

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 81/2019  
[2019] NZSC 124**

BETWEEN                      ROBERT LEE AS TRUSTEE OF THE  
   ESTATE OF J G LEE  
   Applicant

AND                              GREGORY LEE  
   First Respondent

   GREGORY LEE AND JANE LOIS LEE AS  
   TRUSTEES OF THE LEEROY FAMILY  
   TRUST  
   Second Respondents

Court:                      Glazebrook, O'Regan and Ellen France JJ

Counsel:                      Applicant in person  
   D A T Chambers QC and A H H Choi for Respondents

Judgment:                      8 November 2019

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**JUDGMENT OF THE COURT**

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- A      The application for leave to appeal is dismissed.**
- B      The applicant must pay costs of \$2,500 to the respondents.**
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**REASONS**

**Introduction**

[1]      In a judgment delivered on 30 July 2019 the Court of Appeal dismissed an appeal by the applicant (Mr Lee) against a decision of the High Court requiring him to provide security for costs.<sup>1</sup> The Court directed security for costs in the sum of

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<sup>1</sup>      *Lee v Lee* [2019] NZCA 345 (Stevens, Venning and Dunningham JJ) [CA judgment].

\$75,000 be provided to the satisfaction of the Registrar. Mr Lee now seeks leave to appeal from that decision to this Court.

## **Background**

[2] The present application arises in the context of a family dispute between Mr Lee and his brother Gregory Lee, the first respondent, involving the transfer of shares in their parents' company, High Duty Plastics Limited (HDP). Mr Lee filed a statement of claim in the High Court in late September 2011 on behalf of himself and his sister in their capacity as trustees of the estate of their late mother. The proceeding challenges transactions through which shares in HDP were transferred to the first respondent. The statement of claim alleges three causes of action, namely that: the first respondent exercised undue influence over his parents, in particular, in 2000 to procure the transfer of shares in HDP to himself at an undervalue; that the first respondent acted in breach of the fiduciary duty he owed to his parents as shareholders in HDP; and/or that the first respondent obtained the shares through an unconscionable bargain. The relief sought includes an account of profits and that the transfer of the shares be set aside.

[3] In his statement of defence and counterclaim of November 2011, the first respondent accepted the shares were transferred to him but, in essence, says that this occurred as part of an estate planning exercise reflected in a deed of trust signed in October 1997.

[4] The claim has a chequered history.<sup>2</sup> It was initially struck out on limitation grounds.<sup>3</sup> The decision to strike out the claim was reversed by the Court of Appeal in November 2015.<sup>4</sup> There have also been various other interlocutory applications, including in relation to security for costs which was initially set at \$150,000.<sup>5</sup> The proceedings were stayed for a period to allow security to be provided in the form of a mortgage over a property occupied by Mr Lee and owned by the RB and JG Lee Family Trust. The sum of \$150,000 imposed by way of security for costs was

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<sup>2</sup> The history is set out in more detail in the CA judgment, above n 1, at [3]–[17].

<sup>3</sup> *Lee v Lee* [2012] NZHC 3283. The decision of Associate Judge Christiansen was upheld by Collins J on review: *Lee v Lee* [2013] NZHC 1069.

<sup>4</sup> *Lee v Lee* [2015] NZCA 514, [2016] NZAR 61.

<sup>5</sup> *Lee v Lee* [2016] NZHC 1073 (Associate Judge Christiansen).

subsequently reduced by Paul Davison J on review to \$75,000 to reflect the fact that the trial was to be split between liability and quantum.<sup>6</sup> Paul Davison J directed that security for that sum be provided by way of a registrable second mortgage over the property. Again, the proceedings were stayed pending provision of security for costs.<sup>7</sup>

[5] No mortgage was provided by Mr Lee. He said that his fellow trustee would not agree to a mortgage. Eventually, Mr Lee obtained leave to appeal from the Court of Appeal from the decision of Paul Davison J relating to security for costs.<sup>8</sup>

[6] On appeal, the Court of Appeal determined that the plaintiff estate was not impecunious. The Court's assessment was that the claim's prospects of success were weak. In these circumstances, the Court considered that there was a potential injustice to the respondents if, as Mr Lee contended, he should be able to pursue the proceeding without security and with no costs consequences should the claim fail. The Court noted also that while the sum of \$75,000 was appropriate, the High Court should not have directed the Trust to provide security by way of mortgage. Rather, the appropriate order was that the plaintiffs provide security in the sum of \$75,000 to the satisfaction of the Registrar.

### **Proposed appeal**

[7] The key points Mr Lee seeks to raise on the proposed appeal can be summarised in this way. First, he wishes to argue he has no means to pay security and, further, that the absence of means is as a result of the transactions he challenges (particularly, the sale of shares in HDP at what Mr Lee says was a significant undervalue). Next, Mr Lee's case is that his claim has merit. He refers to aspects of the evidence he says support this assessment and relies also on the failure of the Court of Appeal to address his reliance on *Re Rose*.<sup>9</sup> Mr Lee wishes to argue that *Re Rose* supports his argument that the relevant transaction is the transfer of HDP shares in 2000 and not the 1997 transaction. As a result, Mr Lee contends that a worthy claim

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<sup>6</sup> *Lee v Lee* [2017] NZHC 431.

<sup>7</sup> Edwards J subsequently refused an application by the respondents to lift the stay to allow the trial to proceed and an application by the applicant to vary the order for security. An unless order was made: *Lee v Lee* [2017] NZHC 712.

<sup>8</sup> Leave to appeal was declined in the High Court: *Lee v Lee* [2017] NZHC 1503, but granted by the Court of Appeal: *Lee v Lee* [2018] NZCA 282.

<sup>9</sup> *Re Rose* [1952] Ch 499 (CA).

is otherwise stifled because he will be unable to pay security. In this respect, the submission is that the approach taken by the Court of Appeal is contrary to the framework set out by this Court in relation to security for costs on an appeal in *Reekie v Attorney-General*.<sup>10</sup> Mr Lee refers in particular to the observation in *Reekie* that “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”.<sup>11</sup>

### **Assessment**

[8] Mr Lee does not challenge the principles relating to the setting of security for costs at first instance as outlined in *A S McLachlan Ltd v MEL Network Ltd*. This Court may wish to consider those principles at some point but the present case is not an appropriate vehicle for that consideration. No question of general or public importance accordingly arises.<sup>12</sup> Rather, the matters raised are specific to the particular factual circumstances. Further, as the Court of Appeal noted, Mr Lee is both a beneficiary and trustee of a trust that owns “valuable property”.<sup>13</sup> And, as the Court observed, Mr Lee’s assessment of the merits of the case suggested it was in his interests to pursue the proceedings as he is also a beneficiary of his mother’s estate.<sup>14</sup> In those circumstances, we do not consider a risk of a miscarriage of justice arises if the appeal is not heard.<sup>15</sup>

[9] The applicant must pay costs of \$2,500 to the respondents.

Solicitors:  
Lance Lawson, Rotorua for Respondents

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<sup>10</sup> *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.

<sup>11</sup> At [3] citing the review of the jurisdiction in *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

<sup>12</sup> Senior Courts Act 2016, s 74(2)(a).

<sup>13</sup> CA judgment, above n 1, at [77].

<sup>14</sup> At [77]. We understand that the relief sought includes the transfer of all the HDP shares to the estate of JG Lee.

<sup>15</sup> Senior Courts Act, s 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.