

NOTE: COURT OF APPEAL ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF MS A, MR B AND MS C REMAINS IN FORCE.

NOTE: HIGH COURT ORDER SUPPRESSING THE NAMES OF MS A, MR B AND MS C IN [2021] NZHC 2119 AND [2021] NZHC 2090 REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 26/2023
[2023] NZSC 52**

| | |
|---------|------------------------------|
| BETWEEN | B (SC 26/2023) Applicant |
| AND | C (SC 26/2023) Respondent |

Court: O'Regan, Ellen France and Kós JJ

Counsel: Applicant in person

Judgment: 15 May 2023

JUDGMENT OF THE COURT

- A The application to adduce new evidence in this Court is dismissed.**
- B The application for leave to appeal is dismissed.**
-

REASONS

[1] The applicant, Mr B, and his then wife, Ms A, filed proceedings in the High Court at Auckland against the respondent, Ms C, alleging that she had defrauded them of approximately \$500,000. After a lengthy procedural history, the High Court found that New Zealand was not the appropriate forum for determining those claims,

the People's Republic of China was the more appropriate forum.¹ Mr B appealed to the Court of Appeal, but his appeal was dismissed (the Court of Appeal judgment).²

Procedural history

[2] This case has had a lengthy and complex procedural history, which is set out in some detail in the Court of Appeal judgment.³ A summary of this history is sufficient for this judgment.

[3] Mr B alleges that Ms C defrauded Ms A and him by deceiving them into investing in a company based in China which was owned and operated by Ms C. Ms A and Mr B claimed Ms C had represented that this money would be transferred to a New Zealand company also associated with Ms C and then paid to Ms A and Mr B in New Zealand for use in support of their application to immigrate to New Zealand. No payment has been made to them.

[4] Ms C was subsequently arrested in China, and the China-based company ceased trading. Ms C was imprisoned in China. Pending determination of the claims of Ms A and Mr B, the High Court granted a freezing order over Ms C's Auckland property (the property).⁴ In August 2018, the High Court entered default judgment in favour of Ms A and Mr B (the default judgment).⁵

[5] In October 2018, a lawyer representing Ms C (then still in prison) filed a memorandum in the High Court which informed the Court that Ms C had become aware of the proceeding only recently. Ms C subsequently filed a notice of appearance to protest jurisdiction. In response to this, the High Court recalled and set aside the default judgment.⁶ A key factor in the decision to recall was new evidence from Ms C, to the effect that there had not been a meeting in New Zealand where Ms C had made deceptive representations to Ms A and Mr B, contrary to the position outlined in the evidence before the Court in the proceedings leading to the default judgment.

¹ [A] v [C] [2021] NZHC 2090 (van Bohemen J) [High Court judgment].

² B v C [2023] NZCA 28 (Katz, Wylie and Palmer JJ) [Court of Appeal judgment].

³ At [4]–[23].

⁴ [A] v [C] [2017] NZHC 3107 (Lang J).

⁵ [A] v [C] [2018] NZHC 2215 (van Bohemen J).

⁶ [A] v [C] [2019] NZHC 29 (van Bohemen J).

[6] Ms A and Mr B appealed the recall judgment (and another decision rejecting a further application for recall)⁷ to the Court of Appeal. The Court of Appeal allowed the appeal in relation to protest to jurisdiction (but dismissed it in relation to other issues) and remitted the proceeding to the High Court for reconsideration (the 2020 Court of Appeal judgment).⁸ It awarded costs to Ms A and Mr B.

[7] Following reconsideration of the protest to jurisdiction, the High Court again upheld Ms C's protest to jurisdiction.⁹ An important factor in this decision was the High Court Judge's view that the central issue, whether the alleged misrepresentations had been made in New Zealand, could be determined only following cross-examination of Ms C, which could not occur because Ms C was detained in a Chinese prison. The Judge also considered most aspects of the dispute (excluding the misrepresentations) took place in China and that there was a better prospect of calling relevant witnesses in China.¹⁰

The Court of Appeal decision

[8] Mr B again appealed to the Court of Appeal.¹¹ One of the grounds of appeal was that Mr B's claim would be time-barred in China because of the limitation period provided for in art 188 of the Civil Code of China.¹² As this point had not been raised in the High Court, Mr B sought leave to adduce an "Affidavit of Expert Opinion" affirmed by a "practicing lawyer in China" containing evidence of art 188.

[9] The Court rejected the application to adduce this evidence because it was not fresh,¹³ there was a lack of information regarding the qualifications of the expert witness,¹⁴ there was no reference to the code of conduct for expert witnesses, and the affidavit was extremely brief.¹⁵ The Court also noted the potentially damaging involvement of a Mr Young, an interpreter who had had an unusually high degree of

⁷ [A] v [C] [2019] NZHC 206 (van Bohemen J).

⁸ [A] v [C] [2020] NZCA 592 (Collins, Peters and Whata JJ) [2020 Court of Appeal judgment].

⁹ High Court judgment, above n 1.

¹⁰ At [45]–[46].

¹¹ Court of Appeal judgment, above n 2.

¹² At [27].

¹³ At [31].

¹⁴ At [32].

¹⁵ At [33]–[34].

involvement in the proceedings, in the preparation of the affidavit.¹⁶ Having rejected this application, the Court found there was no evidence to support the limitation argument.

[10] Mr B also argued that the protest to jurisdiction should have been rejected on the basis that Ms C's solicitors did not have authority to act for her. Mr B argued that Ms C's signature on an authority to act that was annexed to an affidavit sworn in China by Ms C's Chinese lawyer was forged.¹⁷ The Court rejected this evidence, and found additionally that, as the lawyer's signature was made validly in terms of s 10 of the Oaths and Declarations Act 1957, it would not be appropriate for the Court to find the documents were forged without compelling evidence.¹⁸ Further, there was no plausible motive for forging the signature. The Court commented that the "authority to act" document had no real significance, given that this document is not required by the High Court rules.¹⁹

[11] On the remaining issues, the Court of Appeal upheld the High Court judgment and dismissed Mr B's appeal.²⁰

Grounds for the present application and our assessment of them

[12] The points that the applicant wishes to pursue on appeal to this Court, if leave is granted, and our assessment of them, are addressed in the paragraphs that follow.

[13] Mr B wishes to argue that the Court of Appeal erred in its assessment of the evidence to the effect that Ms C's signature on the form authorising her solicitors to act for her was forged. Mr B also wishes to challenge the Court of Appeal's comment that the High Court rules made the "authority to act" document unnecessary. As the Court of Appeal noted, the issue relating to authority to act has been argued a number of times unsuccessfully.²¹ The Court observed that it was hard to see why anyone other than Ms C would wish to protest the jurisdiction of the Court. This is an

¹⁶ At [35]–[37].

¹⁷ At [39].

¹⁸ At [46(b)].

¹⁹ At [46(c)–(d)].

²⁰ At [47]–[53].

²¹ At [41].

essentially factual issue, raising no matter of public importance²² and we see no appearance of a miscarriage in the way it was addressed in the Court of Appeal.²³

[14] Mr B wishes to argue that Ms C's evidence, contained in an annexure to the affidavit of Ms C's Chinese lawyer, should not have been treated as sufficiently credible to put in issue whether certain representations had been made by Ms C to Ms A and himself.²⁴ Mr B says the evidence was untrue and says it should not have been treated as being true just because it was contained in a sworn affidavit. Mr B says this is particularly so, given Ms C had not made the affidavit herself. We do not see that as raising any matter of public importance and nor do we see any risk of a miscarriage arising if leave is not granted on this point.

[15] The applicant wishes to argue that the Court of Appeal erred in rejecting the application to adduce in evidence the "affidavit of expert opinion" regarding art 188 of China's Civil Code and also wishes to argue that, even if the affidavit was correctly rejected as expert evidence, it should have been admitted under s 144(1)(b) of the Evidence Act 2006. As noted earlier, the Court of Appeal found the evidence was not fresh or cogent. It had doubts about a number of aspects of the proposed evidence. We do not see any appearance of error in the way the Court dealt with this. The text of art 188 may have been admissible under s 144(1)(d) of the Evidence Act. But the Court of Appeal was not asked to admit it under that provision. In any event, we do not consider that evidence of the text of art 188 without more context (such as a discussion of exceptions to it and of how it is applied in practice) would have been a sufficient evidential base to determine whether the claim would or would not be time-barred.

[16] The applicant also wishes to argue there was a conflict of interest resulting from Palmer J sitting on the Court of Appeal panel, given that the wife of Mr Young had previously complained about Palmer J to the Judicial Conduct Commissioner. There is nothing in this ground.

²² Senior Courts Act 2016, s 74(2)(a).

²³ Section 74(2)(b).

²⁴ This was important because, as noted earlier, the High Court considered that this issue could be resolved only if Ms C was cross-examined, which was not possible while she was incarcerated.

[17] The other proposed grounds do not require separate consideration.

Result

[18] None of the proposed grounds of appeal meet the criteria for leave to appeal to this Court. The application for leave to appeal is therefore dismissed.

[19] The Property is currently subject to a further freezing order pending determination of Mr B's application to this Court.²⁵ That freezing order will now lapse.

[20] Mr B also applied to adduce in this Court an affidavit from Mr Young. There is nothing of relevance to the issues before us in that affidavit. The application is therefore dismissed.

[21] Mr B also seeks from this Court an order that Ms C pay him the costs awarded in favour of Ms A and him in the 2020 Court of Appeal decision. This Court does not have any involvement in costs awards by the Court of Appeal.

²⁵ *B v C* [2023] NZCA 54 (Katz J).