

Background

[2] The parties were previously engaged in business together for about six years, until 2016. After their relationship broke down, Mr Malik and his wife, Ms Wilson, published numerous defamatory statements about Mr Syed.

[3] Mr Syed brought proceedings in defamation in the High Court and sought damages in the sum of \$12 million. In those proceedings, Churchman J stated that Mr Malik and Ms Wilson had specifically admitted in their statement of defence that they had defamed Mr Syed, and that they did not plead that the publications were true.¹ In these circumstances, he granted Mr Syed's application for judgment on liability.² However, the Judge declined to enter judgment on quantum. The Judge directed that full particulars of the claims against each of the defendants be provided and adjourned the question of quantum for later consideration.³

[4] After a delay of nearly five years, the issue of quantum was dealt with at a hearing in March 2023. On 30 June 2023, Isac J gave judgment in favour of Mr Syed in the sum of \$225,000.⁴ Mr Malik was found liable for the full award.⁵ Ms Wilson was held jointly and severally liable with Mr Malik for \$150,000.⁶ This reflected her lesser role and culpability.⁷

[5] On 3 July 2023, three days after the judgment was delivered, Mr Malik contacted the registry of this Court advising that he wished to appeal and enquiring about the process for doing so. However, rather than filing an appeal at that stage, Mr Malik applied on behalf of himself and Ms Wilson for a retrial in the High Court. He says that a lawyer gave him this idea.

[6] The matter came before Associate Judge Lester on 24 August 2023. The Judge advised Mr Malik by minute dated 25 August 2023 that the High Court had no jurisdiction to conduct a retrial or rehearing and his application was fundamentally

¹ *Syed v Malik* [2018] NZHC 2278 at [14]–[15].

² At [72].

³ At [72]–[75].

⁴ *Syed v Malik* [2023] NZHC 1676 at [51].

⁵ At [50].

⁶ At [52].

⁷ At [50].

flawed. The Judge advised that the appropriate course was to apply for an extension of time to appeal to this Court.

[7] The present application for an extension of time to appeal was filed promptly thereafter, on 28 August 2023.

[8] In a minute dated 26 October 2023, Mallon J noted it was unclear whether the application for an extension of time to appeal was intended to apply, not only to the quantum judgment of Isac J, but also to the 2018 liability judgment of Churchman J. It appears from their memorandum dated 7 November 2023 filed in response to this minute that the applicants seek an extension of time to appeal against both judgments. However, it appears that their primary objective is to appeal the quantum judgment.

[9] Mr Syed opposes the application. Mr Jaques, counsel for Mr Syed, submits that the applicants cannot claim that they were unaware of the time limit for appealing given they contacted the registry of this Court and subsequently spoke to a lawyer. He submits there is no merit in the proposed appeal and Mr Syed should be entitled to rely on the judgment he has obtained.

Principles to be applied

[10] An application for an extension of time to appeal must be determined in accordance with the approach settled by the Supreme Court in *Almond v Read*.⁸ The discretion as to whether to grant the application is ultimately to be determined by assessing what the interests of justice require.⁹ Factors likely to require consideration include the length of the delay, the reasons for it, the conduct of the parties (particularly the applicants), 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 (to the parties and more generally).¹⁰ The merits of the appeal may be relevant but a decision to refuse an extension of time based substantially on that ground should only be made where the appeal is clearly hopeless.¹¹

⁸ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

⁹ At [38].

¹⁰ At [38].

¹¹ At [39].

Should an extension of time be granted to appeal against the 2018 judgment of Churchman J?

[11] We are satisfied that it would not be in the interests of justice to grant an extension of time to appeal against the liability judgment delivered by Churchman J in 2018. The delay of over five years in seeking leave to appeal against this judgment is inordinate. No satisfactory explanation has been offered for the delay. Nor does there appear to be any risk of a miscarriage of justice if an appeal from this judgment is not heard. The applicants admitted to publishing the defamatory statements about Mr Syed. They did not allege that the statements were true. The judgment on liability appears to have been inevitable. The application for an extension of time to appeal does not identify any arguable error in the liability judgment.

Should an extension of time be granted to appeal against the 2023 judgment of Isac J?

[12] We consider that an extension of time to appeal against this judgment should be granted. The applicants were entitled to appeal against this judgment as of right.¹² It seems clear that they wished to invoke that right and took steps to do so within days of delivery of the judgment. The applicants, who are not represented, were apparently under the impression from a lawyer that they could apply for a retrial in the High Court. That was a misstep, but it was actively pursued. The applicants promptly brought the present application for an extension of time to appeal as soon as it was pointed out to them that this was the appropriate course to follow. The delay has therefore been explained. The delay is not long and is unlikely to cause any material prejudice to Mr Syed. No specific prejudice is asserted. The damages award is substantial, and the issue raised by the proposed appeal is plainly of importance to the parties. In these circumstances, we consider the interests of justice require that the present application should be granted in respect of the quantum judgment so that the appeal from that judgment can be determined on its merits.

¹² Senior Courts Act 2016, s 56(1)(a).

Result

[13] The application for an extension of time to appeal against the judgment of Churchman J delivered on 30 August 2018 ([2018] NZHC 2278) is declined.

[14] The application for an extension of time to appeal against the judgment of Isac J delivered on 30 June 2023 ([2023] NZHC 1676) is granted.

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