

IN THE SUPREME COURT OF NEW ZEALAND

SC 56/2014
[2014] NZSC 130

BETWEEN

YOON LEE
Applicant

AND

DISTRICT COURT AT AUCKLAND
First Respondent

ZHI HONG GAO AND LIN GE
Second Respondents

JOHN CARTER, BRENT O'CALLAHAN
AND TIMOTHY UPTON SLACK
Third Respondents

Court: McGrath, Arnold and O'Regan JJ

Counsel: Applicant in person
G J Luen for Second Respondents
A C Challis and K J M Robinson for Third Respondents

Judgment: 24 September 2014

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay the second and third respondents costs on an indemnity basis, plus reasonable disbursements.**
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REASONS

[1] The applicant, Mr Lee, is a solicitor. In 2005 he acted for the second respondents, Ms Gao and Mr Ge (the Gaos), on their intended purchase of a section in a subdivision from Pro Rata Investments Ltd (Pro Rata). The third respondents, Carter & Partners (Carters), acted for Pro Rata on the transaction. The agreement provided that the purchase price was \$275,000, a deposit of \$27,500 would be paid

on signing, a further \$137,500 would be paid several months later and the balance would be paid on settlement. The Gaos had not taken legal advice before signing the agreement and paying the initial deposit, but the agreement was conditional on the Gaos' solicitor approving its form within three working days. The Gaos instructed Mr Lee and later went ahead with the contract, paying the additional \$137,500 when it fell due.

[2] Pro Rata did not have title to the section when the agreement was executed. It had agreed to purchase several sections in the subdivision from a group of companies trading as Coastal Land Developments (Coastal). In fact, Pro Rata was unable to complete the purchase of the section from Coastal, and Coastal resold it. The Gaos were unable to obtain the return of any of their deposit from Pro Rata, which had used the funds for other purposes and subsequently went into liquidation.

[3] In January 2007, the Gaos issued proceedings against Mr Lee in negligence seeking to recover the lost deposits. Mr Lee denied liability and, in the alternative, alleged contributory negligence on the part of the Gaos. Shortly before trial, Mr Lee joined Carters to the proceedings, alleging that an employee of the firm had given him an oral undertaking that the second deposit would not be released to Pro Rata. This led the Gaos to bring an alternative claim against Carters as second defendant, alleging breach of the oral undertaking and seeking damages of \$137,500. The Gaos also included a wasted costs claim against Mr Lee for \$60,000 in respect of legal fees unnecessarily incurred due to Mr Lee failing to disclose the alleged oral undertaking from Carters. Ultimately, then, the Gaos brought five causes of action, four against Mr Lee for varying amounts – \$165,000, or \$137,500 plus general damages; and \$60,000 for wasted costs alongside the alternative claim against Carters for \$137,500.¹

[4] The Gaos succeeded in the District Court against Mr Lee.² Judge Gittos found that Mr Lee was negligent and dismissed Mr Lee's claim that the Gaos were contributorily negligent. The Judge awarded the Gaos damages of \$165,000 and costs and disbursements of \$44,965.61. The Judge found on the facts that no oral

¹ We have summarised only the claims that are relevant for present purposes.

² *Gao v Lee* DC Auckland CIV-2007-004-2591, 14 May 2010.

undertaking had been given by Carters and dismissed all claims against the firm. On appeal to the High Court, Peters J upheld the finding of negligence but reduced the damages to \$68,750³ and also, in a subsequent decision,⁴ reduced the award of costs to \$15,000. Mr Lee then sought leave to appeal to the Court of Appeal but both the High Court⁵ and the Court of Appeal⁶ refused leave.

[5] Mr Lee then filed an application for judicial review of the District Court decision. Peters J dismissed the application and awarded indemnity costs against Mr Lee.⁷ Mr Lee appealed unsuccessfully to the Court of Appeal, which also awarded indemnity costs against him.⁸ Mr Lee now seeks leave to appeal to this Court.

[6] In his application, Mr Lee raised three grounds. The first was that the District Court's decision was made without jurisdiction as the Gaos' various claims exceeded \$200,000 in total, which is the monetary limit of the District Court's jurisdiction.⁹ The second was that, as a result of a deed of assignment between Pro Rata and Coastal under which Pro Rata assigned to Coastal its interests in sale and purchase agreements with the Gaos and other purchasers, the Gaos should have claimed against Coastal rather than him. The third was that the costs award against him in respect of the District Court hearing (as modified by Peters J) and the award of indemnity costs made against him in the High Court on the judicial review application were unjustified. In his written submissions, Mr Lee pursued only the first and third grounds.

[7] We are not satisfied that it is necessary in the interests of justice that we hear and determine this appeal. On the facts of this case, the jurisdiction issue does not raise a question of general or public importance. It is clear that the Gaos' claims were within the District Court's jurisdiction given that the wasted costs claim, which is alleged to take the total claim over the \$200,000 limit, was an alternative to other

³ *Lee v Gao* HC Auckland CIV-2010-404-3599, 19 May 2011.

⁴ *Lee v Gao* [2012] NZHC 3310.

⁵ *Lee v Gao* HC Auckland CIV-2010-404-3599, 4 October 2011.

⁶ *Lee v Gao* [2012] NZCA 57.

⁷ *Lee v District Court at Auckland* [2013] NZHC 1000.

⁸ *Lee v District Court at Auckland* [2014] NZCA 169.

⁹ District Courts Act 1947, s 29.

claims. The Gaos could not succeed on all their claims. Two outcomes were possible: if the Gaos had succeeded on their primary claim in negligence against Mr Lee they could have received no more than \$165,000, as occurred before Judge Gittos; their claim against Carters would have failed, as would their wasted costs claim against Mr Lee. If they had failed on their negligence claims against Mr Lee but succeeded on their claim against Carters on the basis of the oral undertaking, they would have received no more than \$137,000 from Carters and may have succeeded on their wasted costs claim against Mr Lee for \$60,000. At best, then, the Gaos could have been awarded a total of \$197,500, which is within the \$200,000 limit.¹⁰

[8] The issues about the assignment and costs do not raise any matter of general or public importance. Nor do we see anything of general commercial importance or any risk of a substantial miscarriage of justice in relation to any of the grounds advanced.

[9] Accordingly, we dismiss the application for leave to appeal. We should not be taken, however, as necessarily endorsing the Court of Appeal's view that, because of the late stage at which the point was raised, it did not need to decide the jurisdiction point.¹¹ Our decision is based on the fact that it is clear in any event that there was jurisdiction.

[10] The Gaos and Carters seek indemnity costs, on the same basis as they were awarded in the High Court and Court of Appeal. In the circumstances, we agree with the Courts below that costs should be awarded on an indemnity basis. The challenge by way of judicial review proceedings was a collateral challenge to the earlier decisions of the Courts, and was meritless and vexatious.

Solicitors:
Crown Law Office, Wellington for First Respondent
Hesketh Henry, Auckland for Second Respondents
McElroys, Auckland for Third Respondents

¹⁰ Interest on any award is irrelevant for these purposes: see s 42A.

¹¹ *Lee v Gao*, above n 8, at [22].