

IN THE SUPREME COURT OF NEW ZEALAND

**SC 88/2016
[2016] NZSC 151**

BETWEEN YAO WEI HE
 Applicant

AND ZHIXIONG CHEN
 Respondent

Court: Glazebrook, Arnold and O'Regan JJ

Counsel: Applicant in person
 N R Campbell QC for Respondent

Judgment: 21 November 2016

JUDGMENT OF THE COURT

- A The application for leave to appeal and the application to adduce further evidence are dismissed.**
- B Costs of \$7,500 are payable to the respondent.**
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REASONS

Background

[1] Mr Chen says that he lent Mr He \$300,000. He sued for repayment of that sum plus interest. In those proceedings (the debt proceedings) Mr Chen relied on a document that was handwritten by Mr He and signed by him to the following effect (in English translation):

Acknowledgement of Debt

I, HE Yao Wei, hereby borrow three hundred thousand New Zealand dollars in total from CHEN Zhixiong. The annual interest rate is 6 percent, which only applies to the sum of two hundred thousand New Zealand dollars of the whole amount of the loan. The remaining amount of one hundred thousand dollars is free of interest. The whole amount of the loan must be paid off within half a year.

The borrower: HE Yao Wei

16 August 2010

[2] Mr He defended the claim. He acknowledged receiving \$300,000 and accepted the acknowledgment of debt was authentic. He said, however, that the money was advanced to him on trust for the implementation of a joint venture arrangement with Mr Chen through a joint venture company NZ Products International Ltd (NZPIL). He said that the arrangement was that, assuming Mr Chen was satisfied with the performance of NZPIL after six months, then the \$300,000 was to be treated as an advance to NZPIL.¹ It was Mr He's case that this had occurred and therefore that he was not personally liable to make any payment to Mr Chen.

[3] Mr Chen succeeded in both the High Court² and the Court of Appeal.³ Mr He seeks leave to appeal against the Court of Appeal judgment and also applies to adduce further evidence.

Grounds

[4] Mr He says that his defence to Mr Chen's debt proceedings had two limbs. The first was that the loan was not personal to him but had become a loan to NZPIL. The second was that NZPIL had repaid more money to Mr Chen than Mr Chen had advanced to NZPIL⁴ and that \$300,000 owed had therefore been repaid.

¹ In fact Mr Chen was not a shareholder of NZPIL. His son was, however, a shareholder and director.

² *Chen v He* [2015] NZHC 1593 (Moore J).

³ *He v Chen* [2016] NZCA 340 (Kós, Clifford and Brewer JJ).

⁴ It is not in dispute that Mr Chen had made other advances to NZPIL, although the quantum is not agreed.

[5] The new evidence Mr He seeks to file primarily relates to what he asserts was the second limb of his defence. Mr He submits that the Court of Appeal was wrong to dismiss his application to adduce evidence relating to the second limb and also alleges wrongdoing on the part of Mr Chen and/or failings of Mr He's own counsel with regard to matters related to that second limb.⁵

[6] Mr He, in the Court of Appeal, had applied to adduce five bank statements allegedly showing that Mr Chen had been repaid at least \$387,605 more than he had lent to NZPIL. The Court of Appeal rejected that application on the basis that the evidence was not fresh and that it was not in any event relevant to the question of whether the \$300,000 advance was or was not a personal loan.⁶

Application to adduce further evidence

[7] In the debt proceedings in the High Court, evidence relating to whether NZPIL had repaid more to Mr Chen than he was entitled to receive from NZPIL had been ruled inadmissible on the basis that this could not support a set-off or a counterclaim with regard to any personal obligation on the part of Mr He to repay any personal loan to Mr Chen.⁷ That judgment was not the subject of any appeal.

[8] Instead, Mr He commenced proceedings (the new proceedings) against Mr Chen alleging, among other things, that NZPIL had repaid more money to Mr Chen than Mr Chen had advanced.⁸ An application to consolidate the new proceedings with the debt proceedings was refused.⁹ The new proceedings are still on foot.

[9] All this means that Mr He was not entitled to, and did not, run a defence in the debt proceedings that NZPIL had paid more to Mr Chen than was owed by it. There was therefore no second limb defence in the debt proceedings. Any alleged failings of counsel related to the second limb are therefore irrelevant. Further, any

⁵ These allegations are disputed by Mr Chen and by Mr He's counsel.

⁶ *He v Chen*, above n 3, at [35]–[39].

⁷ *Chen v He* [2014] NZHC 2699 (Faire J) at [13] and [17]–[22].

⁸ *He v Chen* CIV 2014-404-3369.

⁹ *Chen v He* [2015] NZHC 32 (Venning J).

alleged wrongdoing by Mr Chen with regard to NZPIL will be dealt with in the new proceedings. It cannot be relevant to this appeal.

[10] As Mr Chen points out in his submissions:

- (a) If Mr He had established in the debt proceedings that the \$300,000 loan had been “rolled over” to become a loan repayable by NZPIL, Mr Chen’s only claim would have been against NZPIL. This would mean that Mr Chen’s claim against Mr He would have failed, regardless of whether NZPIL had repaid more to Mr Chen than Mr Chen had advanced to NZPIL.
- (b) If there were no such “rollover” term, Mr Chen’s claim against Mr He would succeed, regardless of whether NZPIL had repaid more to Mr Chen than Mr Chen had advanced to NZPIL. The amount repaid by NZPIL to Mr Chen would merely be a matter between NZPIL and Mr Chen (and is in any event the subject of the new proceedings).

[11] This means that the application to adduce further evidence must be dismissed and that any submissions related to the so-called second limb are irrelevant to this application.

The application for leave to appeal

[12] The proposed appeal related to what Mr He calls the first limb of his defence raises no issues of general or public importance. It is highly factual and there are concurrent findings of fact in the courts below. Nor is there any appearance of a miscarriage of justice.¹⁰

Costs

[13] Mr Chen seeks increased costs on the basis of the volume of material filed by Mr He that he has had to deal with. He also submits that the applications were

¹⁰ In the sense required in civil cases: see *Junior Farms Ltd v Hampton Securities Ltd (in liquidation)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

hopeless and that one aspect of them (related to the “second limb”) was an abuse of process. Mr Chen’s costs opposing the application will exceed \$20,000.

[14] We accept that there have been unsatisfactory aspects to these applications. We therefore award costs of \$5,000 with regard to the application for leave to adduce further evidence. We do not, however, award more than the usual costs with regard to the application for leave to appeal, which, leaving aside the issue of the so-called second limb, was relatively straightforward.

Solicitors:
N L Faigan, Auckland for Respondent