

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA730/2015
[2016] NZCA 147**

BETWEEN	JANFERIE MAEVE ALMOND Appellant
AND	BRUCE JAMES READ AND ORS First Respondent
AND	ETHNE GLADYS READ Second Respondent
AND	CHRISTOPHER JOHN READ Third Respondent

Hearing: 18 April 2016

Court: Harrison, Wild and Kós JJ

Counsel: D Law and M McFarland for Appellant
J Airey for First Respondent
N Woods and L Johnson for Second and Third Respondents

Judgment: 21 April 2016 at 11.45 am

JUDGMENT OF THE COURT

- A The application for an extension of time to appeal is declined.**
 - B There is no order as to costs.**
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REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] We would normally exercise our discretion under r 29A of the Court of Appeal (Civil) Rules 2005 to grant an extension of time to a party whose notice of appeal was filed one day late, and where the delay was caused by her lawyer's error and there was no prejudice to the respondent. However, in this instance we are satisfied that the appeal is hopeless, and no purpose would be served by granting an indulgence.

Background

[2] The applicant, Janferie Almond, is the sister of Bruce and Christopher Read and the daughter of Ethne Read (collectively the Reads), the respondents. Mrs Read is now 93 years of age and in care.

[3] Ms Almond is the registered proprietor of a rural property in Drury, South Auckland which she purchased in 2002 for a price of \$190,000. The Reads allege, and Ms Almond denies, that she bought the property pursuant to an oral agreement that each of them would own beneficial shares in the property proportionate to their respective financial contributions towards the purchase price and subsequent improvements. The Reads allege Ms Almond holds title as constructive trustee for their individual interests in nominated shares. In the High Court Thomas J gave judgment in the Reads' favour.¹

[4] The Judge summarised the factual issues for her determination as follows:

[24] The factual issues to be explored in respect of each of the plaintiffs are extensive and require determination prior to a consideration of the legal issues. They are:

- (a) What, if anything, did the parties agree about the purchase of the Property?
- (b) Bruce Read:
 - (i) Did the \$130,000 contribution to the purchase price for the Property belong to Bruce Read or Ms Almond?

¹ *Read v Almond* [2015] NZHC 2797.

- (ii) What was the basis upon which Bruce Read paid \$6,000 towards the cost of a garage constructed on the Property?
 - (iii) Did Bruce Read purchase Rebecca's share in the Property for \$50,000?
- (c) Mrs Read:
- (i) Did Mrs Read make three payments of \$10,000 towards the purchase of the Property, and if so, were they made in the expectation of obtaining a proportionate interest in the Property?
 - (ii) Was construction of the subsidiary dwelling and contributions to improvements to the Property made in expectation of obtaining a proportionate interest in the Property?
 - (iii) Were contributions allegedly to the mortgage over the Property made in the expectation Mrs Read would obtain a proportionate interest in the Property?
 - (iv) Did Ms Almond act contrary to her duties as Mrs Read's attorney in relation to the payment of money to her from Mrs Read's bank account?
- (d) Chris Read:
- (i) Did Chris Read pay \$25,000 or \$30,000 towards the purchase of the Property and, if so, was that payment made in the expectation of obtaining a proportionate interest in the Property?
 - (ii) Did Chris Read make contributions to Ms Almond's mortgage and, if so, were the contributions made in the expectation of obtaining a proportionate interest in the Property?

[5] The Judge found substantially for the Reads on each of these issues. On the threshold or primary issue, she was satisfied that all the parties agreed Ms Almond should hold title on the terms alleged by the Reads. She was satisfied that the evidence of all three Reads was consistent with the existence and terms of such an agreement, as was Ms Almond's own conduct until the parties fell out.²

[6] The balance of Thomas J's lengthy judgment was largely constituted by factual findings about whether the Read brothers and their mother made financial contributions to the purchase price and improvements as alleged. Based upon those

² At [83]–[84].

findings the Judge carefully determined the legal consequences. She found the existence of an institutional constructive trust whereby Ms Almond held title to the property as trustee for the beneficial interests of all four family members ranging from 23.88 per cent to 26.58 per cent — in rough terms they were equally entitled to the net proceeds of sale.³

[7] The Judge ordered Ms Almond to sell the property.⁴ She also found Ms Almond in breach of her duties as her mother's attorney and ordered her to pay compensation of \$29,176 plus interest.⁵ She awarded the Reads costs against Ms Almond.

[8] Thomas J's judgment was given on 11 November 2015. Ms Almond's notice of appeal was filed on 10 December 2015, one day outside of the 20 working day statutory limit. It is common ground that Ms Almond's delay was due to an error by her lawyers. The Reads oppose her application for leave.

Decision

[9] Our power to grant an extension of time to file a notice of appeal is well settled.⁶ The overarching consideration is the interests of justice.⁷ The factors relevant to that inquiry are the length of the delay and its reasons; the parties' conduct; the extent of prejudice caused by the delay; the prospective merits of the appeal; and whether the appeal raises any issue of public importance.⁸ 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.

[10] Ms Almond appeals on a range of grounds. Principally she alleges that the Judge's material factual findings were in error. In argument Ms Law referred to

³ At [251].

⁴ At [261]–[262] and [276].

⁵ At [275].

⁶ Court of Appeal (Civil) Rules 2005, r 29A.

⁷ *My Noodle Ltd v Queenstown-Lakes District Council* [2009] NZCA 224, (2009) 19 PRNZ 518 at [19].

⁸ *Wardell v ASB Bank Ltd* [2015] NZCA 344 at [12].

various documents which, she submitted, tended to undermine or contradict the Judge's findings.

[11] The trial lasted for at least a week. The Judge heard and saw each of the parties giving evidence-in-chief and under extensive cross-examination. Mrs Read's evidence was taken at her rest care facility. The case falls within the category requiring an appellate court's express recognition of the trial Judge's real benefit derived from seeing and hearing the relevant witnesses and in following the collective effect of the evidence as it unfolded.

[12] Thomas J's judgment is a comprehensive recital of the relevant evidence and, more particularly, her findings on each of the contested factual issues. The dispute, and the issues it generated, was of such a nature that only one side could be truthful. There was no room for adopting the middle ground or preferences for evidence based on reliability. It was an outright credibility conflict. Ms Law's reference to a selection of documents does nothing to call into question the overwhelming weight of the Judge's conclusion that the Read brothers and their mother were telling the truth. By contrast, she was satisfied that Ms Almond was not truthful.

[13] The Judge explained in detail why she did not accept Ms Almond's evidence. We do not need to recite or refer to her many, carefully articulated reasons. It is sufficient to note, for example, that the Judge found Ms Almond's denial of financial contributions by her siblings and mother was inconsistent with certain key and uncontested facts, internally inconsistent, and inconsistent with a range of documentary material.⁹ Thomas J also found that Ms Almond misused her mother's trust under a power of attorney by misappropriating \$29,176 for her own purposes. In our judgment her sustained findings adverse to Ms Almond's credibility could not possibly be impeached on appeal.

[14] Ms Almond's remaining grounds of appeal are that the Judge erred in rejecting a defence based on laches and in not following another decision of the High

⁹ *Read v Almond*, above n 1, at [98]–[103], [119]–[121], [139]–[142], [175]–[178] and [271]–[274].

Court in *Kwon v Quon*.¹⁰ However, the Judge found that, first, while the Reads had been guilty in some delays in bringing their claim there was no prejudice to Ms Almond as a result;¹¹ and, second, the decision in *Kwon* was distinguishable.¹² We agree with her. Otherwise Ms Almond does not allege any material error of law.

[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.

Result

[16] The application for an extension of time to appeal is declined.

[17] We note that Ms Almond is, somewhat surprisingly, in receipt of an interim grant of legal aid. No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.¹³ Were it not for the interim grant,¹⁴ Ms Almond would have been ordered to pay costs to the Reads as for a standard application for an extension of time to appeal on a band A basis with usual disbursements.¹⁵

Solicitors:

Law & Associates, Manukau for Appellant

Inder Lynch, Auckland for First Respondent

Rice Craig, Auckland for Second Respondent

¹⁰ *Kwon v Quon* [2013] NZHC 1431.

¹¹ *Read v Almond*, above n 1, at [237]–[240].

¹² At [239]–[231].

¹³ Legal Services Act 2011, s 45(2).

¹⁴ Section 45(5).

¹⁵ Court of Appeal (Civil) Rules 2005, sch 2.