

IN THE SUPREME COURT OF NEW ZEALAND

**SC 68/2008
[2008] NZSC 96**

BETWEEN JULIAN PAUL BURKE AND GILLIAN
ELIZABETH BURKE
Applicants
AND ASL MORTGAGES LIMITED
Respondent

Court: Elias CJ, Blanchard and Wilson JJ

Counsel: Applicants in person
T M Braun for Respondent

Judgment: 17 November 2008

JUDGMENT OF THE COURT

- A. The decision of the Registrar declining an application to waive the filing fee is confirmed.**
- B. The application for leave to appeal is dismissed, with costs of \$2,000 to the respondent.**

REASONS

[1] The applicants seek leave to appeal against a judgment of the Court of Appeal,¹ delivered on 18 April this year, which dismissed in most respects their appeal against a summary judgment entered against them in the High Court.

¹ *Burke and Burke v Advanced Securities Ltd* [2008] NZCA 93 (Chambers, John Hansen and Heath JJ).

[2] The applicants unsuccessfully sought from the Registrar a waiver of the filing fee on the ground that their proceeding seeks to determine or to clarify a question of law that is of significant interest to the public or to a substantial section of the public. The applicants seek a review of the Registrar's decision. We will consider that request along with the application for leave to appeal.

[3] The point which the applicants wish to argue on appeal to this Court is whether the presumption in s 13 of the Credit Contracts and Consumer Finance Act 2003 has been rebutted by the respondent. Under that section, a credit contract is presumed to be a consumer credit contract unless the contrary is established.

[4] The Court of Appeal found that, because no declaration as to the purpose for which the credit was to be used was executed before acceptance of the loan offer, declarations signed by the applicants in which they said that the credit to be provided was to be used primarily for business or investment purposes, or for both, did not operate to rebut the presumption. The Court went on to find however that, on the totality of the evidence, the presumption had been rebutted.

[5] The decision of the Court of Appeal on the question of law of whether the declarations operated to rebut the presumption was to the advantage of the applicants, and is accepted by the respondent. The Court was however free to look at the evidence as a whole. The argument sought to be advanced on appeal is whether the Court of Appeal erred in its assessment of that evidence. That argument cannot possibly be said to raise a question of law of public or general importance. Nor can it be said that there is a plain error of fact which gives rise to a concern that there may have been a miscarriage of justice. It follows that the application for leave to appeal must be dismissed, with costs of \$2,000 to the respondent.

[6] Because the proposed appeal did not, on analysis, raise a question of law of significant public interest, the Registrar was right to refuse the application for waiver of the filing fee. His decision is confirmed.

[7] Even if the applicants had been able to satisfy the criteria for granting leave, they would have faced the major difficulty of their application for leave being out of

time. It was not filed until 3 October, more than five months after the Court of Appeal delivered its judgment and therefore well outside the time limit of 20 working days for seeking leave to appeal. No adequate explanation has been provided for this delay. It followed the indulgence which the Court of Appeal afforded to the applicants of extending time after the appeal to that Court had been filed out of time, and the failure of the applicants to comply with the conditions imposed by the Court when granting leave.

Solicitors:
Harkness Henry & Co, Hamilton for Respondent