



**Supreme Court of New Zealand
Te Kōti Mana Nui**

30 MAY 2017

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

***JANFERIE MAEVE ALMOND v BRUCE JAMES READ, ETHNE
GLADYS READ AND CHRISTOPHER JOHN READ***

(SC 98/2016) [2017] NZSC 80

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

The issue

The issue in this case was whether the Court of Appeal was correct to dismiss an application for an extension of time to appeal where the appeal was filed one day out of time as a result of a lawyer’s error. The Court refused to grant the extension because it considered the appeal to be hopeless.

Result

This Court has allowed the appeal unanimously on the basis that the length of the delay, the reasons for it, the parties conduct and the lack of any prejudice from the delay were all factors which favoured the granting of an extension of time. The merits of the case were not so clear that it could be said with certainty following a summary process that the appeal could not possibly succeed.

Background

The appellant is 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 the appellant lives and is the sole registered proprietor.

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 the appellant holds shares in the property on trust for them.

In the High Court, Thomas J found in favour of the respondents, holding 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.

The appellant instructed her solicitors to file an appeal against Thomas J's decision. Although they served the notice of appeal on the respondents within the 20 working day period required under the Court of Appeal (Civil) Rules 2005, the solicitors filed it in the Court of Appeal one day late 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 required, they filed an application for an extension promptly. The respondents opposed the application, on the basis that the appeal was without merit.

The Court of Appeal refused to extend time. The Court considered that the appeal was hopeless because it sought to challenge findings made by the trial Judge, which it said were based principally on assessments of credibility.

This Court gave leave to appeal against that decision and granted a stay of execution of Thomas J's judgment until further order of the Court.

At issue on the appeal were the principles to be applied in relation to applications for an extension of time to appeal under r 29A of the Court of Appeal (Civil) Rules.

Reasons

This Court found that the ultimate question when considering the exercise of the discretion to extend time to appeal is what the interests of justice require. That necessitates an assessment of the particular circumstances of the case, including: the length of the delay; the reasons for the delay; the conduct of the parties, particularly of the applicant; any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome; and the significance of the issues raised by the proposed appeal, both to the parties and more generally.

The Court accepted that the merits of a proposed appeal may, in principle, be relevant to the exercise of the discretion to extend time. However, there are three important qualifications to this principle. First, there will be some instances in which the merits or otherwise of an appeal will be overwhelmed by other factors and so will not require consideration; second, the merits will not generally be relevant in a case where there has been an insignificant delay as a result of a legal adviser's error and the proposed respondents have suffered no prejudice; and third, consideration of the merits of an appeal in the context of an application to extend time must necessarily be relatively superficial, so that a decision to refuse an extension of time on the basis of a lack of merit should only be made where the appeal is clearly hopeless.

In this case, the Court has found that the merits of the case were not so clear that it could be said with certainty following a summary process that the appeal could not possibly succeed and other relevant factors all favoured granting the extension of time.

Therefore, the appeal is allowed, time to appeal is extended and the stay on the High Court judgment will remain in effect until the determination of the appeal in the Court of Appeal.

Contact person:
Kieron McCarron, Supreme Court Registrar (04) 471 6921