

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 3/2021
[2021] NZSC 33

BETWEEN

QIUFEN LU
First Applicant

LIANSEN MAO
Second Applicant

AND

INDUSTRIAL AND COMMERCIAL
BANK OF CHINA (NEW ZEALAND)
LIMITED
First Respondent

QIAN HOU
Second Respondent

Court: William Young, O'Regan and Williams JJ

Counsel: Applicants in person
D T Broadmore and L M Edginton for Respondents

Judgment: 15 April 2021

JUDGMENT OF THE COURT

- A The applications for leave to appeal are dismissed.**
- B The applicants must pay the first respondent costs of \$2,500.**
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REASONS

[1] The first applicant, Ms Lu, a Chinese citizen and resident, borrowed approximately \$2.9 million from the first respondent (the Bank) to assist with the purchase of a \$6 million property in Auckland. She intended to subdivide the property, but after various defaults on her obligations, the property was sold by the Bank in a

mortgagee sale. The Bank then commenced proceedings in China to recover the shortfall owing under the loan agreement.¹ The proceedings in China involved a claim not only against Ms Lu but also against the second applicant, Mr Mao, who is Ms Lu's husband. The claim against Mr Mao arises because, under Chinese law, a spouse can be jointly liable with the actual debtor for certain debts. The Bank also obtained freezing orders against the assets of Ms Lu and Mr Mao in China.

[2] The freezing orders in respect of Mr Mao's bank accounts and securities and Ms Lu's bank accounts were subsequently discharged. Only a freezing order over Ms Lu's securities remains.

[3] Ms Lu applied in China to have the China proceedings stayed on the basis that New Zealand is the proper forum for the resolution of the Bank's claim. That application failed. An appeal is yet to be determined.

[4] Ms Lu also commenced proceedings against the Bank in the High Court. She claimed that the Bank had represented to her that it would lend her more money after she had two years of repayment history, but it then refused to do so. Her claims included misrepresentation, promissory estoppel, breach of the Consumer Guarantees Act 1993, other breaches of duty and a breach of the duty of reasonable care to obtain the best price reasonably obtainable in the mortgagee sale.² Ms Lu also sought an anti-suit injunction to prevent the Bank from progressing its proceedings in China on the basis that New Zealand was the appropriate forum for resolution of that claim.

[5] The Bank applied to strike out Ms Lu's claim on the basis that all of the causes of action were untenable and also opposed the anti-suit injunction. The High Court granted the strike-out application and dismissed Ms Lu's application for an anti-suit injunction.³ The High Court awarded the Bank costs of approximately \$20,000 plus disbursements.⁴

¹ As at December 2019, this was about \$840,000 plus enforcement costs, according to the information provided by the respondents.

² Property Law Act 2007, s 176(1).

³ *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* [2020] NZHC 402 (Fitzgerald J).

⁴ *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* [2020] NZHC 1604 (Fitzgerald J).

[6] Rather than appealing against the High Court strike-out judgment, Ms Lu sought to file further proceedings in the High Court. Two proceedings were struck out and one was not accepted for filing. Eventually Ms Lu and Mr Mao filed in the High Court a notice of appeal against the High Court strike-out judgment. They were advised that they had filed this in the wrong Court, and eventually filed a similar notice of appeal in the Court of Appeal on 5 August 2020, approximately five months out of time. They sought an extension of time to appeal.

[7] The Court of Appeal dismissed the application for an extension of time.⁵ Applying the approach set out in this Court's decision in *Almond v Read*,⁶ the Court concluded that it was not in the interests of justice to extend time.⁷ In particular, it took the view that the proposed appeal against the High Court strike-out judgment could fairly be described as "clearly hopeless".⁸

[8] The applicants also applied to stay enforcement of both the High Court strike-out judgment and the High Court costs judgment. Their application was dismissed. In view of the Court's refusal to extend time, the application for stay of enforcement of the High Court strike-out judgment fell away.⁹ There was no appeal against the High Court costs judgment and therefore no basis on which to grant a stay of enforcement of that judgment.¹⁰

[9] The applicants now seek leave to appeal against the decision of the Court of Appeal refusing to extend time to appeal to that Court. They also seek leave to appeal directly to this Court against the High Court strike-out judgment and the High Court costs judgment.

[10] In relation to the Court of Appeal judgment, the applicants say that it is a matter of public interest for customers of Chinese banks to know that the law of China may be applied to enforce loans from New Zealand in China. We do not see that point as

⁵ *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* [2020] NZCA 538 (Kós P and Courtney J) [CA judgment].

⁶ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

⁷ CA judgment, above n 5, at [14] and [28].

⁸ At [27].

⁹ It was, in any event, non-executory, so therefore not amenable to a stay.

¹⁰ At [31].

arising in the proposed application. The Court of Appeal judgment involved an orthodox application of this Court's decision in *Almond v Read* to an application to extend time to appeal to the Court of Appeal. No point of general or public importance arises and there is no appearance of any miscarriage of justice.¹¹ The grounds for leave to appeal are not therefore made out and we decline the application for leave in relation to the Court of Appeal judgment.

[11] In relation to the two High Court judgments, the applicants must satisfy not only the normal criteria for leave to appeal set out in s 74 of the Senior Courts Act 2016, but also the "exceptional circumstances" test imposed under s 75 of that Act.

[12] In relation to the High Court strike-out judgment, there is nothing in the material placed before this Court by the applicants identifying a matter of general or public importance or the appearance of a miscarriage of justice. The criteria in s 74 are therefore not met. Nor is there any basis for arguing that exceptional circumstances exist that would justify a direct appeal from the High Court to this Court in relation to the High Court strike-out judgment. The application for leave to appeal against that judgment is therefore dismissed.

[13] In relation to the High Court costs judgment, this is a routine and orthodox application of costs principles to the Bank's application for costs after its success in the High Court strike-out proceeding. The applicants did not appeal against this judgment to the Court of Appeal. It is clear that neither the normal appellate criteria in s 74 nor the exceptional circumstances requirement of s 75 is met. The application for leave to appeal in relation to that judgment is therefore also dismissed.

[14] The applications for leave to appeal against the Court of Appeal judgment, the High Court strike-out judgment and the High Court costs judgment are dismissed.

¹¹ Senior Courts Act 2016, s 74(2).

[15] The applicants must pay the Bank costs of \$2,500.

Solicitors:
Buddle Findlay, Auckland for Respondents