

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC UR 23/2020
[2020] NZSC 160**

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

Counsel: Applicants in person

Judgment: 23 December 2020

JUDGMENT OF ELLEN FRANCE J

The application for review of the decision of the Deputy Registrar declining to waive the filing fee is dismissed.

REASONS

[1] The applicants presented for filing an application for leave to appeal to this Court from a decision of the Court of Appeal declining to extend the time to appeal to that Court¹ and from two decisions in the High Court.² At the same time the applicants filed an application for a fee waiver. The Deputy Registrar declined the

¹ The Court also declined leave to adduce further evidence and to grant a stay: *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* [2020] NZCA 538 (Kós P and Courtney J) [CA judgment]. The application for leave also indicates an intention to seek a stay.

² *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* [2020] NZHC 402 (Fitzgerald J) [HC judgment (strike-out)]; and *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* [2020] NZHC 1604 (Fitzgerald J) [HC judgment (costs)].

application. He advised the applicants that the filing fee of \$1,100 was payable. The applicants then applied for a review of the Deputy Registrar’s decision under s 160 of the Senior Courts Act 2016. That application has been referred to me for decision.

[2] The background to the judgments is summarised in the second of the judgments in the High Court.³ Fitzgerald J explained that the genesis of the proceedings was that the first respondent, the Industrial and Commercial Bank of China (New Zealand) Ltd:⁴

... had loaned Ms Lu funds in order to complete the purchase of a property in Albany, Auckland. Ms Lu fell into default under the loan agreement, and there were other issues with the property, namely a caveat being registered against the title and Auckland Council obtaining an enforcement order in relation to it. The Bank said these matters also constituted breaches of Ms Lu’s loan agreement. The Bank issued a notice pursuant to s 119 of the Property Law Act 2007 (the PLA) and, after giving Ms Lu the opportunity to sell the property, sold it in October 2019 by way of mortgagee sale.

[3] The Bank thereafter took steps to recover the shortfall due from Ms Lu under her loan agreement. Ms Lu is a Chinese citizen and resides in China. The Bank therefore commenced proceedings against her in China. Those proceedings were also issued against the second [applicant] (Mr Mao, Ms Lu’s husband), on the basis that as a matter of Chinese law, a spouse may in certain circumstances be responsible for the debts of the other spouse.

[4] After the Bank had taken these steps, Ms Lu and Mr Mao filed ... proceedings [in the High Court] alleging a number of breaches and defaults on the Bank’s part. These included misrepresentation claims, claims under the Fair Trading Act 1986 and a claim pursuant to s 176 of the PLA alleging the Bank failed to exercise reasonable care to obtain the best price reasonably obtainable at the time of the sale of the property. ... Ms Lu and Mr Mao also filed an application for anti-suit injunction in relation to the China proceedings. [The High Court] struck out Ms Lu and Mr Mao’s claims and dismissed the application for an anti-suit injunction.

[3] At the heart of the claims of misrepresentation is the allegation that Ms Lu had been promised she would be provided with further loan finance two years after the purchase if she showed a “good record of repayment history” in the interim.⁵

³ HC judgment (costs), above n 2.

⁴ At [2]–[4].

⁵ HC judgment (strike-out), above n 2, at [6(a)] and [68]. The Judge considered this claim was “inherently improbable” but said that, in any event, at the relevant time, Ms Lu had defaulted in her repayment obligations on three occasions: at [73] and [75].

[4] Against this background, the applicants sought to appeal to the Court of Appeal from the High Court's decision to strike out their claims and to decline Ms Lu's application for an anti-suit injunction. As their application was out of time, they sought an extension of time to bring their appeal in the Court of Appeal. In declining to grant the extension of time, the Court took the view the delay in filing the appeal was moderate but inadequately explained. The Court also considered there were aspects of the applicants' own conduct counting strongly against them. Rather than appealing the High Court judgment, they chose to file other proceedings making the same or similar applications. The Court also rejected the applicants' arguments that an extension of time was in the public interest. Rather, the Court said, the principles applied to the strike-out were "well settled" and the applicants' complaints were "directed towards factual matters".⁶ Finally, the Court took the view that the proposed appeal was in the "clearly hopeless" category.⁷

[5] In their application for review, the applicants say that a fee waiver should have been granted because the proposed appeal concerns a matter of "genuine public interest" in terms of reg 5(2)(b)(i) of the Supreme Court Fees Regulations 2003. The applicants contend that the Courts below did not consider the effect of the fact that the Bank is one of four "Chinese banks operated in [New Zealand]", so the Bank's approach will have a broader impact on those who hold property in China and bank with the first respondent or other similar banks in New Zealand. The applicants also say that there is genuine public interest in their claim relating to s 176 of the Property Law Act 2007 and ss 35 and 36 of the Contract and Commercial Law Act 2017.

[6] If the application for leave to appeal was filed, the primary issue that would be before this Court would be a consideration of whether leave should be given to allow the applicants to appeal against the Court of Appeal's judgment refusing to grant an extension of time to appeal to that Court. The applicants do not address that aspect directly. As indicated, the application for leave purports also to challenge the High Court decisions. However, there must be a question as to whether the applicants can

⁶ CA judgment, above n 1, at [23].

⁷ At [27].

pursue both avenues of appeal. In any event, if a direct appeal from the High Court were to be pursued, the applicants would have to meet the higher threshold for leave.⁸

[7] Under reg 5(2)(b), the Registrar may waive the filing fee if satisfied that: (i) the appeal concerns a matter of genuine public interest; and (ii) it is unlikely to be commenced or continued unless the fee is waived. As to reg 5(2)(b)(ii), the applicants indicated in their fee waiver application that they will pay the fee if it is not waived.⁹ In terms of reg 5(2)(b)(i), I agree with the Deputy Registrar that the judgments raise issues particular to this set of facts and apply well-settled principles in relation to the tests for an extension of time and to a strike-out. The High Court made the point that an application for an anti-suit injunction was not a common one in New Zealand.¹⁰ But although the High Court addressed that application, it was in fact unnecessary to do so once the claim had been struck out so that aspect adds nothing here. There was nothing in the decisions that involved any matter of genuine public interest.

[8] The application for review of the decision of the Deputy Registrar declining to waive the filing fee is dismissed.

⁸ Senior Courts Act 2016, s 75. The applicants characterise this part of the application as seeking special leave.

⁹ The applicants do not rely on an inability to pay the filing fee which is the other ground for a waiver: Supreme Court Fees Regulations 2003, reg 5(2)(a).

¹⁰ HC judgment (strike-out), above n 2, at [100] and [107].