IN THE SUPREME COURT OF NEW ZEALAND

SC 94/2016
[2016] NZSC 163

BETWEEN	ALEXANDER PIETER VAN HEEREN Applicant
AND	MICHAEL DAVID KIDD Respondent

Court:	Glazebrook, Arnold and Ellen France JJ
Counsel:	D J Goddard QC and D Williams for Applicant S J Mills QC and B O'Callahan for Respondent
Judgment:	9 December 2016

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs of $2,500.

REASONS

[1] From 1975 until 1991 the applicant and the respondent, who were based in South Africa but had business interests in New Zealand, were in a business relationship, conducted through companies throughout the world. In 1989 they decided to terminate the relationship. On 18 January 1991, as part of the process of disengagement, the parties signed two agreements:

(a) An agreement for the sale of shareholdings in five South African companies and one Hong Kong company by Mr van Heeren to Mr Kidd; and

(b) A broadly-worded indemnity agreement, which provided for Mr Kidd to indemnify Mr van Heeren against claims by Mr Kidd and purported to be a final settlement of all disputes between them, wherever they occurred.

[2] In 1996 Mr Kidd brought proceedings against Mr van Heeren in the New Zealand High Court seeking various remedies, including the taking of accounts, in respect of assets and profits from New Zealand based companies. Mr van Heeren protested the jurisdiction and also applied to have the proceedings struck out in reliance on the indemnity agreement. The proceedings were stayed on the basis that the indemnity agreement required that any dispute be determined by South African law. [1]

[3] On 9 November 1998, Mr Kidd commenced a proceeding in the High Court of South Africa, arguing that the indemnity agreement related only to claims relating to the sale by Mr van Heeren of his shareholding in the companies referred to in the sale agreement or, in the alternative, that the indemnity agreement was void and of no legal effect because he had been induced to enter it by material misrepresentations. Satchwell J found in Mr Kidd's favour, holding that Mr Kidd had been induced to enter the indemnity agreement on the basis of "misrepresentations which were deliberately made" by Mr van Heeren in order to get him to sign it.[2] The Judge reached this conclusion after examining the nature of the parties' business relationship closely.

[4] Satchwell J explained that the indemnity agreement could only be understood in the context of the business matrix within which the parties operated.[3] While acknowledging that the question whether there was a partnership was not addressed in detail in the pleadings, she went on to find (after careful consideration of extensive evidence) that it was "difficult to comprehend the joint enterprise of Kidd and van Heeren constituting anything other than a partnership".[4] She accepted

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1 *Kidd v van Heeren* [1998] 1 NZLR 324 (HC).
2 *Kidd v van Heeren* SGHC Johannesburg 27973/1998, 20 May 2013 [*Kidd* SA judgment] at [152]–[173].
3 *Kidd* SA judgment, above n 2, at [23].
4 At [126].

Mr Kidd's evidence that he was induced to enter the agreement as a result of various factors, including his "trusting reliance" on Mr van Heeren.[5] The Judge was satisfied that Mr van Heeren deliberately took advantage of Mr Kidd's trust in him and his reliance upon his financial acumen and that if Mr Kidd had known the true content and import of the indemnity, he would not have signed it.[6]

[5] Following the judgment in South Africa, Mr Kidd sought to reactivate the stayed New Zealand proceedings, seeking, among other things, orders that an account be taken between Mr Kidd and Mr van Heeren to determine the amount due to Mr Kidd arising out of his claim and for the payment of the amount ascertained as owing in respect of New Zealand-based assets. Both parties accepted that issue estoppel applied to the Judge's finding that the indemnity agreement was void; however, the parties disagreed as to whether issue estoppel applied to the Judge's findings as to the existence of a partnership and the identification of partnership assets. Mr van Heeren wished to argue that the parties were in a joint venture and that the property in question was his alone. Mr Kidd submitted that the South African Judge's findings as to the existence of the partnership and its assets created an issue estoppel in New Zealand, so that all that remained to be determined in the New Zealand proceedings were issues concerning remedy and quantum.

[6] Both the High Court[7] and the Court of Appeal[8] found in favour of Mr Kidd. Mr van Heeren now seeks leave to appeal. Mr Goddard QC for Mr van Heeren says that both parties accept that an issue estoppel will arise only if the relevant issue was determined in an earlier court decision and was necessary for the determination of the claim, but differ as to the concept of necessity. Mr Goddard put the issue as follows:

> [M]ust the finding be objectively necessary/legally indispensible to the conclusion reached by the other court, or is it sufficient that the finding was essential/important to the reasoning of the judge?

In addition to this issue, Mr van Heeren wishes to raise the question of the threshold for ordering a summary account.

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5 At [155].
6 At [165].
7 *Kidd v van Heeren* [2015] NZHC 517 (Fogarty J).
8 *van Heeren v Kidd* [2016] NZCA 401 (Harrison, Miller and Cooper JJ).

[7] The arguments advanced in Mr van Heeren's written submissions are the same as those raised in the Court of Appeal and are addressed comprehensively in that Court's judgment. While we accept that the precise scope of the doctrine of issue estoppel may be a matter of general or public importance that this Court may need to consider at some stage, we are satisfied that this is not an appropriate case to do so. As the judgment of the Court of Appeal amply demonstrates, the question whether or not the parties' business relationship was a partnership was squarely before the South African Court. It was raised in the pleadings (albeit only briefly)[9] and was addressed in interrogatories, in evidence and in argument. The South African Court's partnership findings (that is, the existence of the partnership and its scope) were, as the Court of Appeal put it, "essential and fundamental steps in the logic of Satchwell J's judgment".[10] Mr van Heeren could have appealed that Court's findings, and attempted to do so but was not given leave. On any view of it, issue estoppel applies to the partnership findings. In these circumstances, a grant of leave to this Court on this issue is not justified.

[8] Nor is a grant of leave on the summary account issue justified. That is simply a matter of the application of a particular rule to particular facts. It is not a matter for this Court.

[9] The application for leave to appeal is dismissed. The applicant must pay the respondent costs of $2,500.

Solicitors:
Fee Langstone, Auckland for Applicant
KMO Limited, Auckland for Respondent

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9 As the Court of Appeal noted at [80], the South African Judge acknowledged that the issue of whether or not there was a partnership was "not a highlight in the pleadings".

10 At [123].