IN THE COURT OF APPEAL OF NEW ZEALAND

CA362/2013
[2014] NZCA 169

BETWEEN	YOON LEE Appellant
AND	DISTRICT COURT AT AUCKLAND First Respondent
	ZHI HONG GAO AND LIN GE Second Respondents
	JOHN CARTER, TIMOTHY UPTON SLACK AND BRENT O'CALLAHAN Third Respondents

Hearing:	13 March 2014 (further submissions received 19 March 2014)
Court:	Ellen France, French and Cooper JJ
Counsel:	Appellant in person G J Luen for Second Respondents K J M Robinson for Third Respondents
Judgment:	7 May 2014 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay each of the second and third respondents indemnity costs (their actual costs incurred in relation to the appeal) and usual disbursements.

REASONS OF THE COURT

(Given by Ellen France J)

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Introduction

[1] Mr Lee, who is a solicitor, acted for the second respondents, Mrs Gao and Mr Ge,[1] on their purchase in 2005 of a residential section from Pro Rata Investments Ltd (Pro Rata). The third respondents are the partners of the firm of solicitors that acted for Pro Rata in the sale transaction. Pro Rata ultimately failed to settle the purchase and sold the section to a third party. The Gaos lost two deposits totalling $165,000 they had paid to Pro Rata as Pro Rata could not repay them.

[2] The Gaos successfully sued Mr Lee in the District Court for damages.[2] On Mr Lee's appeal to the High Court, Peters J upheld the finding of negligence but reduced the damages.[3] Mr Lee's application for leave to appeal from that decision was declined in the High Court[4] and his application for special leave was declined by this Court in a judgment delivered on 2 March 2012.[5]

[3] Some time later Mr Lee filed judicial review proceedings in the High Court. Peters J heard the application for judicial review and dismissed it.[6] Mr Lee now appeals to this Court.

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1 We will follow the approach taken in previous decisions and refer to the second respondents as the Gaos.
2 *Gao v Lee* DC Auckland CIV-2007-004-2591, 14 May 2010.
3 *Lee v Gao* HC Auckland CIV-2010-404-3599, 19 May 2011.
4 *Lee v Gao* HC Auckland CIV-2010-404-3599, 4 October 2011.
5 *Lee v Gao* [2012] NZCA 57.
6 *Lee v District Court at Auckland* [2013] NZHC 1000.

[4] Mr Lee points to a range of different matters he says mean he has been unfairly treated to the extent that this Court should intervene. The second and third respondents, in supporting the High Court judgment, submit that the application for judicial review is a collateral attack on decisions which have already been the subject of the appeal process or could have been.[7]

Background

[5] The background is summarised in the judgment of Peters J and we largely adopt her Honour's description.[8]

[6] As we have foreshadowed, the litigation arose in the context of an agreement to purchase a vacant site in a subdivision in Auckland (Lot 8). Under the agreement, which the Gaos executed without seeking legal advice, the purchasers were required to pay two deposits prior to settlement. These deposits totalled $165,000 and constituted 60 per cent of the total purchase price of $275,000. Pro Rata was not the registered proprietor of Lot 8 at the time of the agreement or, as it eventuated, at any time after that. Pro Rata was itself the proposed purchaser of several lots in the subdivision including Lot 8 from a group of companies trading as Coastal Land Developments (Coastal).

[7] After they had paid the first deposit of $27,500, the Gaos instructed Mr Lee to act for them on the purchase. As we have noted, Carter & Partners acted for Pro Rata. The Gaos subsequently paid the second deposit of $137,500. Carter & Partners had paid the deposits to Pro Rata after the agreement became unconditional.

[8] The purchase was due to settle in October 2005. Because Pro Rata had not acquired, and did not acquire, title from Coastal, it was unable to pass title. Coastal subsequently cancelled its agreement with Pro Rata in respect of Lot 8 and sold the property to another party. The Gaos could not get from Pro Rata any portion of the funds paid as deposits. Pro Rata had used the deposit monies to meet other obligations and subsequently went into liquidation.

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7 The first respondent abides the decision of the Court and was excused from attendance.

8 *Lee v District Court at Auckland*, above n 6, at [4]–[12]; see also *Lee v Gao*, above n 5, at [3]–[12].

[9] The Gaos commenced proceedings in negligence against Mr Lee. Mr Lee joined Carter & Partners to the proceedings. The case was to be heard by Judge Cunningham in the District Court in the week commencing 27 July 2009. For reasons we shall discuss shortly, the trial did not proceed on that date.[9] Subsequently, the Gaos joined Carter & Partners as second defendants and Carter & Partners cross-claimed against Mr Lee.

[10] Judge Gittos ultimately heard the proceedings in March 2010. His decision was delivered on 14 May 2010. He found that Mr Lee was negligent and judgment was entered in favour of the second respondents. All claims against Carter & Partners were dismissed.

[11] Mr Lee appealed to the High Court and pending that appeal applied for a stay of proceedings. Judge Joyce QC dealt with that application in July 2010.[10] Mr Lee also successfully sought leave from the High Court to adduce further evidence on the appeal.[11]

[12] Peters J allowed the appeal in part and reduced damages from $165,000 to $68,750. In a subsequent decision, the Judge reduced the costs awarded in the District Court to the second respondents.[12] The Judge dismissed Mr Lee's appeal against the judgment as it related to Carter & Partners and Mr Lee was ordered to pay Carter & Partners' costs. Both the High Court and this Court refused to grant Mr Lee leave to appeal to this Court.

The High Court decision under appeal

[13] Peters J noted that the pleadings were unsatisfactory. The decisions for which review was sought were not identified and nor was the basis on which review was sought. Nonetheless, the Judge proceeded to make the best she could of the application drawing on the submissions.

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9 *Gao v Lee* DC Auckland CIV-2007-004-2591, 27 July 2009.
10 *Gao v Lee* DC Auckland CIV-2007-004-2591, 16 July 2010.
11 *Lee v Gao* HC Auckland CIV-2010-404-3599, 18 August 2010.
12 *Lee v Gao* [2012] NZHC 3310.

[14] Peters J accepted the overarching submission for the second and third respondents, namely, that the application for judicial review was a collateral attack on earlier decisions and was not in the category of cases where the Court retained a discretion to interfere.

[15] The Judge went on to consider the merits of the various matters. We come back to the detail of her Honour's reasoning in relation to some of these matters but, in summary, Peters J concluded that Mr Lee had the ability to appeal the various decisions and should have done so or there was no reviewable error in the relevant decisions. The application was dismissed and costs awarded on an indemnity basis.

The issues

[16] We can deal with the key matters raised on appeal by considering the following headings:

(a) The jurisdiction of the District Court to hear the second respondents' claim.

(b) The effect of an assignment by Pro Rata of its rights under the agreement for sale and purchase.

(c) The calculation of damages.

(d) Costs.

[17] We deal with each of these matters in turn.

The jurisdiction of the District Court

[18] This issue arises because of the sum of damages sought in the Gaos' second amended statement of claim dated 18 September 2009. Four causes of action were alleged against Mr Lee. In relation to the claims for rectification, breach of duty of care and with respect to the second deposit, the Gaos claimed, in the alternative, $165,000 or $137,500 plus general damages, interest and costs. As a fourth cause of action, they claimed Mr Lee had failed to disclose all material information and

sought damages of $60,000 for legal fees unnecessarily incurred prior to the commencement of the proceedings. With the addition of the latter claim for $60,000, the entire claim totalled more than the $200,000 jurisdiction of the District Court.

[19] Section 29(1) of the District Courts Act 1947 provides that the District Court shall have jurisdiction to hear and determine "any proceeding where the … damages … claimed … is not more than $200,000, whether on balance of account or otherwise". Section 37 of the Act provides for jurisdiction to be extended by written agreement between the parties.

[20] The appellant says ss 29 and 37 are mandatory provisions. He also submits that in terms of *Black v Huffman*, having exceeded its jurisdiction, the decision of the District Court is a nullity.[13] Therefore, the appellant submits this is one of the types of cases in which this Court in *Nicholls v Registrar of the Court of Appeal* said that the Court would intervene on the basis of continuing prejudice.[14]

[21] In response, the second respondents contend that the effect of s 36 of the District Courts Act means that *Black v Huffman* is no longer good law. Section 36 deals with the abandonment of part of a claim to give the Court jurisdiction. Section 36(1) provides that where a plaintiff has a cause of action for more than $200,000 in respect of which the Court would have had jurisdiction if the amount was no more than $200,000, "the plaintiff may abandon the excess, and thereupon the court shall have jurisdiction to hear and determine the proceeding". That submission has some support from the authors of the Brookers commentary *Civil Procedure: District Courts and Tribunals* who suggest that there is no monetary limit imposed on any statement of claim in respect of separate causes of action.[15]

[22] We do not need to decide this point. The argument the appellant now makes was not pleaded and so was not dealt with in the High Court. Nor, as we understand it, was the point ever raised in the earlier appeal. It is too late to raise it now on

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13 *Black v Huffman* HC Dunedin AP54/89, 22 November 1990.

14 *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA) at 436–437.

15 Roderick Joyce (ed) *Civil Procedure: District Courts and Tribunals* (online looseleaf ed, Brookers) at [DC29.04]; contrast Peter Whiteside and Anthony Willy *District Courts Practice (Civil)* (online looseleaf ed, LexisNexis) at [DCA29.7]; and see *Dalton v Cartwright* HC Auckland AP47-SW02, 3 September 2002 at [46]. For a further discussion on these issues see *Logan v Millman Holdings Ltd (in liq)* [2006] DCR 304 (HC).

judicial review. Further, as the second respondents submit,[16] the fourth cause of action was effectively an alternative. As the second respondents explain, just prior to the hearing in the District Court scheduled to commence on 27 July 2009, the appellant provided a written brief which for the first time disclosed an alleged oral undertaking by Carter & Partners. If the undertaking was found to have been given, then the Gaos' real claim lay against Carter & Partners, rather than against Mr Lee. The Gaos were given leave at that point to include a claim directly against Carter & Partners. The second respondents continue in their additional written submissions as follows:[17]

> The Gaos also brought a fourth cause of action against Mr Lee for failing to disclose the undertaking earlier. If the Court found [Carter & Partners] had given the undertaking then the Gaos had unnecessarily incurred costs ($60,000) by pursuing Mr Lee rather than [Carter & Partners].
>
> Although the fourth cause of action against the appellant is not stated to be "in the alternative" it could not succeed "in addition" to any of the first three causes of action, because had the oral undertaking been given and the legal costs unnecessarily incurred, the Gaos would not have succeeded in any of their other claims against Mr Lee.

[23] If the question of jurisdiction had been raised in a timely way, the second respondents could have sought leave to file an amended statement of claim which was more clearly expressed. We note in this respect that the appellant was represented in the District Court and on appeal to the High Court, in the latter case by a Queen's Counsel.

The deed of assignment

[24] The appellant's next ground of appeal relies on the fact that by deed dated 2 September 2005, Pro Rata assigned to Coastal Pro Rata's interest in Pro Rata's agreements with third parties, including the agreement with the Gaos. As Peters J records, in return for this and other consideration, "Coastal was to refrain from cancelling its agreements to sell to Pro Rata, again including the agreement in

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16 The second respondents sought leave post-hearing to file further submissions on this aspect. We grant leave because the matter was not foreshadowed in the notice of appeal.

17 Footnote omitted.

respect of lot 8”.[18] Pro Rata did not meet the terms of the deed and Coastal cancelled its agreement in relation to Lot 8. Coastal sold that lot to another party.

[25] Mr Lee says that the second respondents could have claimed against Carter & Partners for loss of a chance and that the effect of the deed of assignment is that the second respondents could recover the benefits that Coastal derived from the assignment, that is, $88,600 and the $20,000 profit from the sale to a third party.[19]

[26] When the issue of the deed of assignment was raised in the High Court, Mr Lee’s complaint was as to non-disclosure of the deed. Peters J records that the Gaos’ lawyer included a draft of the deed in the trial bundle but, in error, did not include the final form of the deed.[20] Mr Lee’s current proposition as to the impact on the second respondents’ claims including matters of causation was not advanced in the High Court. Accordingly, when Peters J considered the matter she stated:[21]

> [30] I consider the Deed wholly irrelevant to the claim that the Gaos brought against Mr Lee and that Mr Lee brought against Carter & Partners. I do not consider the omission of the final form of the Deed might have affected the outcome of the proceedings in any way.

[27] Again, this matter was not pleaded. Indeed, before us the respondents focused on the disclosure issue, not having adequate notice of the shift in the appellant’s case.

[28] The question of the deed of assignment was raised as a basis for the application for leave to appeal in relation to the original proceeding in the High Court. Of this Asher J stated:[22]

> [17] The assignment by the vendor took place after the deposit had been paid and is irrelevant to the assessment of liability or damages.

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18 *Lee v District Court at Auckland*, above n 6, at [29].

19 In reliance on s 11 of the Contractual Remedies Act 1979 dealing, relevantly, with the ability to enforce remedies against an assignee.

20 *Lee v District Court at Auckland*, above n 6, at [28].

21 *Lee v District Court at Auckland*, above n 6.

22 *Lee v Gao*, above n 4.

[29] It is not clear whether this matter was specifically raised in this Court on the application for special leave. The Court recorded Asher J's conclusion on the deed of assignment point.[23] This Court's conclusions were summarised as follows:

> [23] We do not consider that Mr Lee's proposed points, either singly or in combination, come anywhere near meeting the well established test for a second appeal to this Court. Although Mr Lee sought to persuade us otherwise, the judgment of Peters J, and the underlying conveyancing transaction, do not give rise to any question of law or fact capable of genuine and serious argument on second appeal, and nor does the case involve any issue of sufficient interest to outweigh the costs and delays inherent in a second appeal.

[30] The appellant therefore seeks to, belatedly, raise again a matter that was already dealt with in the original appeal proceedings. We are not satisfied that at this late stage the appellant should be able to raise the matter again.

Calculation of damages

[31] The appellant says that the agreement for sale and purchase limits the retention of deposits by the vendors to 10 per cent, which should have affected the calculation of damages. The clause relating to the retention of a maximum of 10 per cent of the deposit is cl 9.4(1)(b)(i), which provides:[24]

> 9.4 If the purchaser does not comply with the terms of the settlement notice served by the vendor then:
>
> (1) … the vendor may:
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> …
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> (b) cancel this agreement by notice and pursue either or both of the following remedies namely:
>
> (i) forfeit and retain for the vendor's own benefit the deposit paid by the purchaser, but not exceeding in all 10% of the purchase price; …

[32] The clause is prefaced by the phrase that this right is "[w]ithout prejudice to any other rights or remedies available to the vendor at law or in equity". But, in any

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[23] *Lee v Gao*, above n 5, at [13(e)].

[24] The agreement was prepared on the Auckland District Law Society and Real Estate Institute of New Zealand standard form Agreement for Sale and Purchase of Real Estate (7th ed (2), July 1999).

event, this matter was not raised before Peters J and was not mentioned in the notice of appeal. It is not a matter appropriately dealt with in an application for judicial review and certainly not at this late stage.

Costs

[33] Mr Lee challenges a number of aspects of costs decisions.

[34] First, Mr Lee argues that his success in the High Court on appeal should have led to a change in the costs award made against him in the District Court. His submission is essentially that he has had to bear an unfairly burdensome proportion of the costs given his success on appeal and the failure of all of the claims against Carter & Partners including that by the Gaos.

[35] This point can be dealt with shortly. Peters J revisited the question of costs in a separate judgment delivered on 7 December 2012.[25] As to the costs vis-à-vis Carter & Partners, Peters J recorded that Mr Lee was wholly unsuccessful against the law firm at first instance.[26] His contention was that the Gaos should bear a share of Carter & Partners' costs in the District Court, given that they had also made a claim against Carter & Partners. Peters J said:[27]

> I do not consider they should. I am satisfied, as was the Judge, that the Gaos' claim against Carter & Partners was made only because of Mr Lee's (unproved) allegation of the undertaking to which I have referred.

[36] In terms of the costs award against Mr Lee in relation to the Gaos, Peters J considered this was a case in which it could be said that each side achieved a measure of success considering the outcome on appeal. Peters J continued:

> [26] Looking at the matter in the round I consider the circumstances are best met by making an award of $15,000 in favour of the Gaos against Mr Lee in respect of all costs and disbursements. I vary the order in the District Court to that effect. Costs in the High Court as between Mr Lee and the Gaos, are to lie where they fall.

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25 *Lee v Gao*, above n 12.

26 At [18]. Counsel for the second respondents advises that the Gaos and Carter & Partners reached agreement as to costs due by the Gaos to Carter & Partners.

27 At [18].

[37] If Mr Lee was not happy with this result, he should have appealed against it.[28] It is not a matter that can be raised now by way of judicial review.

[38] We interpolate here that the same observation can be made in relation to Mr Lee's underlying concern about costs. We refer here to his concern that awards were made on the mistaken belief that there was an agreement between himself and Carter & Partners as to costs. Mr Lee says there was only ever a "non-binding" agreement as to costs. The background to this concern is found in the context of his application in the District Court for a stay. As Judge Joyce records, "without prejudice to Mr Lee's right to argue … for different figures" Mr Lee, "in order to facilitate a similar protection for the second respondent to that now gained by the first respondent, has signed a consent to the cost calculations that have at this point been proffered … by the second respondents".[29] In any event, it is apparent that in her Honour's decision as to costs, Peters J has looked at the substantive merits of the parties' respective positions on costs.

[39] The second point can be dealt with on a similar basis. Mr Lee complains against the costs order made in the District Court by Judge Joyce on Mr Lee's stay application. If he was not happy with that decision, he should have appealed.

[40] Mr Lee's argument is that he was entitled to a stay from the point in time when the second respondents had obtained a charging order (14 July 2010).[30] Apart from the fact that the current proceeding was not the proper remedy, the respondents were required to prepare for a hearing on the stay application. Further, as Peters J stated:[31]

> [37] Mr Lee submits the Judge should not have made the order, as costs follow the event and he was successful in obtaining the stay. It was open to Mr Lee to make these arguments to the Judge at the time if he wished, and he may well have done so. The Judge's reasons for making the order are set out in his judgment. He took the view that Mr Lee had been unreasonable prior to 12 July 2010, in that he had proposed that the Gaos and Carter &

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28 On the basis of *Reid v New Zealand Fire Service Commission* [2010] NZCA 133, (2010) 19 PRNZ 923 at [28]–[32], leave would have been required for that course. The point remains that this was the appropriate course of action to have taken.

29 *Gao v Lee*, above n 10, at [7].

30 In reliance on s 84 of the District Courts Act 1947 which provides, relevantly, that an appeal may operate as a stay when security is given to the Registrar for the amount of the judgment.

31 *Lee v District Court at Auckland*, above n 6.

> Partners should consent to a stay on the basis of a personal undertaking from him, in lieu of other security. Moreover, as counsel for the Gaos and Carter & Partners submitted, I considered (and did not alter) the order that the Judge made when I fixed costs after the appeal. There is no basis for revisiting the matter now.

[41] We agree. We add that the costs challenged by Mr Lee related primarily to a half-hour hearing.

[42] The third aspect of costs relates to the decision of Judge Cunningham allowing an amendment to the statement of claim, declining leave for Mr Pidgeon QC to continue as counsel for Mr Lee and adjourning the hearing.[32] The issue of Mr Pidgeon's ability to remain as counsel for Mr Lee arose because of the late raising by Mr Lee of the alleged oral undertaking. Mr Pidgeon referred in Court to a discussion he had with Mr Lee about this. That raised the possibility of Mr Pidgeon being called as a witness in terms of what was said during the conversation. This was a matter raised in the District Court by counsel for the respondents. Mr Lee's point is that Mr Pidgeon was never required to give evidence and so, on Mr Lee's approach, Mr Pidgeon was debarred from appearing in the proceeding on a false premise. It follows, the argument goes, that Mr Lee should not have had to pay costs in respect of this matter.

[43] This is not a matter that can be dealt with by way of judicial review proceedings. Further, on the material before us, it appears that by the time the case came to trial matters had simply moved on and it was not then seen as necessary to subpoena Mr Pidgeon. There is no merit in this point.

[44] Fourth, in some of the material advanced in support of the appeal, Mr Lee challenges the decision of Peters J to award costs against him on an indemnity basis on the judicial review application in the High Court. He argues that because he is an officer of the court, indemnity costs cannot be awarded unless he has breached his duty to the court and met the test for such an award in *Harley v McDonald*.[33] It is not entirely clear whether or not Mr Lee is pursuing this point but we note that Peters J explained indemnity costs were appropriate because Mr Lee had acted

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[32] *Gao v Lee*, above n 9.

[33] *Harley v McDonald* [1999] 3 NZLR 545 (CA); rev'd [2001] UKPC 18, [2002] 1 NZLR 1.

vexatiously, frivolously, improperly or unnecessarily in bringing and continuing the proceeding.[34] No good reason is advanced as to how the Judge has erred in this approach. As counsel for the third respondents says, the costs were awarded against Mr Lee in his capacity as a party not as counsel or as an officer of the court.

[45] Finally, we deal with a related point with respect to summons issued to various lawyers from Carter & Partners. Mr Lee now complains that the lawyers were not called. However, as we understand it, these summons were issued in order to ensure documents were provided. The documents having been provided, there was no further need to summons the witnesses.

[46] For these reasons, the appeal is dismissed.

Costs in this Court

[47] The second and third respondents sought indemnity costs. Mr Lee resists this application on the basis his arguments have merit.

[48] Rule 53E of the Court of Appeal (Civil) Rules 2005 makes provision for an award of indemnity costs. We consider r 53E(3)(a) is applicable. That rule states that indemnity costs may be awarded if:

> the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending an appeal …

[49] In declining leave to appeal, this Court in its earlier judgment pointed out that the agreement in issue was dated 16 July 2005. Litigation had been "going on virtually ever since" and the Court was "firmly of the view that the case should go no further".[35] Despite that indication, Mr Lee has pursued largely the same matters again in the guise of a judicial review proceeding or has raised new matters that should have been raised in the context of the appeal and subsequent applications for leave to appeal.

[34] At [46].
[35] At [24].

[50] The appellant must pay each of the second and third respondents indemnity costs (their actual costs incurred in relation to the appeal) and usual disbursements.

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