NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT REMAINS IN FORCE: SEE [2018] NZDC 23200.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA301/2021
[2022] NZCA 512

BETWEEN	W Appellant
AND	W First Respondent
AND	MC TRUSTEES (NO 2) LIMITED (as Trustees of the W Family Trust) Second Respondent

Hearing:	31 August 2022
Court:	French, Courtney and Goddard JJ
Counsel:	J R Hosking for Appellant First Respondent in Person No appearance for Second Respondent
Judgment:	31 October 2022 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed. We grant the extension of time for Ms W to appeal the decision in *[W] v [W]* [2015] NZFC 4905 to the High Court.

B The appellant is entitled to costs for a standard appeal on a band A basis, with usual disbursements.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] In 2015 Judge Callinicos delivered a decision in the Family Court at Gisborne setting aside relationship property agreements entered into between Ms W and her (now former) husband, Mr W in 2006 and 2011.[1] Ms W applied for special leave granting her an extension of time to appeal the judgment.[2] Venning J refused the application.[3] Ms W appeals that decision.[4]

[2] Ms W's ultimate goal is to impugn the Family Court decision in respect of both the substantive outcome and also the serious adverse credibility findings made against her. Mr W asserts the correctness of all the findings. He wished to address those substantive issues before us, but the present appeal is not concerned with the correctness of the Family Court Judge's decision. The issue for this Court is whether Venning J erred in refusing to extend the time for Ms W to appeal the decision.

[3] The grant of an extension of time to appeal involves the exercise of a discretion. The correct approach in exercising the discretion is set out in the Supreme Court's decision in *Almond v Read*.[5] The ultimate question is what the interests of justice require. The factors likely to require consideration are:

(a) the length of the delay;

(b) the reasons for the delay;

(c) the conduct of the parties, particularly of the applicant;

(d) any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome; and

(e) the significance of the issues raised by the proposed appeal, both to the parties and more generally.

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1 *[W] v [W]* [2015] NZFC 4905 [Substantive Family Court judgment].
2 High Court Rules 2016, r 20.4.
3 *[W] v [W]* [2016] NZHC 941 [Judgment on appeal].
4 This Court granted Ms W an extension of time to appeal Venning J's decision: *W (CA301/2021) v W* [2021] NZCA 676, [2021] NZFLR 642.
5 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].

[4] This Court will only intervene in the exercise of the discretion where there has been an error of law or principle, or the first instance court has taken into account an irrelevant consideration or failed to take a relevant consideration into account, or the decision is plainly wrong.[6] Ms W asserts all of these errors. One — the High Court Judge's assessment of the merits of the proposed appeal — warrants mention at this stage.

[5] In *Almond v Read*, the Supreme Court acknowledged that the merits of a proposed appeal may be relevant to avoid facilitating unjustifiable delaying tactics on the part of dilatory or recalcitrant litigants. However, it made clear that argument on the merits is only appropriate where they are obviously very strong or very weak and such consideration should occur against the background of the nature of a general appeal:[7]

> 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.

[6] *Almond v Read* post-dates Venning J's decision and the High Court Judge understandably took the approach then understood to be correct.[8] This involved consideration of the merits on a different basis than would be the case under *Almond v Read*. However, we must determine the appeal using the *Almond v Read* framework.

Background

[7] Mr and Ms W married in 1990. When they separated in 2006 after 16 years of marriage, the division of their relationship property should have been reasonably straightforward. However, the exercise proved to be protracted and complex.

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6 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].
7 *Almond v Read*, above n 5, at [39(c)].
8 *My Noodle Ltd v Queenstown-Lakes District Council* [2009] NZCA 224, (2009) 19 PRNZ 518.

The 2006 agreement

[8] Throughout the marriage the couple farmed at Mangaroa Station, near Gisborne. Mr W had received a two-thirds share in the farm from a family trust prior to the marriage. In 2000 he sold that interest to a trust settled by him — the W Family Trust (WFT) — of which he and Ms W and their children were beneficiaries. Mr W's father sold the remaining one-third interest in the farm to the WFT. Mr W and his father both had debts owed by the WFT.

[9] The WFT also owned a section in Winifred St, Wainui Beach, which had been purchased in 2001 with the intention that it would be used by the family and, ultimately for Mr and Ms W to live in when they retired.

[10] The couple's main assets were the homestead, the farming business, a property in Beach Rd, Tokomaru Bay, and a half-share in a property in Tawhiti St, Tokomaru Bay.[9] However, Winifred St was also treated by the parties as relationship property. In addition, Ms W claimed that, as a result of the application of relationship property and her own efforts in the period prior to the transfer of the farm to WFT, she was entitled to a share in the increase of the farm over that time.

[11] The parties reached an agreement at a mediation in August 2006 (the 2006 agreement) under which Ms W received property totalling $1,014,250, comprising mainly the interests in the Tokomaru Bay properties and cash of $600,000. The Winifred St property was to be transferred to a new trust, the Pukelooki Trust, of which Mr and Ms W and a mutual friend were the trustees. The children were the discretionary beneficiaries. Mr W received a life interest in Winifred St and Ms W a life interest in it on his death. Improvements would be accounted for as a debt to the party undertaking them.

[12] There were disputes over the implementation of the agreement in relation to chattels and the circumstances in which the couple finally disengaged were acrimonious. The marriage was dissolved in December 2008.

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9 We omit reference to other assets such as vehicles, chattels and life insurance policies.

[13] In May 2009 Ms W applied to set aside the 2006 agreement. The grounds for her application were mistake as to the effect of the agreement in relation to the Winifred St property, inadequate legal advice in that proper valuations and disclosure were not obtained, and that the 2006 agreement had been entered into under duress. Alternatively, it was said that the agreement was seriously unjust.

[14] In relation to the ground of duress, Ms W relied on her fragile mental state at the time of the agreement as a result of abuse by Mr W during the marriage. Mr W denied that he had been abusive. In response, Ms W filed a further affidavit. One of the exhibits to the affidavit was an Accident Compensation Corporation (ACC) document known as a "20-hour" form that contained details of counselling Ms W had received in 1995, including information recorded by the ACC counsellor. Ms W had altered the form in a number of respects. On her account, this was to correct errors in the information recorded by the counsellor. Most relevantly, Ms W changed her reported age at the time of the alleged abuse from "19–25" to "31–35" and removed references to her former de facto partner, leaving only a reference to having been abused by Mr W.

[15] The fact of the alterations was known to Mr W before the trial, though not the details. Mr W applied to strike out the evidence. Before that application could be heard, the parties agreed to a further mediation.

The 2011 agreement and Mr W's application to set it aside

[16] At a mediation in February 2011, the parties entered into another relationship property agreement (the 2011 agreement). Ms W discontinued her proceedings shortly thereafter.[10] Under the terms of the 2011 agreement Mr W gave up his life interest in Winifred St and agreed that the property would be transferred to the Patangata Trust of which Ms W and her then solicitor, Ms Gravatt, were the trustees. He also agreed to pay Ms W a further $70,000.

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[10] The notice of discontinuance dated 13 March 2011 was before us, though it is not clear what date it was filed.

[17] In September 2011 Mr W applied to set aside the 2011 agreement. The grounds for the application were that the 2011 agreement was seriously unjust, that the process had been unsatisfactory, that Mr W had not received adequate advice and at the time of the mediation he was suffering from a depressive illness.

[18] Mr W also applied under s 182 of the Family Proceedings Act 1980 (FPA) to vary the 2006 agreement by having Ms W's life interest in Winifred St valued and paid out to her and by removing Ms W as a trustee of the Pukelooki Trust and requiring her and any other person with a mortgage or charge against the title of the Winifred St property to remove it (the s 182 application).[11]

[19] Mr W's applications were filed out of time necessitating an extension of time.[12] In his application for an extension of time Mr W relied on both his poor mental health at the time of the 2011 agreement and the altered 20-hour form. Both aspects were taken into account. Granting the extension at first instance, Judge Druce described the 20-hour form as "perjured evidence".[13]

[20] Mr W obtained non-party discovery from ACC. His then counsel was provided with access to Ms W's ACC records to inspect. She saw the original 20-hour form, and was able to compare the altered copy annexed to Ms W's affidavit. The altered 20-hour form assumed significance in Mr W's case.

[21] The applications were heard over eight days in late 2014 and early 2015. The Family Court Judge delivered his decision on 15 June 2015.

[22] The first issue the Family Court Judge addressed was Ms W's credibility, which he considered at length, making very strong adverse credibility findings against her.[14] These were based substantially, though not entirely, on the altered 20-hour form.

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11 Ms W also made an application for a lump sum to recognise economic disparity and for spousal maintenance, which was declined: Substantive Family Court judgment, above n 1, at [184]–[193].

12 Property (Relationships) Act 1976, s 24(2).

13 *[W] v [W]* [2012] NZFC 8314 at [52] and [54]. This decision was the subject of an unsuccessful appeal by Ms W: *[W] v [W]* [2013] NZHC 1755.

14 Substantive Family Court judgment, above n 1, at [62].

Ultimately, the Family Court Judge referred the matter of the altered document to the police for consideration of a perjury charge against Ms W.[15]

[23] As to the substantive issues, the Family Court Judge concluded that the 2011 agreement was unfair to Mr W. He found that, to a significant extent, the unfairness of the agreement was attributable to inadequate advice Mr W had received from his lawyers, some of whom were the subject of trenchant criticism.[16] The Family Court Judge set aside the 2011 agreement and directed Ms W to repay the $70,000 that Mr W had paid her pursuant to that agreement.[17]

[24] The Family Court Judge then turned to consider the 2006 agreement. At the outset of his decision, he had referred (erroneously) to Ms W's application to set aside the 2006 agreement as still being live.[18] However, he approached the status of the 2006 agreement on the basis that:

> [344] Given the 2011 agreements have been set aside, an issue arises as to whether the final division should remain in accordance with the 2006 division, or be regulated by reference to s 21M.

[25] The Family Court Judge concluded that the Winifred St property was not relationship property and the 2006 agreement was unfair to Mr W.[19] He did not consider that an order under s 182 of the FPA was the appropriate way to deal with the issues created by the 2006 agreement.[20] Although he allowed the division of property in Ms W's favour to remain to the value of $1,104,250, he nevertheless set aside the 2006 agreement.[21] That resulted in the transfer of Winifred St to the trustees of the Patangata Trust being set aside.[22] The Family Court Judge ordered that the property be transferred into the name of the WFT or such other trust as nominated by Mr W.[23]

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15 At [371].
16 At [312]–[320].
17 At [362].
18 At [1].
19 At [122]–[129] and [355].
20 At [356].
21 At [354]–[355] and [359(c)].
22 At [362(c)]. The Family Court Judge erroneously referred to the wrong trust when making this order.
23 At [362(d)].

Costs

[26] The Family Court Judge did not make a costs order at the conclusion of the substantive judgment. Instead, he said:

> [383] It follows that the outcome of this decision has been significantly unfavourable to [Ms W]. If [Mr W] seeks costs then he is invited to file full and detailed submissions (supported by authority) within 42 days of the issue of this decision. If [Ms W] opposes an order for costs then she shall file full response within 35 days thereafter.
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> [384] I do observe that the issue of costs is somewhat complicated by the fact that much of [Mr W's] need to seek to set aside the 2011 agreement derives from inadequacy of the advice that led to it. [Mr W] will need to weigh that factor into any request for costs against [Ms W].

[27] Mr W sought indemnity costs based on Ms W's conduct of her case and the use of falsified evidence as the foundation for her application to set aside the 2006 agreement.

[28] In a decision dated 9 November 2015, the Family Court Judge declined to award indemnity costs and instead fixed costs on a 3C basis with an uplift of 30 per cent, which resulted in Ms W having to pay Mr W costs and disbursements totalling $267,998.29.[24] The Family Court Judge considered that, although Ms W's conduct met the threshold for indemnity costs, citing her reliance on "false evidence", she was not solely responsible for the cost of the proceeding — the poor legal advice that Mr W had received was a causative factor.[25]

The hearing before Venning J

[29] In December 2015 Ms W applied to extend time for appealing the substantive decision and appealed the costs decision (for which time had not yet expired). The application was heard on 28 April 2016. Ms W was unrepresented and appeared in person. She had filed a notice of appeal and written submissions, to which were attached an affidavit (wrongly intituled). Mr W was represented by senior counsel.

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24 *[W] v [W]* [2015] NZFC 9395, [2016] NZFLR 13 at [61]–[62].
25 At [56]–[57].

[30] The High Court Judge addressed the length of the delay and the reasons for it, the conduct of the parties, prejudice to the respondent, the merits of the proposed appeal and the significance of the issues arising. We come to those specific issues shortly. Having considered them, the High Court Judge concluded:[26]

> [45] Weighing all relevant matters, the interests of justice in this case are overwhelmingly in favour of declining leave. The policy behind time limits for appeals is finality in litigation. This is a prime example of a case where finality is important both for credibility of the judicial system and also for the benefit of the parties to the proceedings before the Court (whether or not Ms [W] is able to recognise that at this time).

[31] In September 2016 Ms W's appeal against the costs decision was dismissed after she failed to advance it.[27]

Ms W is charged with perjury

[32] In 2017, following the Family Court Judge's reference of the matter to the police, Ms W was charged with perjury. In 2018 she was convicted[28] and sentenced to one year of home detention.[29] Ms W appealed her perjury conviction and sentence. The appeal against conviction failed but the sentence was reduced to nine months' home detention.[30]

[33] This Court granted leave for Ms W to bring a second appeal against conviction.[31] That appeal was successful and in 2020 the conviction was set aside.[32] The reasons for allowing the appeal were, essentially, that the original of the document was not put before the trial court, so the extent of the changes could not be determined.[33] Further, some alterations were obvious from the photocopy, Ms W had acknowledged she had made alterations and there was no evidence that, in swearing the affidavit, she had actually sworn that the exhibit was a "true copy" of the original document.[34] Relevantly for present purposes, the Court also expressed a view

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26 Judgment on appeal, above n 3.
27 *[W] v [W]* [2016] NZHC 2212.
28 *R v [W]* [2018] NZDC 2543.
29 *R v [W]* [2018] NZDC 22589
30 *W v R* [2019] NZHC 2740.
31 *W (CA641/2019) v R* [2020] NZCA 90.
32 *W (CA641/2019) v R* [2020] NZCA 286.
33 At [13].
34 At [41].

about the low probative value of the document and the risk that undue reliance on it could lead to incorrect inferences about Ms W's motivations.[35]

Appeal

[34] Ms W asserts error by the High Court Judge in his consideration of all the factors relevant to the granting of an extension of time to appeal. In addition, she relies on the setting aside of her conviction, and comments made by this Court about the probative value of the 20-hour form as a change of circumstance that justifies a different outcome.

The length of the delay

[35] Time for appealing the substantive decision expired on 13 July 2015. Ms W filed her application for an extension of time to appeal on 7 December 2015, a delay of just under five months.

[36] Venning J regarded the delay as significant in itself and "particularly relevant" in the context of the background to the proceedings.[36] He referred to the length of time that had passed since the parties separated, noting Ms W's application to set aside the 2006 agreement, then "further delays" until the 2011 agreement.[37]

[37] Ms Hosking, for Ms W, submitted that the High Court Judge's consideration of the time since separation was irrelevant. We agree that the focus on this aspect detracted from the fact that the actual delay in bringing the appeal was a moderate one. Issues of finality and of the conduct of the parties during the course of long litigation are separate considerations. While the fact that the parties had separated in 2006 was potentially relevant to the overall assessment of the interests of justice, it was not relevant in considering the actual delay in applying for leave.

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35 At [19].
36 Judgment on appeal, above n 3, at [8].
37 At [9].

The reasons for the delay

[38] It was clear that Ms W's immediate motivation in applying for an extension was the costs order. She said that she had not understood that costs would be awarded against her, much less costs at the level that ultimately were awarded. She was emotionally and financially drained and had decided to move on with her life until the costs judgment was delivered.

[39] In her submissions and affidavit Ms W provided further context for her decision. She described the hearing as "very traumatic" and the decision as "a shock". She said that she struggled to digest some of the Court's findings and that, subsequent to the decision:

> I was not coping mentally with this decision, or indeed the way my life had turned out and I was suffering from anxiety, depression and was self-mutilating.

[40] As a result of the costs judgment Ms W faced either bankruptcy or working to repay Mr W; her only assets were "trust assets" valued at $770,000 and she had minimal savings, a mortgage to Westpac of $509,000 and, as a result of the costs judgment, a debt to Mr W of some $300,000. Upon receipt of the costs judgment, Ms W sought legal advice about an appeal against that decision.

[41] Acknowledging that most parties to long drawn out litigation arising from a former relationship were likely to feel "exhausted and strained" by the proceeding, the High Court Judge nevertheless considered it relevant that Ms W was able to instruct counsel in relation to the issue of costs and saw no reason why she could not have instructed counsel in relation to an appeal at the same time.[38] The High Court Judge noted that, generally, the Court is less receptive to granting leave where there has been such a change of mind.[39] He was also influenced by the fact that Ms W was still within time to appeal the costs decision.[40]

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38 Judgment on appeal, above n 3, at [13].

39 At [16], citing *Donaldson v Green Juice Co Ltd (in rec)* (1995) 8 PRNZ 409 (CA); and *Williams v Allott* (2001) 15 PRNZ 684 (CA).

40 At [15].

[42] Ms Hosking submitted that although the High Court Judge was correct to identify Ms W's change of mind as a relevant factor, he had failed to fully recognise the context in which Ms W made that decision. We accept this submission. The present case is very different from those relied on by the High Court Judge in which there had been a change of mind by the applicant. *Donaldson* involved a call on shares and *Williams* involved an appeal against summary judgment on a sale and purchase agreement following the issue of bankruptcy proceedings. Neither was comparable in terms of the effect of the judgment on the applicant.

[43] The Family Court decision canvassed, in detail, the most personal aspects of the parties' characters and relationship. The resultant credibility findings against Ms W could only be described as excoriating. Few litigants face criticism of this kind. Even if the criticism were justified it was apparent that Ms W was in a fragile mental state. It is evident from her submissions and affidavit that the effect of the judgment was traumatic and the costs judgment essentially the last straw. We think that, in viewing Ms W's change of mind as occurring against the backdrop of the kind of stress that is typical of any long litigation, the High Court Judge failed to recognise the extreme nature of the findings and their effect on Ms W.

[44] In this regard, we take into account the further evidence filed for the purposes of this appeal by Mr Allen, who had appeared for Ms W at the Family Court hearing, Mr Allen's affidavit supports the assertions by Ms W in her submissions and affidavit filed in the High Court. He refers to his observations about Ms W's state of mind following the delivery of the substantive judgment, including conversations with Ms W about how she was coping mentally with the decision and his concern for her mental health. Moreover, he said that some months after the decision, Ms W had approached him to act on an appeal but that he had declined, partly because of his concern about the impact of the ongoing proceedings on her health and wellbeing.

[45] Finally, we accept Ms Hosking's submission that the fact that Ms W was still within time to appeal the costs decision was not a relevant consideration. The costs decision reflected the factual findings, including the credibility assessments, made in the substantive decision. An appeal against the costs decision was unlikely to succeed unless the substantive judgment could also be impugned.

The conduct of the parties

[46] The High Court Judge identified two aspects of the parties' conduct that he regarded as relevant. The first was Mr W's offer to settle all aspects of the litigation, including the costs, by waiving the costs award altogether, on conditions that included, relevantly, repaying the $70,000.[41] There is no criticism of the High Court Judge for this.

[47] Secondly, the High Court Judge took into account Ms W's conduct during the Family Court hearing, based on the Family Court Judge's credibility findings and the fact that the matter of the fabricated evidence had been referred to the police.[42] He rejected Ms W's endeavours to explain the changes she made to the document and to point to other evidence that supported her account.[43] The High Court Judge effectively treated the findings of the Family Court Judge as conclusive.

[48] Ms Hosking submitted that the only conduct relevant to the granting of special leave is that which explains or does not explain the delay. The position is not that narrow. Known misconduct in the course of the hearing may well be relevant. In this case, however, the High Court Judge erred in treating the Family Court Judge's findings as conclusive evidence of misconduct. That reasoning was circular; Ms W was refused an extension of time to appeal factual findings on the basis of those very findings. We return to this point later, in relation to the merits of the proposed appeal.

[49] It is also relevant to note that, although the High Court Judge took into account the fact that the fabricated evidence had been referred to the police, no charge had yet been laid against Ms W. It was unknown whether she would be charged and, if she was, whether she would be convicted. Of course, it is now known that, although convicted, her conviction was set aside. Mr W points out, correctly, that the setting aside of the conviction does not exclude the possibility that Ms W lied or fabricated evidence. But it changes the landscape because it creates uncertainty over an important aspect of the Family Court Judge's findings, making it even more

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41 Judgment on appeal, above n 3, at [18].

42 It will be apparent from the chronology outlined earlier that, at the time of the hearing before Venning J, Ms W had not yet been charged with perjury.

43 Judgment on appeal, above n 3, at [19].

important that the mere fact of the adverse credibility findings not be used as a reason to refuse an extension of time to appeal those findings.

Prejudice

[50] Venning J identified three aspects of prejudice to Mr W that would result if Ms W was permitted to bring her appeal. First, the proceedings would be drawn out further and Mr W, who had already incurred $600,000 in legal and associated costs, would incur further legal costs.[44] Secondly, given that Ms W claimed to be impecunious, Mr W's ability to recover anything further may be questionable.[45] Thirdly, the effect of the proceedings on the parties' children from ongoing litigation would be adverse.[46]

[51] It is apparent that the first two aspects identified do not amount to prejudice as a result of Ms W's delay in bringing an appeal. They would have occurred if Ms W had brought her appeal within time. Mr W's position regarding legal costs and ability to recover further costs was unchanged as a result of the delay.

[52] Nor, in our view, did the perceived adverse effect on the children amount to prejudice caused by the delay. While it might be inferred that allowing the litigation to continue, notwithstanding the delay, could adversely affect the children (by then young adults), equally, it might be viewed as having a neutral effect, given the likely adverse effect on them from the findings against their mother. The evidence was insufficient to draw a conclusion. We note that letters written by the children in support of Ms W at sentencing (which post-dated the hearing before Venning J) show that they were affected by the allegation of perjury against their mother, and the consequent damage to her reputation. It therefore seems unlikely that the children would have perceived the delay as having an adverse effect on them. And in any event, in this context it is only the incremental delay over and above that which would have resulted from a timely appeal that is relevant. There is no reason to think that the incremental delay of some five months would be material to the children.

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44 At [23].
45 At [24].
46 At [25].

[53] The High Court Judge also referred again to the fact that Ms W was not prejudiced because she was still within time to appeal the costs decision.[47] However, as we have already discussed, an appeal against the costs decision was of little use unless the substantive judgment could be impugned.

[54] We therefore consider the issue of prejudice afresh. Mr W has not been able to identify anything that has happened during the nearly five months delay between the appeal period expiring and Ms W applying for an extension of time that might have caused specific prejudice to him. In particular, the Winifred St section remained in its undeveloped state. It was not until 2020 that Mr W and his current partner moved a house onto the section.

[55] We accept that Mr W has suffered significant stress as a result of this litigation. He submits that he is entitled to move on with his life, pointing out that Venning J's decision is now more than six years ago. The length of time this matter has taken to reach this point is very unfortunate. However, and without diminishing the stress that Mr W experienced as a result of the overall time frame, we are satisfied that no specific prejudice resulted from Ms W's nearly five-month delay in applying for an extension of time to appeal.

Merits of proposed appeal

[56] As noted earlier, Venning J applied the principles set out in *My Noodle.* Under that approach, the merits of the proposed appeal were a relevant factor to be considered. This differs from what is now understood to be the correct approach, as explained in *Almond v Read*. On that approach, the merits were relevant only if the proposed appeal was obviously very strong or very weak.

[57] Ms W identified two broad grounds of appeal. The first was a challenge to the credibility findings against her. The High Court Judge treated this ground as having little merit on the basis that an appellate court is bound to recognise the advantages a first instance judge has in assessing a witness and regarded that as particularly relevant

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[47] At [26].

in this case "where the [Family Court Judge] has given a substantial number of careful reasons for coming to his particular view as to credibility".[48]

[58] It is of course, right to recognise the advantages a first instance judge has over an appellate court. For this reason, it is only in exceptional cases that an appellate court will interfere with the factual findings of the first instance judge.[49] In this case, however, the circumstances were unusual in two respects. First, Ms W asserts factual errors by the Family Court Judge that would show the credibility findings to be flawed. Secondly, it is now known that Ms W's conviction has been set aside. Even acknowledging Mr W's point that the difference in the respective standards of proof might mean that the outcome is ultimately the same, it is not possible to say that this ground is completely hopeless.

[59] Ms W's second proposed ground of appeal was that Family Court Judge erred in setting aside the 2006 agreement because there was no application before him seeking that outcome and Ms W was never on notice as to the possibility of being deprived of the benefit of the 2006 agreement (save to the extent that Mr W sought to vary it).

[60] The High Court Judge regarded the status of the 2006 agreement in the Family Court as not clear cut, commenting that "[a]lthough a discontinuance may have been filed on Ms [W's] 2009 application, such discontinuances can be reviewed".[50] He treated the pre-trial applications (Mr W's s 182 application and Ms W's s 15 application) and the evidence filed by the parties as disclosing an intention that the 2006 agreement would be a live issue.

[61] We do not accept that this reasoning shows the proposed ground of appeal to be clearly hopeless. Ms W's application to set aside the 2006 agreement was discontinued and there was never an application made by any party to set aside the discontinuance. Further, Mr W's s 182 application sought only to vary the

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48 At [29].

49 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 197–198; and *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) at 647 per Lord Jauncey, citing *Nocton v Lord Ashburton* [1914] AC 932 at 957 per Viscount Haldane LC.

50 Judgment on appeal, above n 3, at [32].

2006 agreement. In these circumstances, it is not possible to say that this ground of appeal is clearly hopeless. To the contrary, it appears to be well arguable.

[62] Nor do we accept the High Court Judge's view that the setting aside of the 2006 agreement had limited practical effect because, as a result of the finding that the 2011 agreement was unjust to Mr W, the only practical adjustment was for the return of the $70,000 and resettlement of the Winifred St property.[51] The High Court Judge concluded that:

> [43] Even if Ms [W] had an arguable case that the [Family Court Judge] should not have addressed the 2006 agreement (which is not at all clear cut), there is little practical value in such a claim. The substantive merits of the proposed points Ms [W] seeks to raise do not support the grant of leave.

[63] Ms Hosking submitted that there was significant practical value in the 2006 agreement from Ms W's perspective; she would have a life interest on Mr W's death and, in terms of capital, Winifred St would have remained intact for the benefit of the children. The position now is that Mr W and his current partner personally own a half share each in the property. Ms Hosking also points to the natural justice issue arising as a result of Ms W not being on notice that the 2006 agreement might be set aside. We accept that these points have obvious apparent merit. The proposed appeal was not so clearly hopeless as to justify an extensive consideration of the merits and the taking of that aspect into account as a relevant factor.

[64] In reaching this conclusion, we acknowledge Mr W's extensive submissions on the merits of the proposed appeal. The matters he raises may be properly ventilated at a substantive appeal but, as a matter of principle, are not amenable to full consideration now.

Summary

[65] We have concluded that the High Court Judge erred in his consideration of Ms W's application. In our view, the delay was a moderate one that was adequately explained by the traumatic effect of the substantive Family Court judgment on Ms W. Her change of mind following receipt of the costs judgment was explicable in that

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[51] At [37].

context. The conduct of the parties, for the purposes of considering an extension of leave to appeal, was neutral. There was no discernible prejudice from the delay itself. The merits of the proposed appeal were not so obviously strong or weak as to justify consideration of them in any detail.

[66] We therefore step back and consider the overall interests of justice in this case. Self-evidently, achieving finality between the parties in this matter is an important consideration. Mr W and Ms W have been separated for more than 15 years. They have both suffered in the ongoing litigation. Their children have become adults against that backdrop. If an extension of time were granted, the litigation would resume in the High Court and it is unlikely that a final outcome would be reached for another year, assuming there was no further appeal. These considerations tell against allowing the appeal.

[67] Yet the findings made by the Family Court Judge were unusually strong, even in a forum where strong adverse credibility findings are not uncommon. Ms W has experienced serious reputational damage and financial loss as a result of the Family Court decision. There are natural justice issues in relation to the setting aside of the 2006 agreement. In the absence of any real prejudice resulting from the delay in bringing the application for an extension of time, we consider that the interests of justice meant that the application should have been granted.

Conclusion

[68] The appeal is allowed. We grant the extension of time for Ms W to appeal the decision in *[W] v [W]* [2015] NZFC 4905 to the High Court.

[69] The appellant is entitled to costs for a standard appeal on a band A basis, with usual disbursements.

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