

BETWEEN	GEORGE CHARLES KAIN First Applicant
AND	GEORGE MICHAEL KAIN Second Applicant
AND	GEORGE THOMAS CARLTON KAIN Third Applicant
AND	GEORGE HARRY KAIN Fourth Applicant
AND	GEORGINA KAIN Fifth Applicant
AND	WYNN WILLIAMS & CO Respondent

Court: Elias CJ, McGrath and Chambers JJ

Counsel: O G Paulsen for Applicants
G H Nation for Respondent

Judgment: 8 April 2013

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicants must pay to the respondent costs of \$2,500 plus reasonable disbursements to be fixed by the Registrar.**
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REASONS

[1] Wynn Williams & Co, the respondent, acted for the applicants pursuant to a conditional fee agreement. The applicants now do not want to pay the agreed

“success fee” of \$150,000 plus interest. Wynn Williams sued for summary judgment. The High Court granted the application¹ and the Court of Appeal concurred.²

[2] The first proposed ground of appeal concerns the lawfulness of conditional fee agreements (or success fee agreements, as they are sometimes called) in New Zealand. The agreement in this case was made before the Lawyers and Conveyancers Act 2006 came into force. That Act sets out a regime now for conditional fee agreements. It is rarely of general or public importance to answer a question of historical interest only³ and this is no exception. Nor do we consider a substantial miscarriage of justice will occur if we decline to hear the appeal on this point. In this regard, we note that a New Zealand Law Society Standards Committee, the Legal Complaints Review Officer and French J have all independently assessed the reasonableness of the fee and pronounced it fair and reasonable.⁴

[3] The second proposed ground of appeal raises an argument as to whether the conditional fee agreement was a consumer credit contract in terms of s 11(1)(d)(ii) of the Credit Contracts and Consumer Finance Act 2003. It is not suggested this is a question of general or public importance, but it is asserted a substantial miscarriage of justice will occur if the appeal is not heard on this ground. Essentially the complaint is that s 13 of the 2003 Act created a presumption that the contract was a consumer credit contract, the consequence being that Wynn Williams had an onus to displace that presumption. The applicants complain the Court of Appeal reversed the onus of proof.

[4] Both French J and the Court of Appeal concluded the fee arrangement was not a consumer credit contract. That was essentially a factual finding based on evidence that, while the firm’s standard practice was to grant clients a 14 day grace period for checking and paying invoices, it was not a term of their contracts of

¹ *Wynn Williams & Co v Kain* [2011] 3 NZLR 709 (HC) [the HC judgment].

² *Kain v Wynn Williams & Co* [2012] NZCA 563, [2013] 1 NZLR 498 [the CA judgment].

³ See, for example, *New Zealand Post Ltd v Postal Workers Union of Aotearoa Inc* [2013] NZSC 15.

⁴ For French J’s view, see the HC judgment, above n 1, at [94].

commercial engagement and the firm could not be said to be in the practice of providing credit in the course of its business.⁵ That factual finding was clearly open to the Court of Appeal. There is no suggestion that French J made an error as to the party bearing the onus. The applicants point to several passages in the Court of Appeal's judgment which they say demonstrate error as to onus on that Court's part. When those expressions are read in context, we do not accept any error has been demonstrated. It must be remembered that, by the time the case reached the Court of Appeal, the onus was on the Kains to demonstrate the High Court Judge had fallen into error.

[5] Neither ground of appeal meets the statutory criteria. Accordingly, the application for leave to appeal is dismissed. The applicants having been unsuccessful, they must pay costs to Wynn Williams in the standard amount.

Solicitors:
Cavell Leitch Pringle and Boyle, Christchurch for Applicants
Wynn Williams, Christchurch for Respondent

⁵ The CA judgment, above n 2, at [70].