had appealed unsuccessfully.[70] In particular, Mr Slavich wished to argue in his proposed appeal about the admissibility of certain evidence given in the criminal trial, a matter which had been extensively canvassed in his original appeal against conviction. The Court of Appeal agreed with the High Court Judge that the judicial review applications were collateral attacks on the appeal decisions and were an abuse of process.[71] Mr Slavich's application for an extension of time was accordingly dismissed.

(d) *Nature of the claim*. This category covers a variety of difficulties arsing from the nature of the particular claim(s) sought to be pursued on appeal. One example is *Currie v Goodwin*.[72] The applicant, Mr Currie, wished to appeal against orders made refusing him leave to adduce further evidence and declining an application for non-party discovery in an up-coming trial. The notice of appeal was filed one day late as a result of an error on the part of Mr Currie's solicitor. The Court of Appeal declined leave to appeal out of time, in part because there would be prejudice to the respondent and because of the applicant's previous non-compliance with court orders. But the principal reason was that the proposed appeal, being against the exercise of discretion in the context of an up-coming trial, had no realistic prospect of success given that it could only succeed if it could

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68 See, for example, *Havanaco Ltd v Stewart* (2005) 17 PRNZ 622 (CA) at [15]–[16].

69 *Slavich v Judicial Conduct Commissioner* [2012] NZCA 31.

70 *R v Slavich* [2009] NZCA 188. Leave to appeal to the Supreme Court was denied: *Slavich v R* [2009] NZSC 87.

71 *Slavich*, above n 69, at [8]–[9].

72 *Currie v Goodwin* CA216/04, 6 December 2004.

> be shown that the judge was plainly wrong. The Court was satisfied that this test could not be met.[73] Another example is where the applicant wishes to raise in the proposed appeal allegations of perjury, fraud or corruption that are not adequately particularised or substantiated.[74]

[32] While the Court of Appeal has said that an extension of time will not be granted where "the appeal has no legs", it has also recognised that there may be "insufficient material before the Court to exclude the possibility that there is merit".[75] The fact that an appeal appears to be weak does not justify denying an extension.[76]

[33] Before we move on to discuss the present case in more detail, we should say something, albeit briefly, about the position in England and Wales. Under the Civil Procedure Rules 1998, a party may apply to the relevant appeal court to vary the time limit for filing an appeal notice.[77] The court has a general power to vary time limits.[78] In deciding how to exercise its power, the court must take into account the overriding objective of enabling the court to deal with the case "justly and at proportionate cost".[79] The authorities establish that appellate courts deal with applications for an extension of time to appeal on the same basis as they deal with applications for relief from sanctions (for example, failure to comply with an "unless" order). The principles are set out in *Mitchell v News Group Newspapers Ltd*,[80] as modified by *Denton v T H White Ltd*.[81]

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73 At [16]–[17].

74 See, for example, *Lawrence*, above n 39, discussed above at [24]; and *Lupton v Commissioner of Inland Revenue* [2013] NZCA 82, [2013] NZTC ¶21-009 at [11]–[12].

75 *Robertson v Gilbert* [2010] NZCA 429 at [24].

76 See, for example, *Slater v Bloomfield* [2015] NZCA 240 where an application for an extension of time was granted despite the fact that the proposed grounds of appeal "[did] not appear strong": at [33]–[34]. The Court stated that "the interests of justice may require leave to be granted, not necessarily because the merits appear strong, but because there is insufficient material before the Court to exclude the possibility that there is merit": at [18].

77 Civil Procedure Rules 1998 (UK), r 52.15.

78 Rule 3.1(2)(a).

79 Rule 1.1. See *Sayers v Clarke Walker* [2002] EWCA Civ 1408, [2002] 1 WLR 305 at [18].

80 *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795.

81 *Denton v T H White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926.

[34] In *R (Hysaj) v Secretary of State for the Home Department* the Court of Appeal summarised the relevant principles after *Denton* as follows:[82]

> [38] In the *Denton* case … the court affirmed the guidance given in [*Mitchell*], but explained the approach in more detail as follows, at para 24:
>
> > "A judge should address an application for [an extension of time] in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(I). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]'."

The Court went on to explain the relevance of the merits of the proposed appeal:

> [46] If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them. Here too a robust exercise of the jurisdiction in relation to costs is appropriate in order to discourage those who would otherwise seek to impress the court with the strength of their cases.

The Court found support for that conclusion in the decision of the Supreme Court of the United Kingdom in *Global Torch Ltd v Apex Global Management Ltd (No 2)*.[83]

Summary of the relevant principles

[35] It may be helpful at this point if we summarise the principles that we consider should guide the exercise of the discretion to grant or deny an extension of time to appeal. While this statement builds on the authorities, it also adds to them.

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82 *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, [2015] 1 WLR 2472.

83 *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64, [2014] 1 WLR 4495, particularly at [30] per Lord Neuberger.

[36] The first point we make is that in most civil cases in New Zealand there is a right to a first appeal. The Court of Appeal (Civil) Rules do not confer an explicit power on the Court of Appeal to strike out timely appeals summarily on their merits (although they do contemplate appeals being struck for non-payment of security for costs[84] or non-compliance with directions[85]). Even if the Court has such a power, it has not been the Court's practice to exercise it, so that those who bring timely appeals will almost always be able to have them heard on the merits.[86] We think that this is an important part of the background against which extension applications must be determined.

[37] Accordingly, where a litigant takes steps to exercise the right of appeal within the required timeframe (including advising the other party), but misses the specified time limit by a day or so as a result of an error or miscalculation (especially by a legal adviser) and applies for an extension of time promptly on learning of the error, we do not think it is appropriate to characterise the giving of an extension of time as the granting of an indulgence which necessarily entitles the court to look closely at the merits of the proposed appeal. In reality, there has simply been a minor slip-up in the exercise of a right. An application for an extension of time in such a case should generally be dealt with on that basis, with the result that an extension of time should generally be granted, desirably without opposition from the respondent.

[38] The ultimate question when considering the exercise of the discretion to extend time under r 29A is what the interests of justice require. That necessitates an assessment of the particular circumstances of the case. Factors which are likely to require consideration include:

(a) *The length of the delay.* Clearly, the time period between the expiry of the appeal date and the filing of the application to extend time is

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84 Court of Appeal (Civil) Rules 2005, r 37.

85 Rule 6(2).

86 The extent of the Court of Appeal's power to strike out timely appeals was not argued and is not something that we need to resolve. We note, however, that the Court has struck out appeals on abuse of process or similar grounds: see, for example, *Clark v Libra Developments Ltd* [2008] NZCA 416, where an appeal was struck out on the basis that the appellant was seeking to re-litigate issues which had already been conclusively determined against him. The respondents' application to strike out in that case was framed in abuse of process terms: at [7]. In *Siemer v Stiassny* [2009] NZCA 624 an appeal was struck out in part, for reasons analogous to abuse of process.

relevant. But in a case where there has been a slip-up and the appeal date has been inadvertently missed, how quickly the applicant sought to rectify the mistake after learning of it will also be relevant.[87] Obviously, the longer the delay, the more the applicant will be seeking an "indulgence" from the court and the stronger the case for an extension will need to be.

(b) *The reasons for the delay.* It will be particularly relevant to know whether the delay resulted from a deliberate decision not to proceed followed by a change of mind, from indecision, or from error or inadvertence. If from a change of mind or from indecision, there is less justification for an extension than where the delay results from error or inadvertence, particularly if understandable.

(c) *The conduct of the parties, particularly of the applicant.* For example, a history of non-cooperation and/or delay by an applicant may be relevant.[88]

(d) *Any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome*. Again, the greater the prejudice, the stronger the case will have to be to justify the grant of an extension of time. Where there is significant delay coupled with significant prejudice, then it may well be appropriate to refuse leave even though the appeal appears to be strongly arguable.

(e) *The significance of the issues raised by the proposed appeal, both to the parties and more generally*. If there is a public interest in the issues, the case for an extension is likely to be stronger than if there is no such interest.[89]

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87 See, for example, *Grey*, above n 40, at [5] and [13]–[18]; *French v Public Trust* CA197/04, 25 November 2004 at [16]; and *Green v Kelly* [2010] NZCA 398 at [9].

88 See, for example, *Arranmore Developments Ltd v Don Ha Real Estate Ltd* [2011] NZCA 85 at [5] and [8].

89 For an extreme example, see *Attorney-General, ex rel Gould v Mayor of Christchurch* [1930] NZLR 931 (CA).

[39] We accept that the merits of a proposed appeal may, in principle, be relevant to the exercise of the discretion to extend time. This is because there will be occasions on which the court will risk facilitating unjustifiable delaying tactics on the part of dilatory or recalcitrant litigants if it does not consider the merits.[90] There are three qualifications to this principle, however:

(a) There will be some instances in which the merits or otherwise of a proposed appeal will be overwhelmed by other factors (such as the length of the delay and the extent of the prejudice to the respondent or others) and so will not require consideration.

(b) As we have already indicated, the merits will not generally[91] be relevant in a case such as the present where there has been an insignificant delay as a result of a legal adviser's error and the proposed respondents have suffered no prejudice (beyond the fact of an appeal). As we noted above,[92] r 29A differentiates between cases where the respondent consents to the extension and those where it does not, giving the Court broader powers in the former case. In cases of this type, respondents are generally best advised to consent to an extension to enable the appeal to be determined promptly. The delay which has occurred in final determination of this case could have been avoided had the respondents given their consent and has been to no one's benefit. A respondent who does not consent in such a case runs the risk of an adverse costs award.

(c) Consideration of the merits of an appeal in the context of an application to extend time must necessarily be relatively superficial. In this connection, we agree with the observations of the Court of

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90 See, for example, *Havanaco*, above n 68, at [23]. Different considerations may apply where r 29A is engaged after an appeal is deemed to be abandoned and the time for seeking an extension under r 43(3) has expired.

91 We say "generally" because we accept that there may be instances where the delay is short and there is no prejudice but the lack of merit is so obvious (for example, the claim is legally untenable) that the court is justified in refusing to extend time: see below at [39](c).

92 At [28].

> Appeal of England and Wales in *R (Hysaj)*,[93] to the effect that the court should firmly discourage much argument on the merits and should reach a view about them only where they are obviously very strong or very weak.[94] Moreover, any assessment of the merits must take place against the background of this Court's description of the nature of a general appeal in *Austin, Nichols*.[95] Accordingly, a decision to refuse an extension of time based substantially on the lack of merit of a proposed appeal should be made only where the appeal is clearly hopeless. An appeal would be hopeless, for example, where, on facts to which there is no challenge, it could not possibly succeed, where the court lacks jurisdiction, where there is an abuse of process (such as a collateral attack on issues finally determined in other proceedings) or where the appeal is frivolous or vexatious. The lack of merit must be readily apparent. The power to grant or refuse an extension of time should not be used as a mechanism to dismiss apparently weak appeals summarily.

[40] Finally, we should note that, in some circumstances, the court will be able to deal with concerns that might arise from extending time by imposing conditions, for example, to ensure that the appeal is dealt with promptly. Conditions as to costs might also be imposed, as in *State Insurance Ltd v Brooker*, where the applicant was required to pay its own costs of the appeal whatever the outcome.[96]

This case

[41] As we noted above, in the present case the Court of Appeal accepted that the length of the delay, the reasons for it, the parties' conduct and the lack of any prejudice from the delay favoured granting leave.[97] The decisive factors in the Court's decision to refuse leave were that the Court considered that Ms Almond's proposed appeal was hopeless and that it was time to bring an end to intra-family litigation that had been contentious and divisive. The Court considered that the

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93 *R (Hysaj)*, above n 82.
94 See above at [34].
95 *Austin, Nichols*, above n 13.
96 *Brooker*, above n 39, at [21].
97 Above at [5].

appeal was hopeless because it sought to challenge findings made by the trial Judge based principally on assessments of credibility.

[42] We deal first with the second reason given by the Court of Appeal – that it was time to bring an end to intra-family litigation that had been contentious and divisive. While that is an understandable sentiment, we do not think it is relevant. Ms Almond had a right to appeal. She sought to exercise that right, and would have done so had her solicitors not made a calculation error which meant her notice of appeal was filed a day late. Whether her decision to appeal was an appropriate decision in the family's particular circumstances is neither here nor there.

[43] We turn then to the principal reason given by the Court of Appeal, namely that the appeal was hopeless. We have already cited the passage from *Austin, Nichols* in which this Court summarised the approach to be taken by an appellate court on a general appeal.[98] The Court did acknowledge, however, that an appellate court must exercise caution in over-turning factual findings when the first instance court has had an opportunity to assess credibility and its findings as to credibility are critical to its factual findings overall. We refer to two passages from the judgment:[99]

> The tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important). In such a case the appeal court may rightly hesitate to conclude that findings of fact or fact and degree are wrong.

And later:[100]

> The appeal court must be persuaded that the decision is wrong, but in reaching that view no "deference" is required beyond the "customary" caution appropriate when seeing the witnesses provides an advantage because credibility is important.

[44] These passages indicate that, where there is an appeal which involves a challenge to factual findings made by the trial judge, the factual findings and the basis for them will require careful assessment by the appellate court. In general, that will not be an assessment that can sensibly be undertaken in a summary way. In the present case, we acknowledge that the trial Judge had the opportunity to assess the

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98 *Austin, Nichols*, above n 13, at [16], cited above at [7].
99 At [5] (footnotes omitted).
100 At [13] (footnotes omitted).

witnesses and that her assessment played an important part in her factual findings. However, we think it significant that there is objective contemporaneous evidence which supports Ms Almond's account, in particular a letter written by her late father to the Council in which he explained the nature of the arrangements in relation to the property.[101] We are not persuaded that this is one of those cases where the merits are so obvious that it can be said with certainty following a summary process that the appeal cannot possibly succeed. Indeed, it will be a relatively rare case where it is possible to conclude summarily that an appeal, even one against factual findings, must necessarily fail, so that the appeal can (effectively) be struck out.

[45] In the result, then, we allow the appeal. The application for an extension of time to appeal to the Court of Appeal is granted. The stay will remain in effect until the determination of the appeal in the Court of Appeal. The respondents are jointly and severally liable to pay costs of $13,000 to the appellant, plus reasonable disbursements.

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Rice Craig, Auckland for Second and Third Respondents

[101] *Almond* (HC), above n 1, at [78]–[81].