

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA433/2020
[2020] NZCA 538**

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: Kós P and Courtney J

Counsel: First and Second Applicants in Person
D T Broadmore and L M Edginton for First and Second
Respondents

Judgment: 2 November 2020 at 3.30 pm
(On the papers)

JUDGMENT OF THE COURT

- A The application for leave to adduce further evidence is declined.**
 - B The application to extend the time to appeal the substantive decision is declined.**
 - C The applications for stay are declined.**
 - D The respondents are entitled to costs.**
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REASONS OF THE COURT

(Given by Courtney J)

[1] Ms Lu and her husband Mr Mao wish to appeal a decision of Fitzgerald J delivered on 5 March 2020 (the substantive decision) striking out their claims against the Industrial and Commercial Bank of China (New Zealand) Ltd (ICBC) and declining their application for an injunction preventing ICBC from pursuing legal proceedings against her in China.¹ They are out of time to bring an appeal and need an extension of time to do so. They have filed an application styled as an application for “special leave to appeal to Court of Appeal out of time” which we treat as an application under r 29A(1) of the Court of Appeal (Civil) Rules 2005 (the Rules) to extend the time to bring the appeal.

[2] The applicants have also filed a “notice of civil appeal by adduce new evidence” in which they repeat their intention to appeal the substantive decision and seek a stay of that decision and the Judge’s subsequent costs decision.²

Application for leave to adduce further evidence

[3] We infer that the evidence sought to be adduced is an article regarding the trial of a former president of ICBC’s Shanghai branch on charges of bribery. It appears to have been published on a Chinese news website on 7 July 2020. A copy was annexed to an affidavit by Mr Mao without any explanation as to its relevance to this case. No submission was made in respect of it.

[4] Although the evidence is fresh, we cannot see any relevance in it to the issues we have to determine. It certainly does not assist to explain the delay in the appeal being brought and has no obvious relevance to the issues that fell for determination in the High Court. The application to adduce further evidence is declined.

¹ *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* [2020] NZHC 402 [Substantive decision].

² *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* [2020] NZHC 1604 [Costs decision].

Background

The background to the High Court proceedings and the decision under challenge

[5] Ms Lu is a Chinese citizen and resident. In 2015 she purchased a property in Auckland for \$6 million and borrowed approximately \$2.9 million from ICBC. Her intention was to sub-divide the property. Ms Lu defaulted on the mortgage and the property was the subject of a mortgagee sale. ICBC also commenced proceedings in China to recover the shortfall owing under the loan agreement (the China proceedings). These proceedings were brought against both Ms Lu and Mr Mao (the latter on the basis that, as Ms Lu's spouse, he is jointly liable for the debt). ICBC obtained freezing orders against Ms Lu's and Mr Mao's assets in China.

[6] Ms Lu applied in China to have the China proceedings stayed on the basis that New Zealand is the proper forum for resolution of ICBC's claim. That application was declined by a Chinese court. Ms Lu's and Mr Mao's appeal is yet to be determined.

[7] In New Zealand, Ms Lu commenced proceedings against ICBC. The gist of her complaint was that ICBC represented to her that it would lend her more money after she had two years of repayment history but that it later refused to do so. She alleged a variety of breaches and defaults on ICBC's part, including misrepresentation, promissory estoppel, breach of the Consumer Guarantees Act 1993, generalised breaches of "duty" and breach of duty to secure a reasonable price for the property under s 176 of the Property Law Act 2007.

[8] Ms Lu also sought an injunction to prevent ICBC from progressing the China proceedings, on the basis that New Zealand is the appropriate forum for resolution of that claim (the anti-suit injunction).

[9] The Judge granted ICBC's application to strike out Ms Lu's claim entirely, finding that all the causes of action were untenable.³ Although, as the Judge noted, this step rendered the application of an anti-suit injunction moot, she nevertheless

³ Substantive decision, above n 1, at [98].

considered the merits of that application and dismissed it, observing that she was “far from persuaded that it would be unconscionable for [ICBC] to be permitted to continue its debt proceedings in China”.⁴

[10] Later, in a decision delivered on 7 July 2020, the Judge awarded costs in ICBC’s favour.⁵

Events subsequent to the High Court decision

[11] Following the delivery of the substantive decision, Ms Lu sought to file further proceedings in the High Court. On 18 March 2020 she filed a proceeding naming ICBC and the Auckland Council (the Council) as defendants. On 21 May 2020 Muir J struck out the claim against ICBC as an abuse of process but allowed the claim against the Council to proceed as it represented a new claim.⁶

[12] On 15 June 2020 Ms Lu filed another statement of claim against ICBC and the Council, which was not accepted for filing. On 9 July a further statement of claim was filed. Lang J struck out that out the following day, noting that the exact allegations against the Council were unclear but that any such claims should have been brought in the proceeding that Muir J had permitted to proceed.⁷

[13] Four and a half months after Fitzgerald J delivered her substantive decision, Ms Lu and Mr Mao filed an application in the High Court to appeal the judgment out of time. Upon being advised that the application had been filed in the wrong court, they filed the present application on 5 August 2020, a delay of five months.

Application for extension of time to appeal

[14] The principles that apply to an application under r 29A(1) are set out in *Almond v Read*.⁸ In summary, in deciding whether to grant an extension of time, the ultimate

⁴ At [118].

⁵ Costs decision, above n 2.

⁶ *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* HC Auckland CIV-2020-404-475, 21 May 2020 (Minute of Muir J).

⁷ *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* HC Auckland CIV-2020-404-41045, 10 July 2020 (Minute of Lang J).

⁸ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

question is what the interests of justice require, having regard to: (a) the length of the delay; (b) the reasons for the delay; (c) the conduct of the parties; (d) any prejudice to the respondent; and (e) the significance of the issues raised by the proposed appeal.⁹ The merits of the proposed appeal may be relevant but will generally not be determinative.¹⁰

[15] The grounds for the application are stated as:

- (a) The applicants have filed an application to adduce new evidence on appeal.
- (b) The applicants have filed a statement of claim against Mr Liang (a former employee of ICBC said to have made the representation regarding further funding) which was “approved” by Muir J as part of the claim against the Council.
- (c) The deadline of 20 working days to appeal under r 29 of the Rules fell within the Covid-19 level four lockdown period.
- (d) The applicants have filed another statement of claim against Mr Liang which was “refused” by the High Court and the High Court had directed them to “appeal in this court under special leave out of time”.
- (e) The applicants’ assets have been frozen “by respondents’ ‘official relationship’ with Chinese court in China” as ICBC is the largest bank in China. Consequently, the applicants lack funding for legal representation.

[16] Some of these grounds can be dealt with summarily. Self-evidently, ground (a) is not a proper ground to support the applications for an extension of time. Nor can grounds (b) and (d) justify extending of leave to appeal. The only relevance of the

⁹ At [38].

¹⁰ At [39].

other proceedings is in relation to the conduct of Ms Lu and Mr Mao in advancing their application to extend time, to which we come later.

[17] Instead of filing conventional submissions, the applicants annotated a copy of the decision with their “replies” to the reasoning, as well as making fresh allegations against ICBC. They responded to ICBC’s submissions in the same way. We treat the annotations in both documents as submissions.

Length and reasons for delay

[18] There are assertions that Covid-19 restrictions affected the applicants’ ability to file the appeal but no specific explanation as to how they were affected. The alert level 4 restrictions started only five working days prior to the deadline for bringing the appeal and the total lockdown period ended more than two months before the application for an extension of time was filed. Significantly, throughout the alert levels two, three and four periods the applicants were filing other documents in court and conducting correspondence with the High Court by email. We do not accept that the Covid-19 restrictions had any effect on the applicants’ ability to file an appeal within time.

[19] Nor is there any proper support for the claim regarding the applicants’ inability to retain counsel. ICBC points out that the freezing orders in respect of Mr Mao’s assets and Ms Lu’s bank accounts were discharged in late 2019. Only Ms Lu’s shares remain subject to freezing orders. In any event, as ICBC notes, the freezing orders did not prevent the applicants from obtaining legal representation in the past for the High Court proceeding.

[20] In all these circumstances we find that there has been a moderate delay that is not adequately explained.

The applicants’ own conduct

[21] There are aspects of the applicants’ own conduct that count strongly against them in this application. They could have simply appealed the decision but instead chose to file other proceedings which made the same or similar allegations. Muir J’s

minute could not have been plainer in explaining why the applicants could not make a further claim against the ICBC. But rather than appeal, the applicants made two further attempts to file such proceedings, presumably in an effort to relitigate the matters that fell within the scope of the proceedings that Fitzgerald J had determined.

Prejudice to ICBC

[22] ICBC says that it has and continues to suffer prejudice from the delays in the recovery of its debt owed by Ms Lu. Some degree of prejudice is inevitable where a respondent is forced to deal with applications and appeals brought out of time. There is, however, no specific detail about the claimed prejudice to ICBC; it seems likely that its position is most significantly affected by the ongoing proceedings in China.

Public interest

[23] The applicants cite alleged collusion between the Chinese government and the Chinese courts as a matter of public interest that supports granting an extension. We do not accept that the judgment in this case raises any such issue. It concerned a property transaction in New Zealand that was determined in accordance with New Zealand law. The relevant legal principles on which the claim was struck out are well settled and are not contentious. The complaints about the judgment are directed towards factual matters; there is no criticism of the Judge's application of legal principles.

The merits of the proposed appeal

[24] ICBC submits that the appeal is hopeless and bound to fail. Fitzgerald J comprehensively addressed all the live arguments and correctly concluded that the claims should be struck out (and, though moot, that the anti-suit injunction should be dismissed).

[25] The applicants' annotated copy of the decision contains fresh allegations against ICBC as well as criticisms of the decision. In its submissions ICBC's counsel has summarised and responded to the new allegations; broadly the applicants allege that ICBC:

- (a) caused the defaults by failing to provide further lending;
- (b) owed a duty of care to allow borrowing up to \$4.5 million;
- (c) repudiated the loan agreement before it was entitled to do so;
- (d) owed a duty of care to help Ms Lu to minimise loss, and therefore should have granted further lending;
- (e) used its relationship with the Chinese courts to obtain a favourable result;
- (f) relied on an outdated valuation report for the purposes of the mortgagee sale;
- (g) caused illegitimate prejudice to the applicants by obtaining freezing orders; and
- (h) failed to apply to the High Court to optimise the subdivision of the property, giving rise to a breach of s 176 of the Property Law Act.

[26] ICBC says that these allegations are unfounded, that it owed no such duties of care and that it was entitled to take the enforcement steps that it did.

[27] In our view the proposed appeal against the strikeout decision can fairly be described as “clearly hopeless”.¹¹ It is not said that the Judge made any error in her identification or application of the relevant legal principles. The comments contained in the annotations mostly reiterate factual issues that were before the High Court. None of Ms Lu’s various claims seem reasonably arguable. Given that, any appeal regarding the decision on the anti-suit injunction is moot, as Fitzgerald J noted.¹²

[28] We are therefore satisfied that the interests of justice do not require an extension of time in this case.

¹¹ *Almond v Read*, above n 8, at [39(c)].

¹² Substantive decision, above n 1, at [99].

Application to stay enforcement

[29] The applicants seek a stay of both the substantive decision and the costs decision. ICBC did not oppose a stay of the costs decision pending the earlier of the determination of any appeal against that decision, or the application for an extension of time to appeal the substantive decision being declined.

[30] ICBC resisted any effort to stay the substantive decision on the ground that the application is misconceived because the strikeout judgement is non-executory and therefore not amenable to an order for a stay.

[31] Given our decision refusing to extend the time to bring an appeal against the substantive decision, the basis for the application to stay that decision falls away. And since Ms Lu has not filed any appeal against the costs decision, there is no basis on which to stay enforcement of it.

Result

[32] The application for leave to adduce further evidence is declined.

[33] The application to extend the time for appealing the substantive decision is declined.

[34] The applications for stay are declined.

[35] The respondents are entitled to costs.

Solicitors:
Buddle Findlay, Auckland for Respondents