IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA458/2017
[2019] NZCA 345

BETWEEN	ROBERT LEE AS TRUSTEE OF THE ESTATE OF J G LEE Appellant
AND	GREGORY LEE First Respondent
	GREGORY LEE AND JANE LOIS LEE AS TRUSTEES OF THE LEEROY FAMILY TRUST Second Respondents

Hearing:	27 June 2019
Court:	Stevens, Venning and Dunningham JJ
Counsel:	Appellant in person D A T Chambers QC and A H H Choi for Respondents
Judgment:	30 July 2019 at 4.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The plaintiffs in CIV-2010-463-430 are to provide security for costs in the sum of $75,000 to the satisfaction of the Registrar.

C In the event security is not provided by 16 August 2019 the proceeding will be stayed.

D The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Venning J)

Introduction

[1] Last year this Court granted Mr Lee leave to appeal against a decision of the High Court requiring him to provide security for costs.[1]

[2] The approved question for which leave was granted was whether the High Court was wrong in all the circumstances of the case to order Mr Lee to provide security for costs without considering the merits of his claim.[2]

Background

[3] It is instructive to put Mr Lee's claim and the procedural background to these proceedings in context.

[4] In June 2010 Mr Lee applied for a pre-proceeding order for discovery. He then filed a statement of claim on 30 September 2011 citing himself as first plaintiff and his sister, Helen Heard, as second plaintiff. They brought the proceedings in their capacity as trustees of the estate of their late mother, Joyce Lee.[3]

[5] The plaintiffs challenge transactions pursuant to which their parents transferred shares in a plastic manufacturing business, High Duty Plastics Ltd (HDP) to their brother Gregory Lee. They allege that Gregory exercised undue influence over their parents and acted in breach of fiduciary duty. They say Gregory obtained an unconscionable bargain. They seek a variety of orders including setting aside the transfer and an account of profits.

[6] The plaintiffs' case is that the transactions in issue took place in August 2000. The defendants (Gregory Lee and Jane Lee) say the shares were transferred in 1997 as part of a family arrangement at that time.

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1 *Lee v Lee* [2017] NZHC 431.
2 *Lee v Lee* [2018] NZCA 282.
3 As trustees they should have been cited as one plaintiff.

[7] On 6 December 2012 Associate Judge Christiansen struck out the plaintiffs' claims on limitation grounds.[4] On review Collins J upheld that decision.[5] However, it was reversed on appeal by this Court and the proceedings were reinstated on 4 November 2015.[6]

[8] On 23 May 2016 Associate Judge Christiansen heard a number of interlocutory applications, including the defendants' application for security for costs.[7] During the course of the hearing the Court adjourned to enable counsel, Ms Chambers QC and Mr Lee, to discuss the provision of security.[8] Following that adjournment Ms Chambers submitted that security might be provided by Mr Lee in the form of a second registered mortgage over a property owned by a trust, the RB and JG Lee Family Trust (the Trust), but occupied by him at 101 Springfield Road, Rotorua (the Springfield Road property). The security was to be up to a maximum of $150,000 which was the sum then calculated to cover all costs in the event of judgment against the plaintiffs. The Judge endorsed that approach.[9] He made an order that security be provided in those terms, directing that a registered mortgage be provided within 21 days and until provided, the plaintiffs' proceedings were to be stayed. Leave was reserved to settle the terms of the mortgage.[10]

[9] Mr Lee applied to review the orders requiring the plaintiffs to pay security. That application, together with other pre-trial applications, was heard in December 2016 before Davison J.

[10] In his judgment issued on 14 March 2017, Davison J allowed Mr Lee's application for review in part.[11] Davison J determined that, on the basis of the information regarding the available equity in the trust property and, as the trial was to be split between liability and quantum, the appropriate sum for security was $75,000 rather than $150,000. Although the Judge recorded that the property was held in trust

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4 *Lee v Lee* [2012] NZHC 3283.
5 *Lee v Lee* [2013] NZHC 1069.
6 *Lee v Lee* [2015] NZCA 514, [2016] NZAR 61.
7 *Lee v Lee* [2016] NZHC 1073.
8 At [33].
9 At [34]–[35].
10 At [36].
11 *Lee v Lee* [2017] NZHC 431.

and that Mr Lee had indicated his co-trustee Mr Aarts was unlikely to agree to provide mortgage security, Davison J directed that security for that sum be provided by Mr Lee by way of a registrable second mortgage over the property.[12] In the event of non-compliance by 24 March 2017 the proceedings were to be stayed.[13]

[11] Mr Lee did not provide the mortgage. He says his co-trustee Mr Aarts refused to sign the mortgage.

[12] In the meantime the Court had allocated a substantive fixture for five days to commence on 3 April 2017. Mr Lee sought to vacate the substantive fixture. That application was declined by Davison J at a teleconference on 21 February 2017. Davison J observed that:

> [19] I note that this proceeding has been underway now for a considerable time and that since mid 2016, a fixture in the first half of 2017 has been anticipated. Whilst the first plaintiff may have been preoccupied with other aspects of the case and has had difficulty in dealing with the volume of material he wishes to review, and preparing himself for the hearing, it is his responsibility as plaintiff to do so. The Court recognises that a litigant in person may find the process of trial preparation more difficult than parties who have legal representation. However, the Court is also concerned to ensure that the interests of justice are served for all parties which of course includes the defendants, by ensuring that proceedings are conducted as efficiently and expeditiously as possible. In my view the point has clearly been reached where this matter should be determined at the scheduled April hearing without further delays, and accordingly I have confirmed the fixture and made the necessary timetable directions.

[13] The case came before Edwards J in Rotorua on 3 April 2017.[14] There was no appearance for Mrs Heard, and no reason given for her non-appearance. On behalf of the defendants Ms Chambers sought an order lifting the stay to allow the trial to proceed (on the basis that an order be made directing the Registrar to sign the mortgage document).[15] Mr Lee opposed the stay being lifted. He stressed he was entitled to rely on Davison J's order that the proceeding would be stayed if the mortgage was not provided.[16]

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12 At [29].
13 At [30]–[31].
14 *Lee v Lee* [2017] NZHC 712.
15 At [17].
16 At [18].

[14] Edwards J recorded her assessment of the position as follows:

> [20] There was considerable merit in Ms Chambers' submission that Mr Robert Lee had deliberately failed to comply with Court orders so that he could secure the very adjournment of the fixture which had been declined on earlier occasions. The ongoing hardship to the defendants in not having a final resolution of all issues also weighed in favour of the stay being lifted so that the trial could proceed. …

Despite that, the Judge accepted that the stay should remain in place.[17] Ultimately she decided to vacate the substantive fixture.

[15] A week later, on 10 April 2017, Mr Lee applied for leave to appeal the judgment of Davison J. On 30 June Davison J dismissed the application and declined leave to appeal.[18]

[16] Mr Lee subsequently applied to this Court for leave to appeal and obtained leave in the judgment issued on 1 August 2018 on the terms referred to.[19]

[17] The respondents have given notice of their intention to support the High Court decision on other grounds. They say that if the merits of the plaintiffs' claims are considered, they support the order for security for costs.

The relevant rule

[18] Security for costs is provided for under r 5.45 of the High Court Rules 2016 (the Rules):

> **5.45 Order for security of costs**
>
> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
>
> (a) that a plaintiff—
>
> (i) is resident out of New Zealand; or
>
> (ii) is a corporation incorporated outside New Zealand; or

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17 At [25].
18 *Lee v Lee* [2017] NZHC 1503.
19 *Lee v Lee*, above n 2.

(iii) is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or

(b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.

(2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.

(3) An order under subclause (2)—

(a) requires the plaintiff or plaintiffs against whom the order is made to give security for costs as directed for a sum that the Judge considers sufficient—

(i) by paying that sum into court; or

(ii) by giving, to the satisfaction of the Judge or the Registrar, security for that sum; and

(b) may stay the proceeding until the sum is paid or the security given.

(4) A Judge may treat a plaintiff as being resident out of New Zealand even though the plaintiff is temporarily resident in New Zealand.

(5) A Judge may make an order under subclause (2) even if the defendant has taken a step in the proceeding before applying for security.

(6) References in this rule to a **plaintiff** and **defendant** are references to the person (however described on the record) who, because of a document filed in the proceeding (for example, a counterclaim), is in the position of plaintiff or defendant.

[19] In the present case Mr Lee accepted he was impecunious and would otherwise be unable to pay the costs of the defendants if he was unsuccessful in the proceeding. Mrs Heard lives in Australia. It is accepted that she is impecunious as well. In the circumstances the discretion under r 5.45(2) is engaged.

[20] The discretion is a broad one. It may be exercised to require security even if that may prevent a plaintiff from pursuing a claim. But access to the Court for a genuine plaintiff is not lightly to be denied. In *A S McLachlan Ltd v MEL Network Ltd* this Court summarised the position:[20]

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[20] *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [13]–[14].

> [15] The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the Courts for a genuine plaintiff is not lightly to be denied.
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> [16] Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

The merits issue

[21] Mr Lee argued that consideration should be given to the following matters on this appeal:

(a) the merits of the plaintiffs' case;

(b) the relevance, if any, of the Trust;

(c) the nexus between the plaintiffs' impecuniosity and the transaction, the subject of the proceedings;

(d) the principle of access to the courts of first instance for impecunious litigants; and

(e) any other "normal considerations" when considering an order for security.

Consideration of the merits so far in this case

[22] Before addressing those issues, we briefly record the background to the consideration of the merits to date.

[23] Associate Judge Christiansen did not address the merits of the plaintiffs' claim in his decision on the application for security.

[24] Mr Lee did not raise the issue of the merits on his application for review before Davison J. It is apparent from that decision that the focus of Mr Lee's argument was

that the order was based on an error as to the capital value of the Springfield Road property.

[25] Mr Lee also submitted that, in making the order for security the Associate Judge failed to recognise that the plaintiffs' impecuniosity had been caused by Gregory excluding the plaintiffs from obtaining any benefit or interest in the shares of HDP.[21]

[26] Finally, Mr Lee said that while he was registered on the title to the Springfield Road property it belonged to the Trust and his co-trustee, Mr Aarts, was unlikely to provide a second mortgage as security for costs.

[27] Given the focus of the application for review, and the fact the merits were not raised by Mr Lee, it is understandable that Davison J did not consider the merits of the proceedings in his review decision.

[28] However, Davison J did deal with the merits of the plaintiffs' claim in the application for leave to appeal. In that decision, which ran for some 66 paragraphs, Davison J dealt with the prima facie merits of the plaintiffs' claim in the following paragraphs:[22]

> [54] The first plaintiff submits that the prima facie merit of the claim is evident by virtue of it having survived a strike out application. He submits that in these circumstances where the plaintiffs have not yet had the benefit of a substantive decision of a court, and their claim has survived a strike out application, it should not have been difficult to persuade the Court against the making of an order for security for costs.
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> [55] In response Ms Chambers notes that the defendants' strike-out application which was unsuccessful did not relate to the merits of the claim, but was solely based on the Limitation Act 1950. Accordingly, she submits that the Court of Appeal judgment does not speak to the merits of the claim.
>
> [56] In her response to the plaintiffs' submission that their case is strong or overwhelming, Ms Chambers refers to a detailed summary of the defendants' contentions set out in her written submissions to support a submission that the plaintiffs' case in fact has little prospect of success. In the context of deciding the current application it is not necessary or appropriate to engage in a detailed evaluation of the relative strengths and positions of the parties.

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21 This argument confuses the position of the plaintiffs as trustees of their mother's estate with their personal position.

22 *Lee v Lee*, above n 18.

> For present purposes it is sufficient to observe that the defendants have set out the basis of their response to the plaintiffs' claims in a comprehensive manner with references to the affidavit evidence and exhibits produced in the course of the proceeding to date. From that detailed outline, it prima facie appears that their case has substance. While at this stage it is a matter largely of impression rather than detailed evaluation, without expressing any view as to the relative strengths of the cases, it would be quite wrong to proceed on the basis contended for by the first plaintiff, namely that the plaintiffs' case is strong or overwhelming and that consequently no order for security for costs should have been made.
>
> [57] Therefore I consider that the plaintiffs have not shown that the Court erred in its assessment of the prima facie merit of their case in the judgment such as to justify granting leave for a second and further appeal.

[29] So, while the merits of the plaintiffs' claim were not considered by the Associate Judge and were not dealt with in the course of the application for review, they were considered by the Judge when declining the application for leave to appeal from that decision. It is apparent from his decision that Davison J did not consider the plaintiffs' case was a strong one.

[30] Given the grounds upon which leave was granted and the basis upon which the respondents seek to support the judgment, the parties focused on the merits of the plaintiffs' proceedings.

The pleadings

[31] The starting point for consideration of the merits of the claim must be the pleadings. The plaintiffs' claim is now contained in a second amended statement of claim. It is a discursive document. The plaintiffs' claim is based on the transfer of the shares in HDP from the plaintiffs' parents, Ray and Joyce, to Gregory. HDP was a family business established in 1983 by Ray and Joyce. Gregory worked in the business from 1984. The plaintiffs allege that from 1988 Gregory began asserting influence over his parents in relation to the business in order to gain control of it.

[32] By the early 1990's Ray and Joyce had three major assets:

(a) the Springfield Road property;

(b) a commercial property at 192 View Road, Rotorua; and

(c) their shares in HDP.

[33] From 1994 to 1997 Ray and Joyce met with their accountant, Clive Smith and solicitor, John Battersby on a number of occasions and discussed their estate and estate planning with them. The plaintiffs' complaint centres on events that occurred in 1997 and 2000. As relevant the pleadings include:

> **The Events of 1997**
>
> 56. In relation to the proposed transactions recorded in the Minutes dated 25 June 1996 [minutes of the meeting held at Mr Smith's office] the following events occurred in 1997 which demonstrate a significant shift in Gregory's favour:
>
> (a) Ray and Joyce sold the View Road and Springfield Road properties to the family trust as per valuation.
>
> (b) The Family Trust did not purchase an additional property;
>
> (c) The [HDP] shares were reissued with Ray and Joyce owning 50 voting "A" shares each and 450 non-voting "B" shares each for a total of 1,000 shares;
>
> (d) the parents did not either sell or transfer their "A" shares to Mr Smith or their "B" shares to Gregory though on 1 October 1997 though they did sign a Deed of Acknowledgement of Debt for $200,724 and
>
> (e) the same valuations were relied upon;
>
> (f) Gregory entered into a Term Loan contract to the Family Trust dated 2 October 1997 for $133,174. The loan was on terms favourable to Gregory including that it was to be repaid seven years after the death of the last surviving parent. No repayments or interest were ever made. This "debt" was later [cancelled] by the Deed of Agreement of 4 August 2000;
>
> (g) Gregory remained a beneficiary of the family trust;
>
> (h) The lease was assigned to [HDP] on 2 October 1997;
>
> (i) rent was $26,000 per annum meaning the other siblings could conceivably receive $8,666 before tax each per annum — assuming the parents received nothing;
>
> (j) the lease agreement did have a clause contemplating the need to extend the building if the business grew;
>
> (k) the good will was increased and a dividend was declared.
>
> 57. On 30 September 1997 Gregory consented to becoming a director of [HDP].

58. On 2 October 1997 Gregory also acknowledged a debt of $200,724 to Ray and Joyce. The terms were favourable to Gregory because any interest had to be demanded in advance and in writing. In practice it was interest free.

59. On 2 October 1997 Joyce and Ray signed new Wills that were favourable to Gregory in which Mr Smith and Mr Battersby were the executors and trustees. Gregory was to be given Ray and Joyce's current account and a debt of $200,724 to Ray and Joyce was to be forgiven. The Wills made no provision for any residual.

…

[34] The plaintiffs then allege a significant growth in the value of HDP from 1996 to 2000 and plead:

The 2000 Transactions

80. Ray and Joyce still enjoyed beneficial and legal ownership of all the [HDP] shares in 2000.

81. Between April 2000 and July 2000 Gregory made repeated approaches to Ray and Joyce demanding that they sell him their [HDP] shares for $200,000. This was a significant undervalue and well below market value.

82. Ray and Joyce repeated declined Gregory's offers but Gregory did not accept his parents' refusals.

83. As a result of the stress placed on Ray by Gregory's repeated advances Ray significantly increased his alcohol consumption such that he was no longer able to look after himself. He moved in with Robert and his wife.

84. In April 2000 Gregory attempted to prevent the parents from learning the full extent of [HDP's] most successful year in its history by instructing Helen not to allow Robert access to [HDP's] computer system to do the annual end of year roll-over as was his custom.

85. In May 2000 Gregory threatened that unless Ray and Joyce accepted his offer he would:

    (a) leave [HDP];

    (b) set up a business in opposition to [HDP];

    (c) take three key [HDP] staff with him;

    (d) take three key [HDP] customers with him.

…

95. On 4 August 2000 the parents signed a deed acknowledging a debt of $23,768 to Gregory which was attracted interest and was repayable upon demand.

96. Also on 4 August 2000 the parents, Gregory and Mr Smith signed a Deed of Agreement in relation to the payment of $200,000 by Gregory in return for the parents resigning as shareholders and directors of [HDP].

…

Ray and Joyce's Health

104. By 2000 Ray and Joyce's health had deteriorated significantly to the point that they were at a significant disadvantage to Gregory. In particular:

…

(b) Joyce also had a range of ailments that cumulatively made her frail and vulnerable including:

(i) Bi Polar Disorder from 1994;

(ii) a mini-stroke in 1998;

(iii) a heart attack in November 1999;

(iv) Chronic Obstructive Pulmonary Disease (Emphasema) from 50+ pack-years of cigarette smoking;

(v) 100% blockage of the left carotid artery and 70% plus blockage of the right carotid artery which required surgery.

[35] The plaintiffs then plead their three causes of action: first, breach of fiduciary duty. It is alleged from 30 September 1997 when he became a director of HDP, Gregory owed a duty to the individual shareholders, Ray and Joyce. It is said he breached that duty by:

(a) personally profiting from his intimate knowledge of the company by acquiring HDP shares on favourable terms; and

(b) failing to disclose to Ray and Joyce the full extent of the significant increase in HDP turnover and profits for the year ended 2000 and the true value of the HDP shares in 2000.

[36] The relief claimed for the breach is:

(a) rescission of the transaction dated 6 October 1997 (a bare trust deed in relation to HDP shares) to the extent that it is relevant;

(b) rescission of the two transactions dated 4 August 2000;

(c) all the HDP shares to be transferred to the estate of JG Lee from:

(i) Gregory Lee in his personal capacity;

(ii) Jane Lois Lee in her personal capacity;

(iii) Gregory and Jane Lee as trustees of the Leeroy Family Trust;

(d) an account of profits from 4 August 2000 to present;

(e) a reasonable allowance for the efforts Gregory and Jane expended;

(f) compound interest;

(g) the removal of Gregory and Jane Lee as directors of HDP;

(h) the surrender to the estate of any shelf companies held by the defendants with names resembling High Duty Plastics Limited;

(i) a restraint of trade order for Gregory and Jane Lee for any business that would compete with HDP;

(j) costs; and

(k) such further or other relief as the court may deem just.

[37] The second cause of action alleges undue influence. The plaintiffs say a presumption of undue influence arises because Ray and Joyce placed trust and confidence in Gregory, given he was the most senior employee of HDP and effectively

controlled the company. He was a director from 30 September 1997 and owed a fiduciary duty as a director to the shareholders. As Gregory was also their son, Ray and Joyce were vulnerable to influence. They were retired and suffering a range of debilitating conditions.

[38] The plaintiffs allege that Gregory exerted undue influence in a variety of ways, including:

(a) holding HDP back from prospering from 1988 so that he was more likely to be able to afford to buy it;

(b) abusing company credit cards and supplier accounts;

(c) disposing of HDP's waste metal for cash;

(d) selling HDP products to his own customers for cash;

(e) such that on 6 December 1994 Joyce was admitted to the Mental Health ward of Rotorua Hospital; and

(f) threatening Ray and Joyce in May 2000 that if they did not transfer the shares to him for $200,000 he would leave HDP and set up in opposition.

[39] The third cause of action alleges an unconscionable bargain. The plaintiffs allege that Gregory took advantage of, and actively extorted, his disadvantaged parents and obtained an unconscionable bargain when purchasing the HDP shares at undervalue. It is said Ray and Joyce were disadvantaged by being elderly, suffering from a range of health conditions and stress and not being in possession of up-to-date valuations or legal advice.

[40] The relief claimed under the first cause of action is repeated for the second and third causes of action. It is apparent the focus is on the transfer of the shares in HDP to Gregory and the plaintiffs' belief that occurred in August 2000.

[41] The defendants admit that Gregory and his parents signed a Deed of Acknowledgement of Debt for $200,724 in 1997 but say that sum represented an approximate quarter share of the estate as valued at that time. Gregory was the debtor and Ray and Joyce were the creditors. They further admit Gregory acknowledged a loan to the Trust for a further $132,174 to be repaid seven years after the death of the last surviving parent, which debt was later cancelled by the Deed of Agreement of 4 August 2000. At that time Gregory paid his parents an additional $200,000 instead of the $132,174 to be paid after their death.

[42] The defendants deny all allegations in relation to breach of fiduciary duty, undue influence, and unconscionable bargain. They also plead affirmative defences of laches, acquiescence/estoppel/affirmation and change of circumstances.

The appellants' arguments on the merits

[43] On appeal Mr Lee referred to the following points to support his argument the claim was meritorious:

(a) the credibility of the defendants' key witnesses was undermined;

(b) until 1995 the parents were determined to leave all their shares in HDP to their four children in equal shares;

(c) Gregory had made numerous approaches to the parents to influence them to give him their shares;

(d) consideration of the 1997 proposal at face value;

(e) issues of representation in 1997 and 2000;

(f) the 2000 transaction called for an explanation;

(g) Gregory was a director of the family business and owed a fiduciary duty to the shareholders, namely his parents; and

(h) by 2000 both the parents' health had declined significantly.

(a) The credibility of the defendants' key witnesses

[44] A major difficulty for the plaintiffs' claim is that Gregory's account that the majority of the shares in HDP were transferred to him as part of a family arrangement in 1997 is largely supported by affidavit evidence from Mr Smith, the accountant, and Mr Battersby, the solicitor, who acted for Ray and Joyce at the relevant time.

[45] To overcome that hurdle, Mr Lee alleges there was a conspiracy between the defendants' key witnesses to forge share transfer documents in order to mislead the Court that the transfer took place in 1997. He also says that, contrary to the evidence of Mr Smith, and a record of the meeting distributed to the family, Gregory was present at a meeting on 25 June 1996 when the family arrangements were discussed. Mr Lee effectively alleges that the professional advisers acting for Ray and Joyce at the time have colluded to mislead the Court and have engaged in perjury. Those are serious allegations. From our review of the voluminous material before the Court, we consider that the evidence of Mr Smith and Mr Battersby is consistent with other contemporaneous documents, such as correspondence and memoranda executed by Ray and Joyce.

[46] The best explanation for why Ray and Joyce made the family arrangements they did and transferred the shares in HDP to Gregory is to be found in the documents executed by them. They each executed a Memorandum of Wishes directed to the trustees of the RB and JG Lee Family Trust at the time (6 October 1997). In her memorandum Joyce said:

> 3. After the death of my spouse I want the Trustees to provide primarily for my three children, **Helen**, **Melvin** and **Robert** as survive me. So far as possible I wish the Trustees to maintain equality between these three children. The assets of the trust are sufficient that it should not be difficult to do this. ...
>
> 4. I record that, although I love him dearly, my son **Gregory** is not provided for herein as he will receive, following the death of the last of my said husband and me to die, the last of the shares in the Company [HDP]. In this way **Gregory** has received his inheritance much earlier than the other three children. This will

> complete the transfer of all the shares of that Company to **Gregory**, with most of the non voting shares having been transferred to him during my lifetime. The transfer of these shares is in recognition of **Gregory's** contribution to the growth of that Company. The details of the transfer of those shares are embodied in a Bare Trust Deed executed by me and my said husband. My husband and I, along with our solicitor and accountant, have given this matter a great deal of thought over a number of years.

[47] Insofar as the handwritten notes of a meeting on 25 June 1996 may record additional parties were present at a meeting to those noted in the more formal document prepared afterwards, we consider nothing turns on that. Mr Lee and his sister (and other brother) were clearly aware of what was happening at the time and raised the issue with Ray and Joyce and their advisers at the time in a memorandum of August 1996.

(b) Until 1995 Ray and Joyce were determined to leave their shares in HDP in equal shares

[48] Mr Lee poses the rhetorical question: "What other than Gregory, could have influenced them to change their minds?" The first point is that, although Mr Lee seeks to pursue these proceedings in the name of his mother's estate, it is quite apparent from his submissions that his main complaint is that the shares in HDP were transferred to Gregory rather than to him and other members of the family. That is not a loss sustained by his mother's estate. Apart from that issue, his challenge to the transfer of the HDP shares to Gregory overlooks that the agreement to transfer them was part of an overall estate planning exercise from which he and his sister (and other brother) also ultimately benefitted.

(c) Gregory's approach to his parents to have them transfer the shares

[49] The Memorandum of Wishes noted above provides insight into why Ray and Joyce wanted to transfer the shares to Gregory.

(d) Consideration of the 1997 proposal at face value

[50] Mr Smith has given evidence of the background to the family arrangements in 1996/1997. The properties and the shares in HDP were independently valued. The valuations were:

(a)	shares in HDP	$332,898;
(b)	View Road property	$275,000;
(c)	Springfield Road	$195,000
	Total:	$802,898

A one-quarter share of the combined property at the time would have been $200,724. On that basis if the HDP shares were transferred to Gregory he would owe his parents a further $132,174 to even the adjustments out equally between the children.

[51] With Gregory to receive the HDP shares, the other assets, the residential and commercial property were to be transferred into the Trust for the benefit of Ray and Joyce and Gregory's siblings. Gregory was subsequently removed as a beneficiary of the Trust with his consent in order to give effect to that intention.

(e) Issues of representation

[52] Mr Lee questions why Gregory did not have his own representation. Nothing turns on this. In consensual family arrangements that is often unnecessary.

(f) The 2000 transaction

[53] Again Mr Lee raises a rhetorical question as to why would the same advisers in 2000 recommend the sale of the HDP shares for $200,000 cash when the business was at that time worth almost a million. In his submission the transaction calls for an explanation and a trial is required.

[54] Against that, the evidence of the advisers supports the respondents' interpretation of events, namely that the agreement to transfer the shares was made and completed in 1997 as part of the overall family and estate planning exercise conducted by Ray and Joyce (with professional legal and accounting advice) at that time. The further transactions in 2000 were, on the respondents' case, a variation in order to complete the earlier transaction that was otherwise agreed. The evidence is consistent with Gregory paying $200,000 to the immediate benefit of his parents in

2000 in lieu of the $132,174 which was not due to be paid until after their death. That followed the review by Ray and Joyce's new accountant, Mr Willemsen.

(g) The fiduciary duty issue

[55] Mr Lee repeats the submission that Gregory as a director of the family business owed a fiduciary duty to the shareholders being Ray and Joyce. As Ms Chambers observed, Ray and Joyce remained directors and were quite capable of being involved in decisions relating to the company. Further, the effect of the bare trust document executed at the time limited Gregory's control of the company but ensured the shares were held for him.

(h) The parents' health

[56] Mr Lee argues that by 2000 Ray and Joyce's health had declined significantly. We note that both Mr Lee and his sister are beneficiaries under his mother's will, which was not executed until 2004. There has been no issue raised as to her testamentary capacity or ability to make the will at that time. Robert and Joyce Lee's lawyer confirmed she had capacity even in March 2004 and that, while frail in health, she was still mentally alert at that time, some years after the transactions in issue.

[57] We return to the other issues that Mr Lee sought to rely on to avoid an order for security for costs in this case.

The RB and JG Lee Family Trust

[58] The Trust now owns the Springfield Road property occupied by Mr Lee and his family. For present purposes we take Mr Lee's explanation of that Trust as follows. The Trust was settled on 22 December 1994 by Ray and Joyce. The original trustees were Ray and Joyce and Clive Smith. The beneficiaries of the Trust originally included Ray and Joyce and their four children, together with their spouses, partners and children.

[59] In 1997, and as part of the family arrangement, the Springfield Road property and the commercial property were transferred to the Trust. In September 2003 Gregory was removed as a beneficiary of the Trust with his consent. Mr Lee was

appointed trustee. Subsequently the other siblings were removed as beneficiaries so that Mr Lee and his interests are the only beneficiaries. Mr Lee lives in the main asset of the Trust, the Springfield Road property.

[60] Mr Lee says Mr Aarts was appointed a trustee on 10 August 2009. The respondents question whether Mr Aarts has been properly appointed. We do not need to resolve that issue. For present purposes we proceed on the basis that Mr Aarts is a trustee with Mr Lee.

Nexus between plaintiffs' impecuniosity and the transaction the subject of the proceedings

[61] As noted previously, the proceedings are brought on behalf of the estate of Joyce. The issue is not Mr Lee's present impecuniosity but whether it could be said Joyce's estate was impecunious as a result of the transactions. On the information before the Court that argument cannot be sustained given the evidence of the payments made by Gregory.

[62] As to Mr Lee's personal position, we understand that while he is described in the proceedings as an IT consultant, he is otherwise unemployed. We also understand he has declined to apply for legal aid to assist with this proceeding.

The principle of access to the Courts

[63] Mr Lee relied on the Supreme Court decision in *Reekie v Attorney-General*, and particularly the following observations of the Court:[23]

> [3] Applications for security for first instance proceedings call for careful consideration and judges are slow to make an order for security which will stifle a claim.
>
> (Footnote omitted.)

[64] As a matter of principle that is, with respect, uncontroversial and consistent with the observations of this Court in *A S McLachlan Ltd v MEL Network Ltd*.[24] The Supreme Court also went on to discuss the current costs regime in general terms

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23 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.
24 *A S McLachlan Ltd v MEL Network Ltd*, above n 20.

and its relationship to security for costs. In doing so it made a number of observations of general application:

> [33] Although an order dispensing with security is therefore, in itself, of limited economic significance, the costs regime, including the usual requirement for appellants to provide security for costs, imposes some discipline on litigants. *The liability to pay costs if unsuccessful is a disincentive to the commencement of frivolous proceedings. As well, most litigants will not commence proceedings if the costs of the exercise, including those they must pay if unsuccessful, exceed the likely benefits. So the costs system discourages litigation which is disproportionate to the occasion.* Increased costs may be ordered where proceedings have been conducted vexatiously, and this serves as a disincentive to vexatious conduct. *An appellant who will not be able to meet a subsequent order for costs is free of constraints that affect other litigants and this freedom carries with it the potential for injustice to the respondent.*
>
> …
>
> [35] Against that background, we consider that the discretion to dispense with security should be exercised so as to:
>
> (a) preserve access to the Court of Appeal by an impecunious appellant in the case of an appeal which a solvent appellant would reasonably wish to prosecute; and
>
> (b) prevent the use of impecuniosity to secure the advantage of being able to prosecute an appeal which would not be sensibly pursued by a solvent litigant.
>
> *A reasonable and solvent litigant would not proceed with an appeal which is hopeless. Nor would a reasonable and solvent litigant proceed with an appeal where the benefits (economic or otherwise) to be obtained are outweighed by the costs (economic and otherwise) of the exercise (including the potential liability to contribute to the respondent's costs if unsuccessful). As should be apparent from what we have just said, analysis of costs and benefits should not be confined to those which can be measured in money*.
>
> (Emphasis added.)

[65] While the observations were made in the context of security for costs on an appeal, they are still relevant to consideration of whether security for costs should be required.

[66] Essentially Mr Lee's position is that he (and his sister) should be entitled, without any order for security for costs against them, to pursue the proceedings against the defendants in these proceedings. In the event the claim fails there should be no

cost consequences to them. We consider that to permit that would be to inflict a potential injustice on the respondents.

Other considerations

[67] Mr Lee made the point that this Court had allowed his appeal against the strike-out decision. But that appeal was in relation to a limitation defence.

[68] There are a number of other relevant considerations.

[69] The plaintiffs say Gregory owed a fiduciary duty arising from his position as a director of HDP. But as noted, both Ray and Joyce remained as directors of HDP as well until 10 August 2000. At the time Gregory was appointed a director in 1997 his parents had the benefit of an independent valuation of the company and legal and accounting advice. They continued to regularly attend the company office. Relevantly, both Mr Smith and Mr Battersby, the accountant and solicitor, have deposed that the parents recognised the contributions Gregory had made to HDP.

[70] The independent evidence of the solicitor and accountant do not support the allegations of undue influence. While the evidence is untested, their evidence is consistent with contemporaneous documents. It is also relevant that the shares in HDP were Gregory's inheritance and he did not receive a share in the trust, unlike his other siblings.

[71] Further, prior to the 2000 transaction the parents received further advice from another chartered accountant, Mr Willemsen. That advice was copied to both Mr Smith and Mr Battersby.

[72] Again, on the current information before the Court, the plaintiffs' claim of an unconscionable bargain seems a difficult one for the plaintiffs on the basis of the valuation of the assets and the Memorandum of Wishes.

Summary - merits

[73] We have spent some time considering the merits of the claim, rather more so than would be usual on an application for security. Normally the court will only endeavour to assess the merits and prospects of success of the claim by way of overview. But given the extent of Mr Lee's submissions we have sought to address the issue in more detail. We do emphasise, however, that an application for security for costs should not generally become an opportunity to explore the merits in any depth.[25]

[74] We consider the plaintiffs' claims face a number of substantial difficulties. On our assessment, the prospects of success are weak. The plaintiffs' own pleadings give rise to real difficulties as to whether the claims can be made out even without considering the affirmative defences, which are available to the defendants. There is also the forensic difficulty in answering the evidence of Mr Smith and Mr Battersby and responding to the contemporaneous documents. It would not be in the interests of justice to allow the appeal and effectively enable the plaintiffs to pursue these difficult, aged proceedings without providing some security for the defendants in the event the claim is ultimately unsuccessful.

[75] Other factors also count against setting aside the order for security in this case.

[76] As noted, a review of the procedural steps in the proceeding discloses that when it has suited Mr Lee he has accepted the stay.

[77] Finally, Mr Lee is both a trustee and final beneficiary of a trust which owns a valuable property. Given Mr Lee's assessment of the merits of the claim, it would be in his interest to pursue these proceedings as he is also a beneficiary of his mother's estate. One means of providing security to enable that would be for the Trust to assist by providing a second mortgage to the Registrar's satisfaction. That is a matter for the trustees to consider.

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[25] At [21].

Conclusion

[78] An order for security is appropriate. The sum of $75,000 is a reasonable sum in the circumstances of this case. We agree however, that the High Court should not have directed that the Trust provide security by way of a mortgage. The appropriate order under r 5.45(3)(a)(ii) of the Rules is that the plaintiffs in the High Court are to provide security in the sum of $75,000 to the satisfaction of the Registrar. That could be by the provision of a registrable second mortgage over the Trust property, but it need not be.

Result

[79] The appeal is dismissed.

[80] The plaintiffs in CIV-2010-463-430 are to provide security for costs in the sum of $75,000 to the satisfaction of the Registrar.

[81] In the event security is not provided by 16 August 2019 the proceeding will be stayed.

[82] The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.

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