

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 22/2021
[2021] NZSC 53**

BETWEEN	LIANSEN MAO Applicant
AND	INDUSTRIAL AND COMMERCIAL BANK OF CHINA (NEW ZEALAND) LIMITED First Respondent
	QIAN HOU Second Respondent

Court: William Young, Ellen France and Williams JJ

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

Judgment: 31 May 2021

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay the respondents costs of \$2,500.**
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REASONS

Introduction

[1] On 28 October 2020, Whata J struck out a proceeding the applicant brought against the Industrial and Commercial Bank of China (New Zealand) Ltd, the first respondent (the Bank).¹ The applicant appealed against that decision to the Court of Appeal and subsequently sought dispensation from payment of security for costs for

¹ The decision was in the form of a minute.

the appeal. The Registrar declined to dispense with security. The applicant's application for a review of the Registrar's decision was dismissed by Miller J in the Court of Appeal on 2 March 2021.² The applicant was directed to pay security of \$7,060. The applicant seeks leave to appeal from that decision.

Background

[2] In dismissing the application for review, Miller J noted that the proceeding struck out by the High Court was "a fourth proceeding in litigation challenging the Bank's decision to recover a shortfall on a mortgagee's sale in New Zealand by obtaining a judgment and freezing orders in China".³ Ms Lu, the applicant's wife, was the mortgagor. The proceedings in China also involved a claim against the applicant because, under Chinese law, a spouse can be jointly liable with the actual debtor for certain debts.

[3] The initial claim brought by Ms Lu and the applicant against the Bank was struck out in the High Court on the basis that the causes of action were untenable.⁴ The Court of Appeal dismissed an application for an extension of time to appeal against that decision.⁵ This Court subsequently dismissed an application for leave to appeal against the decision of the Court of Appeal and to appeal directly to this Court against the decision of the High Court.⁶ Further proceedings sought to be filed in the High Court were also struck out as untenable or abusive or were not accepted for filing. Miller J said that Whata J considered the latest proceeding was "either a rerun of those proceedings [that had been struck out] or the claims ought to have been brought earlier".⁷

² *Mao v Industrial and Commercial Bank of China (New Zealand) Ltd* [2021] NZCA 36 [Review decision].

³ At [2].

⁴ *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* [2020] NZHC 402 at [98].

⁵ *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* [2020] NZCA 538 [CA (extension of time)].

⁶ *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* [2021] NZSC 33. The application for leave to appeal also sought leave to appeal directly from the costs judgment of the High Court in the initial proceeding: *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* [2020] NZHC 1604.

⁷ Review decision, above n 2, at [2].

[4] Against this background, Miller J agreed with the Registrar that it had not been demonstrated that the Bank should have to defend the appeal without security. Miller J stated:⁸

Mr Mao does not claim to be impecunious, and it is not apparent to me that his appeal raises any question of public interest. Nor do I accept that the bank already has security; it maintains that assets affected by the freezing order are of insufficient value to recover amounts owed to the bank and the frozen assets may not necessarily be available for a costs order made in New Zealand. There is force in the bank's submission that it needs the protection afforded by security because Mr Mao's conduct is vexatious.

The proposed appeal

[5] The applicant wishes to argue that Miller J erred by not considering the effect of the decision of the Chinese Court to apply New Zealand law to the proceeding brought there, which he says makes that proceeding oppressive. He says that the decision of the Chinese Court was not before Whata J.

[6] The applicant also says that it is a matter of public interest for customers of Chinese banks in New Zealand to be aware of the approach that may be taken to enforce loans from New Zealand in China. Finally, the applicant wishes to argue that the respondent Bank has sufficient security from the freezing order which remains over the assets of his wife.

Our assessment

[7] In making the decision on the review, Miller J applied the settled principles applicable to dispensation from security for costs.⁹ The proposed appeal does not challenge those principles. No question of general or public importance nor any question of general commercial significance accordingly arises.¹⁰ Nor does anything raised by the applicant give rise to an appearance of any miscarriage of justice.¹¹ This is not a case where it is right to require the respondents to defend the appeal without the usual protection as to costs which security provides.

⁸ At [4].

⁹ *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.

¹⁰ Senior Courts Act 2016, s 74(2)(a) and (c).

¹¹ Section 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.

Result

[8] The application for leave to appeal is dismissed.

[9] The applicant must pay the respondents costs of \$2,500.

Solicitors:

Buddle Findlay, Auckland for Respondents