**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 67/2025**
**[2025] NZSC 153**

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| BETWEEN | XINHONG (VICTOR) JIA<br>Applicant |
| AND | YULING YANG<br>First Respondent |
| | SEN GAO<br>Second Respondent |

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| Court: | Ellen France and Kós JJ |
| Counsel: | B O'Callahan for Applicant<br>D J Chisholm KC and J D Ryan for Respondents |
| Judgment: | 10 November 2025 |

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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 the respondents one set of costs of $2,500.**

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**REASONS**

## Introduction

[1] This proposed appeal relates to the judgment of the Court of Appeal[1] upholding the decision of the High Court to grant summary judgment on an application by the

1 *Jia v Yang* [2025] NZCA 231 (Woolford, Muir and Isac JJ) [CA judgment].

respondents.[2] The appeal would focus on the interpretation of a clause in an agreement for sale and purchase which provided:[3]

> 20. The parties agree that the transfer of title is to take place on 20 May 2019. The settlement funds will not be payable until at such time that the Victor Project by Brownsbay Seaview Limited [BBSL] has been completed *and the shareholder dividends are payable* and paid to the shareholders.

**Background**

[2] The background is set out in the judgments of the Courts below.[4] In very broad terms, in 2014 Mr Jia incorporated a company, BBSL, to carry out a multi-story residential development. The parties became friends over the course of 2015 and about three years later, Mr Gao began investing in the development (Ms Yang was involved as well). By May 2019 the respondents' investment was in the order of $14 million. In early 2019, Mr Jia asked Mr Gao for a loan to repay a debt. The High Court found the resulting arrangements were separate from the parties' broader business relationship.

[3] The vehicle by which assistance was initially to be given was the transfer of land to Mr Jia: a property owned by the respondents. The payment of the purchase price of $3 million was to be deferred until Mr Jia received a dividend from the development. Clause 20, set out above, is the relevant provision relating to repayment. There were changes in the way the transaction in fact proceeded but, ultimately, on 26 June 2019, Ms Yang advanced $3 million to the applicant. As the Court of Appeal said, "[w]hat was formerly a deferred payment obligation at this point because an unsecured loan which Mr Jia applied to repayment of [an] advance from BBSL and the debt" he owed.[5]

[4] By 2022, the relationships between the parties had soured. The development was under financial stress with large liabilities to a secured lender. Refinancing was problematic. Against this background, on 8 September 2022, the respondents sought summary judgment in relation to the $3 million loan on the basis that there was an

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2 *Yang v Jia* [2024] NZHC 992 (Associate Judge Brittain) [HC judgment].
3 Emphasis added.
4 CA judgment, above n 1, at [5]–[22]; and HC judgment, above n 2, at [20]–[24].
5 CA judgment, above n 1, at [11].

alleged oral term the loan was repayable on demand. The High Court dismissed that application.[6] Associate Judge Lester found that the respondents' approach was inconsistent with the rationale of the transaction as that linked repayment to receipt of dividends from the BBSL development, and that this construction lacked commercial common sense.

[5] There was no appeal from that decision but, by September 2023, the problems with the development had worsened. Ultimately, Mr Jia put the two relevant companies — BBSL and another, Winter Forest Holdings Ltd (WFHL) — into liquidation. The respondents then sought and obtained leave to bring a second summary judgment application.[7] They pleaded the loan was repayable on the liquidations of BBSL and/or WFHL on the basis of either an express or implied term of the agreement for sale and purchase. There is no dispute that for the purposes of cl 20, the development is "completed".

[6] The High Court granted summary judgment. The Court found that a reasonable person in the shoes of the parties at the relevant time would not have understood the qualifying event for repayment to include completion of a liquidation of the development company and a liquidator's pursuit of claims for unliquidated damages against a mortgagee of the company or its directors. Rather, the reasonable person would have treated the qualifying event to be completion and payment of any shareholder dividends payable to the respondents by a development company controlled by its board of directors. The Associate Judge said that on liquidation of the two companies the qualifying event was satisfied because dividends were no longer payable as a matter of law. Alternatively, the Court said the criteria for implication of a term were met so that cl 20, read against the relevant background, must be treated as meaning liquidation required repayment of the loan.

[7] The Court of Appeal, in upholding the decision of the High Court, considered that Mr Jia's approach to interpretation sought to avoid what was "a significant lacuna" in the contract, that is, "what happens if a shareholder dividend becomes impossible

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6 *Yang v Jia* [2023] NZHC 639, (2023) 23 NZCPR 954 (Associate Judge Lester).
7 HC judgment, above n 2.

as a result of insolvency or liquidation".[8] That lacuna was relevant to implication of a term. Drawing on the meaning of "dividend" and the factual matrix, the Court of Appeal considered the parties had not:[9]

> … turned their mind to the consequences of insolvency because it was simply never contemplated. The word "dividend" was … intended to recognise what would flow from the successful conclusion of the project. It was a dividend of the type authorised by s 52 [of the Companies Act 1993] and assumed solvency.

[8] With liquidation, payment of such a dividend was legally not possible.

[9] Having discussed this Court's approach to the implication of terms in *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, the Court said cl 20 should be read to include the words "or dividends are no longer payable as a result of liquidation" at the end of cl 20.[10] The Court identified the following "critical contextual factors" in support of that interpretation:[11]

> (a) The loan was for a very significant sum — $3,000,000.
>
> (b) It was between parties not only involved in a separate business relationship, but, at that stage, bound by friendship.
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> (c) It was "a big favour" designed to preserve Mr Jia's "standing" within the Chinese community in Auckland.
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> (d) It was never intended to be a gift [as the High Court also found].
>
> (e) It was intended to be repaid from dividends which, from the point Mr Jia resolved to liquidate the [c]ompanies, could never be declared.
>
> (f) It was non-interest bearing and unsecured.

[10] The Court concluded that implication of the suggested term was "essential to give effect to the reasonable expectations of the parties, objectively determined".[12]

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8 CA judgment, above n 1, at [49].
9 At [56].
10 At [66]; and see *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [113]–[115] per Winkelmann CJ and Ellen France J, and [232(b)] per Glazebrook, O'Regan and Williams JJ.
11 CA judgment, above n 1, at [65] (footnote omitted).
12 At [66].

## The proposed appeal

[11] The applicant says the proposed appeal raises a question of law about the approach to the implication of terms and the extent to which the approach should be iterative or sequential. The Court of Appeal approached it in a sequential way and a different outcome could have been produced if the Court had instead taken an iterative approach. Further, the applicant argues a miscarriage of justice may have occurred. This is said to be based on alleged factual errors and/or the omission of critical contextual factors.

[12] Assuming for these purposes there remains a question of law about the iterative versus sequential approach, this case does not provide an appropriate vehicle to consider it.[13] The proposed appeal does not have sufficient prospects of success given the concurrent findings of fact that the sum advanced was a loan, not a gift. Nor do we see the factual points the applicant wishes to raise as having sufficient merit.[14] There is accordingly no appearance of a miscarriage of justice as that term is understood in the civil context.[15]

## Result

[13] The application for leave to appeal is dismissed.

[14] The applicant must pay the respondents one set of costs of $2,500.

Solicitors:
Zhang Law Ltd, Auckland for Applicant
Claymore Partners Ltd, Auckland for Respondents

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13 See *Bathurst Resources Ltd*, above n 10, at [114]–[115].

14 We have not found it necessary to consider the affidavit of the applicant dated 27 October 2022 which was before the Court of Appeal.

15 Senior Courts Act 2016, s 74(2)(b); and see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].