

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA77/2011
[2012] NZCA 19**

BETWEEN YOUNG KWAN KIM
 Applicant

AND JUNG NAM LEE
 Respondent

Hearing: 7 February 2012

Court: Glazebrook, Wild and White JJ

Counsel: M W Ryan and S J Corlett for Applicant
 G J Kohler for Respondent

Judgment: 21 February 2012 at 2.30 pm

JUDGMENT OF THE COURT

- A An extension of time to appeal is granted on the conditions set out at [11].**
- B The applicant must pay the respondent's costs for a standard application on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Glazebrook J)

This application

[1] Mr Kim applies for a further extension of time to appeal against a judgment of Heath J delivered on 9 November 2010 awarding Mr Lee \$250,000 damages for

defamation jointly and severally against Mr Kim and two other defendants.¹ We will call this Heath J's Judgment (No 1).

Background

[2] A first extension of time to appeal was granted to Mr Kim by this Court in a judgment delivered on 3 June 2011.² This Court, in granting that extension of time, considered that Mr Kim had suffered a serious injustice at the trial in the High Court in that Mr Kim's lawyer withdrew as solicitor on the record without following the relevant court rules. This meant that Mr Kim, who was unaware of the trial, had had no opportunity to present his case.³

[3] Mr Kim contends that he could have called further evidence in the High Court. He claims to have evidence that would demonstrate that he had no personal involvement with the newspaper which published the defamatory articles, had no knowledge of the defamatory articles at the time they were published, and that he was not involved in the publication of the defamatory articles at all.⁴

[4] In its judgment on the earlier extension of time application, this Court suggested that one way forward could be for the matter to be referred back to the High Court for determination of Mr Kim's non-involvement defence in light of whatever further evidence he might advance. This Court said that that course would require the agreement of both parties because, in effect, the appeal would have been allowed, and relief granted, by consent.

[5] The appeal period under the extension of time expired on 4 July 2011. Mr Kim did not file his notice of appeal by that date. Nor did he seek Mr Lee's consent to the Court's suggestion of referring the matter back to the High Court until 14 July 2011, over a week after the appeal period had expired.⁵

¹ *Lee v The New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 9 November 2010.

² *Kim v Lee* [2011] NZCA 256.

³ At [26]–[29].

⁴ Mr Lee contends that there is nevertheless no realistic prospect that Mr Kim will be able to rely on the innocent dissemination defence provisions in s 21 of the Defamation Act 1992.

⁵ There were, however, some settlement attempts during the appeal period.

[6] Mr Lee declined to consent to a rehearing. Mr Kim then applied, on 12 August 2011, to the High Court for a rehearing.

[7] In Judgment (No 2) delivered on 9 November 2011 Heath J declined Mr Kim's application for a rehearing, largely on jurisdictional grounds, although he indicated that he would also have declined the application on its merits.⁶

[8] On 2 December 2011 Mr Kim filed a notice of appeal against Heath J's Judgment (No 2).⁷

[9] Mr Kim now seeks a further extension of time to appeal against Heath J's Judgment (No 1). If that application for an extension of time is granted, Mr Kim has indicated that he will make an application to adduce further evidence. If that application succeeds, Mr Kim will abandon his appeal against Judgment (No 2).

Decision

[10] Mr Kim could certainly have been more timely in his response to the first extension of time within which to appeal granted by this Court. Pursuing a rehearing in the High Court was no reason not to file the notice of appeal within the proper timeframe. Indeed, even the rehearing option was not pursued in a timely manner.

[11] However, given the reason for the extension of time granted by this Court in its 3 June 2011 judgment, and the fact that Mr Kim was following a suggestion of this Court in seeking a rehearing in the High Court, we are prepared to grant one further extension. We grant that further extension on the condition that the notice of appeal must be filed and served by 2 March 2012, together with the application to adduce further evidence.

[12] On any view, Mr Lee should not have been required to face this second application for an extension of time to appeal. Accordingly, although we have granted the application, Mr Kim is to pay Mr Lee's costs for a standard application on a band A basis and usual disbursements.

⁶ *Lee v The New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 9 November 2011.

⁷ *Kim v Lee* CA805/2011.

Solicitors:

Brookfields Lawyers, Auckland for Applicant

Byoung Kook Ahn, Auckland for Respondent