**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA247/2015**
**[2016] NZCA 401**

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| BETWEEN | ALEXANDER PIETER VAN HEEREN<br>Appellant |
| AND | MICHAEL DAVID KIDD<br>Respondent |

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| Hearing: | 11 and 12 April 2016 (further submissions received 14 April 2016) |
| Court: | Harrison, Miller and Cooper JJ |
| Counsel: | D J Goddard QC and S D Williams for Appellant<br>S J Mills QC, B O'Callahan and T F Cleary for Respondent |
| Judgment: | 19 August 2016 at 11.30 am |

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**JUDGMENT OF THE COURT**

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**A The appeal is dismissed.**

**B The appellant must pay the respondent costs for a complex appeal on a band B basis and usual disbursements. We certify for two counsel.**

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**REASONS OF THE COURT**

(Given by Cooper J)

**Table of Contents**

## Introduction

[1] An issue estoppel arises where a judgment has determined an issue as an essential and fundamental step in the logic of the judgment and without which it could not stand.[1] The issue so determined may not be contested in subsequent litigation between the same parties. The rule rests on two foundations:

(a) the interest of the community in the determination of disputes and the finality and conclusiveness of judicial decisions; and

(b) the protection of individuals from repeated suits for the same cause.

[2] This appeal raises an important question about the approach to be taken in deciding whether the issue determined was in fact an essential part of the reasoning of the judgment said to give rise to the estoppel. The appellant, Mr van Heeren, contends that the second court, before which the estoppel is asserted, must inquire objectively for the purpose of forming its own view as to whether the issue was truly a question needing to be determined by the first court in the earlier litigation. The respondent, Mr Kidd, asserts it will be sufficient if the first court decided resolution of the issue was necessary, a matter to be determined by examining what was in fact decided in the context of the dispute before that court.

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1 *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 (CA) at 37.

[3] In the present case Mr Kidd relies on issue estoppels said to arise from a judgment of the High Court of South Africa.[2] An issue estoppel may arise from the judgment of a foreign court, but in such cases a cautious approach may be required.[3] This case has the unusual feature that Mr Kidd had sued Mr van Heeren in New Zealand in relation to the same dispute prior to commencing the South African proceeding. However, in circumstances we will discuss, the New Zealand proceeding was stayed by Smellie J in a judgment of 22 October 1997.[4]

[4] In the judgment now subject to appeal, Fogarty J dealt with an application by Mr Kidd that revived the New Zealand proceeding.[5] The application sought, 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. This was in effect to treat the South African judgment as having determined the key issues relating to Mr van Heeren's liability on Mr Kidd's New Zealand claim.

[5] Mr Kidd relies on the South African judgment as having decided that the parties were in a partnership and that the assets of the partnership included real and personal property described in the South African judgment. Contrary to those findings, Mr van Heeren seeks to assert in the New Zealand proceeding that the parties were in a joint venture, not a partnership, and that the property in question was his. He claims that the issue estoppels asserted by Mr Kidd relate to matters it was not necessary for the South African Court to decide, and argues that the necessary cautious approach to estoppels based on foreign judgments requires the New Zealand Court to reject the claimed estoppels, allowing the New Zealand litigation to run its course.

[6] Fogarty J rejected Mr van Heeren's arguments. He considered that the South African Judge had to decide the partnership and assets issues as part of ascertaining the factual matrix in which key documents relevant to the dispute had been signed by the parties on 18 January 1991. Even though those issues were not

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2 *Kidd v van Heeren* SGHC Johannesburg 27973/1998, 20 May 2013 [*Kidd SA judgment*].
3 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 (HL) at 918, 927, 948 and 965.
4 *Kidd v van Heeren* [1998] 1 NZLR 324 (HC) [*Kidd stay judgment*].
5 *Kidd v van Heeren* [2015] NZHC 517 [*Kidd HC judgment*].

themselves ingredients of any cause of action before her, they were matters that the Judge needed to resolve before she could determine the causes of action advanced by Mr Kidd.[6] Fogarty J held that Mr van Heeren could not dispute in the New Zealand litigation the findings in the South African judgment as to the partnership and its assets. All that was left for determination in the New Zealand litigation were issues concerning remedy and quantum.

**Background**

[7] From 1975 until 1991 the parties were in a business relationship that involved procuring and trading in steel. The business was conducted through companies located throughout the world they jointly owned either directly or through trustees. Mr Kidd asserts that their relationship was that of partners, and the South African judgment determined that was so despite Mr van Heeren's denial.

[8] Mr van Heeren says that the parties each owned shares in companies that traded and he and Mr Kidd each participated in the management of those companies and the business conducted by them, earning income and deriving dividends. However, the parties sold to each other the shares in the various companies so that since 1991 the companies have been owned by one or the other of them. Some of the companies have been wound up. He asserts there are no assets jointly owned by the parties or in respect of which the parties need to account to each other. It follows that the South African Court's determination about the extent of the partnership assets was erroneous and, since there are no valid issue estoppels arising from the South African judgment, the parties should be able to litigate the issues in New Zealand.

[9] In an affidavit filed in the High Court in support of the application for stay determined by Smellie J, Mr van Heeren stated that by 1989 both he and Mr Kidd wanted their relationship to be dissolved as it was no longer working. He said that after discussions between them they decided to implement an arrangement in which Mr Kidd would exchange his shareholding in a company called Genan Trading Co

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6 At [117].

NV (Genan) for cash, and obtain Mr van Heeren's shareholding in the other jointly owned companies.

[10] The termination of the relationship between the parties was addressed in five key documents. The implication of those documents was the subject of vigorous dispute and there was an issue as to whether some of them had in fact been executed.

[11] The first of these documents was an agreement dated 21 February 1990. Mr Kidd claimed he never signed it, and the South African judgment said it had not been proved he did.[7] The first clause of that agreement provided that, as from its date, the parties would "cease to be partners in the company of Genan Trading Company N.V.". The second clause provided that Mr van Heeren would pay Mr Kidd the sum of USD 3,000,000 "in full and final payment of all KIDD'S shares in Genan". In the proceeding commenced in New Zealand Mr Kidd asserted that the figure of USD 3,000,000, which was in Mr van Heeren's handwriting, had been inserted after Mr Kidd signed the document without his approval and did not represent the agreed consideration between them. The third clause of this document contained an acknowledgement by Mr Kidd that Mr van Heeren took Genan completely and that Mr Kidd was owed no further monies by Genan and would immediately execute a transfer of all of his shares in that company in favour of Mr van Heeren or his nominee. The parties executed a share transfer agreement in respect of Genan that same day.

[12] Another document was a deed made on 25 September 1990. It contained four clauses, which read as follows:[8]

> 1) <u>THE</u> parties hereto <u>DO HEREBY AGREE AND ACKNOWLEDGE</u> that in respect of any past or present contractual dealings, agreements or arrangements between them, Kidd will pay to van Heeren the sum of *US$1=00 (US Dollars one)* in full and final settlement of any payments, moneys due or obligations of any kind between the parties.
>
> 2) <u>IT IS ACKNOWLEDGED AND AGREED</u> by Kidd and van Heeren that no shares are held in each other's companies worldwide.
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> 3) <u>IT IS ACKNOWLEDGED AND AGREED</u> that in respect of shares held by Genan Trading Company N.V. in Jocrow (Steel) Limited, these shares

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7 *Kidd SA judgment*, above n 2, at [73]–[76].

8 The italicised words were handwritten in the document.

> will be transferred by Genan Trading Company N.V. to Bramlin Limited for the sum of *US$1-00 US Dollars One.*
>
> 4) FINALLY, the parties hereto acknowledge that this Deed is in full and final settlement of all matters currently outstanding between them, including all other companies or trusts controlled by them.

[13] Mr Young QC, counsel for Mr van Heeren in the stay proceeding before Smellie J, acknowledged that the version of the document then in evidence was not the final document and that there were still "loose ends to be tidied up".[9]

[14] Of more significance for present purposes, the parties entered into a further agreement on 18 January 1991, Mr van Heeren as the "seller" and Mr Kidd as the "purchaser" (the Sale Agreement). For a nominal consideration, Mr van Heeren sold to Mr Kidd all of the shares held by Mr van Heeren in "Galaxy Export Import Company (Proprietary) Limited", "Edmonton Properties (Proprietary) Limited", "Edmondton [sic] Steel (Proprietary) Limited", "Group Four Trading (Proprietary) Limited", "T.G.M. Metal (Proprietary) Limited", and "Bramlin Limited" (a company incorporated in Hong Kong). The purchase price for the shares in each of the first five of those companies was said to be ZAR 1 (one rand). As to Bramlin, cl 2 of the agreement provided:

> In respect of Bramlin Limited the agreement which was reached by the parties on the 25th day of September 1990 is still valid and is incorporated herein and is bound by the conditions as stipulated in the Indemnity and the price for which these shares were bought was the sum of $1,00 US.

[15] Clause 4 provided that on signature of the agreement, Mr van Heeren would deliver up to Mr Kidd signed and completed instruments of transfer together with the share certificates for the shares being sold. Clause 5 then provided:[10]

> Any dispute between the parties shall be determined according to South African law in the Republic of South Africa and each party elects as his domicilium citandi et executandi for all purposes the address recorded in the preamble hereto.

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9 *Kidd stay judgment,* above n 4, at 330. Once again this document was not proved in the South African trial, the Judge observing that it had not been signed by Mr van Heeren: *Kidd SA judgment*, above n 2, at [77]. It has not featured in the arguments on appeal.

10 The addresses so recorded were in South Africa.

[16] A second document signed on 18 January 1991 was headed "Indemnity" (the Indemnity). It had one recital in which Mr van Heeren and Mr Kidd recorded that they had on that day "entered into an agreement terminating their business relationships".

[17] Operative provisions of the Indemnity included the following:

(a) Clause 1, under which Mr Kidd indemnified Mr van Heeren "against all claims which KIDD or any company, of which VAN HEEREN was previously a shareholder, might have against VAN HEEREN".

(b) Clause 2, in the following terms:

> Beyond thus stated in paragraph 1 above neither party shall have any claim of any nature whatsoever against the other, neither shall any company of which either is a shareholder, director, employee, or has any other interest, have any such claim, and each shall take all such steps as may be possible in order to ensure that no action is instituted.

(c) Clause 3, which stated:

> The parties agree that monies paid by KIDD to VAN HEEREN in respect of the sale of VAN HEEREN'S shareholdings shall constitute a settlement of all disputes between the parties anywhere in the world and shall furthermore be in full and final settlement of all claims which either party may have against the other, and in full and final settlement of all claims which any company in which either party is directly or indirectly involved may have against the other or against any company in which the other may directly or indirectly be involved.

(d) Clause 5, which recorded the express agreement of the parties that they had no further shareholdings in any companies or trusts but also said that if there was any such company or trust it would be transferred to Mr van Heeren at a price of ZAR 1.

(e) Clause 6, providing that the document would be binding on the parties in relation to "any company, shareholding or other business in which the parties are directly or indirectly involved anywhere in the world".

(f) Clause 7, providing that any dispute between the parties should be determined according to South African law in the Republic of South Africa.

[18] As will be seen, the essential reason for the stay ordered by Smellie J was to enable the validity and effect of the Indemnity to be determined in South Africa.

**History of the litigation**

*Proceeding commenced in New Zealand*

[19] Mr Kidd's proceeding was commenced in the High Court at Auckland on 20 February 1996.

[20] The statement of claim advanced eight causes of action. These alleged:

(a) breach of contract ("partnership or otherwise"). This cause of action contained Mr Kidd's fundamental assertions that the parties had together incorporated Genan for the purpose of trading in the international steel market, and incorporated or purchased other companies in South Africa and elsewhere "in equal 50/50 ownership" before moving their activities to New Zealand and making additional investments here. It was claimed that all of the properties, companies and share investments listed in the statement of claim were "part of the worldwide 50/50 partnership" between the parties, but Mr van Heeren had wrongly refused to account for and pay Mr Kidd his share of the value of the jointly owned property. In advancing this claim, Mr Kidd asserted that the Sale Agreement and the Indemnity had been signed on the basis of a specific representation and promise made by Mr van Heeren that he would "separately account for a half share of the worth of all property and shares owned or controlled by Genan";

(b) breach of a duty of utmost good faith. This cause of action was again said to arise from the partnership or by virtue of the special

circumstances of the relationship of the parties and their "business joint venture arrangement". It was claimed Mr van Heeren breached his duty by holding properties and shares in his own name that should have been jointly owned, failing to keep Mr Kidd informed about the value of the property and to disclose business transactions and dealings, using documents for fraudulent or improper purposes, exercising undue influence, and behaving unconscionably including in relation to the settlement documents of 21 February 1990 and the Indemnity;

(c) breach of trust. This again was based on the same factual assertions;

(d) an entitlement to share in undisclosed benefits Mr van Heeren derived from his role as Chairman of the New Zealand Import/Export Corporation, based on "partnership, joint venture, trust or contract";

(e) an entitlement to half the benefits allegedly derived by Mr van Heeren from a contract between a company he controlled (Prime Pacific Chartering) and the Forestry Corporation of New Zealand pursuant to contractual, partnership, fiduciary or trustee obligations;

(f) breach of contract. This claim focused on an alleged agreement to establish a business in New Zealand that would use funds from Genan to purchase properties and make investments in New Zealand for the equal benefit of the parties;

(g) the factual allegations in the sixth cause of action, but characterising the duties said to have been breached as "fiduciary duties in the alternative"; and

(h) an express oral agreement of 18 January 1991 that the plaintiff would account for one half of the full value of all shares and property owned by or through Genan (or to which Genan should be entitled "according to the terms of the parties' worldwide partnership")

in return for Mr Kidd signing the Sale Agreement and the Indemnity executed on that day.

[21] Mr van Heeren did not file a statement of defence. Instead, he applied to dismiss or stay the claim, contending that the parties had formally agreed that any disputes between them should be resolved in the courts of South Africa. Mr van Heeren's application relied in particular on cl 7 of the Indemnity, which was in the following terms:[11]

> Any dispute between the parties shall be determined according to the South African law in the Republic of South Africa and each party elects as his "domicilium citandi et executandi" for all purposes the address recorded in the preamble hereto.

*Judgment of Smellie J*

[22] The parties filed extensive affidavit evidence, but the interlocutory nature of the application meant that it was not possible for the Judge to resolve the substantial factual disputes between the parties. As noted above, Smellie J granted Mr van Heeren's application.

[23] The Judge summarised what he described as Mr van Heeren's general position, set out in an affidavit sworn on 8 October 1996. He described Mr van Heeren's reliance on the Indemnity as a "complete answer" to all of Mr Kidd's claims with the possible exception of the cause of action based on Mr van Heeren's involvement in the Forestry Corporation venture.[12] In respect of that claim, however, Mr van Heeren alleged that the Forestry Corporation venture arose subsequent to determination of his relationship with Mr Kidd.[13]

[24] The Judge then referred to the other documents on which Mr van Heeren relied, being the documents signed on 21 February 1990, the deed of 25 September 1990 and the Sale Agreement.[14]

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11 The addresses so recorded were in South Africa.
12 See above at [20](e).
13 *Kidd stay judgment*, above n 4, at 329.
14 At 330–331.

[25] The Judge recorded that while Mr Kidd did not dispute the authenticity of his signature on the Indemnity, he claimed not to be bound by it for a number of reasons. Those included fraud, misrepresentation, duress, mistake and an allegation his signature was obtained under false pretences.[15]

[26] However, Smellie J rejected an argument advanced by counsel for Mr Kidd that the subject matter of the Indemnity was limited on its terms to the South African and Hong Kong companies referred to in the deed of 25 September 1990 and the Sale Agreement. He considered the wording of cls 1–4 of the Indemnity was clear and provided for a complete settlement of all disputes between the parties.[16]

[27] Nor could he accept (because there was a "complete conflict" on the affidavit evidence) the other argument advanced on behalf of Mr Kidd that he was mistaken as to the purport of the Indemnity because he understood that it related only to the South African shares and that the effect of the Indemnity had been misrepresented to him. The same applied in respect of the allegation of breach of the obligation of utmost good faith.[17]

[28] These conclusions meant the stay should be granted unless there was a strong reason not to do so.[18] After reviewing a range of relevant considerations, Smellie J recorded his view that the Indemnity was pivotal: if it was upheld it would be decisive in Mr van Heeren's favour. As its validity was to be decided according to South African law, and as the witnesses relevant to that issue were as readily available in South Africa as in New Zealand, it was appropriate for that to be determined in South Africa as a preliminary issue.[19]

[29] In the result, Smellie J ordered that:[20]

> There will be a stay of this action until further order of the Court, or until it is established either that the South African Courts decline jurisdiction to declare the validity and scope of the indemnity signed at Randburg on 18 January 1991 … or otherwise uphold the plaintiff's challenge to it.

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15 At 331.
16 At 333–334.
17 At 334.
18 At 334, applying *The Eleftheria* [1969] 2 All ER 641 (HC).
19 *Kidd stay judgment*, above n 4, at 341.
20 At 342.

The Judge observed that this order left the door open for the case to proceed in New Zealand, recording his view New Zealand would be the more appropriate forum.[21]

*Proceeding commenced in South Africa*

[30] On 9 November 1998, Mr Kidd commenced a proceeding in the High Court of South Africa seeking an order that the Indemnity related only to claims arising between the parties in respect of the sale by Mr van Heeren of his shareholding in the companies referred to in the Sale Agreement. In the alternative, an order was sought declaring the Indemnity to be "void, alternatively voidable and avoided and of no legal force and effect".

[31] By amendment to the particulars of claim, Mr Kidd sought (as claim A) that the Court decline jurisdiction because of the proceeding commenced in New Zealand said to concern the same subject matter and to be founded on the same causes of action.[22] Mr Kidd claimed it would be inconvenient and unduly costly to proceed in both New Zealand and South Africa.

[32] This issue was dealt with by the South African Court as a preliminary matter in March 2004. In his judgment of 25 June 2004, Joffe J held the effect of the order for stay made by Smellie J was to remove from the ambit of matters to be decided by the High Court of New Zealand the issues relating to the validity and scope of the Indemnity, which were before the High Court of South Africa. He rejected Mr Kidd's argument based on lis alibi pendens on the basis that, although there were two proceedings, one in New Zealand and one in South Africa, the relief claimed in each was different. He also rejected Mr Kidd's claim that the special plea made by Mr van Heeren in response to claim C in the South African proceeding (which we discuss below) amounted to an abuse of process.

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21 At 342.

22 In South Africa the expression particulars of claim is used for what in New Zealand would be called the statement of claim.

[33] The other allegations in Mr Kidd's claim as it eventually went to trial were referred to as claims B1–B4, claim C and claim D. Claims B1–B4 were advanced as alternatives to A and claims B1–B3 were advanced as alternatives to one another.

[34] Claim B1 was based on what was said to be the proper construction of the Indemnity. Mr Kidd contended that properly construed, the Indemnity related only to claims arising between the parties in respect of the sale by Mr van Heeren to Mr Kidd of the shares in the companies listed in the Sale Agreement. That claim was rejected by Satchwell J based on the wording of the indemnity and need not be further discussed.[23]

[35] Claims B2–B4 respectively alleged:

(a) common mistake — the parties were labouring under the common assumption that the Indemnity related only to the business relationship between them in relation to the companies listed in the Sale Agreement;

(b) iustus error — Mr Kidd claimed he mistakenly but reasonably believed and assumed the Indemnity related only to the business relationship between the parties concerning the companies listed in the Sale Agreement, a belief founded on the representations of Mr van Heeren and his attorney that Mr van Heeren deliberately or negligently failed to correct; and

(c) misrepresentations (negligent or deliberate) — Mr van Heeren and his attorney misrepresented that the Indemnity was limited to the business relationship between the parties concerning the companies listed in the Sale Agreement and these misrepresentations were false and such as to induce Mr Kidd to enter into the Indemnity.

[36] Claim C was a further alternative claim to claims A and B1–B4. It proceeded on the assumption the Indemnity was enforceable. However, it was then said there

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[23] *Kidd SA judgment*, above n 2, at [19]–[20].

was a dispute about its scope, "i.e. which assets formed part of the partnership sought to be dissolved and settled by the conclusion of the [I]ndemnity". This claim then alleged that, as at 18 January 1991, the partnership included:

(a) "claims to and in respect of" the companies listed in the Sale Agreement; and

(b) the other named companies; land in New Zealand, Belgium, the United Kingdom and Johannesburg; land referred to as "Dolphin Island" (a Fijian Island known as Yanuca); and interests in gold, silver and "Brazilian cut aquamarines" (the disputed assets).

[37] As a final alternative claim to claims A, B1–B4 and C, claim D sought rectification. It alleged that neither the Indemnity nor the Sale Agreement correctly reflected the common intention of the parties. The pleading set out Mr Kidd's claim as to the appropriate wording of both documents as they should be rectified.

[38] The relief sought in relation to claims B1–B4 was the same. An order was sought:

> Declaring the [I]ndemnity to relate only to claims arising between the parties in respect of the sale by the Defendant to the Plaintiff of the Defendant's shareholding in the companies referred to in [the Sale Agreement] concluded between the parties immediately prior to the signing of the [I]ndemnity, alternatively declaring the [I]ndemnity to be void, alternatively voidable and avoided and of no legal force and effect.

[39] The relief sought in relation to claim C was a declaration that the claims that formed the subject matter of the Indemnity excluded claims in respect of the other assets (those not mentioned in the Sale Agreement) with the result that "the Plaintiff is accordingly entitled to approach the New Zealand Court for a determination of his claims in respect of [the other] assets".

[40] The relief sought in relation to claim D was rectification in accordance with changes that were scheduled to the particulars of claim.

[41] On 26 November 2002 Mr van Heeren entered what was referred to as a special plea in relation to claim C. The plea read:

> 18 **SPECIAL PLEA TO CLAIM C**
>
> 18.1 The plaintiff has instituted proceedings against the defendant in a court in New Zealand, which proceedings are pending.
>
> 18.2 The said proceedings in New Zealand:
>
> 18.2.1 are based upon the same cause of action as arises in Claim C herein;
>
> 18.2.2 relate to the same subject matter as arises in Claim C herein;
>
> 18.3 The defendant accordingly asks that Claim C herein be stayed pending the determination of the proceedings in New Zealand.

[42] This special plea was abandoned before the trial. In an affidavit sworn on 20 June 2014, Mr Nicholas Alp, an attorney (a solicitor in New Zealand terms) acting for Mr Kidd, noted that Mr Duncan Sinclair, an attorney acting for Mr van Heeren at the time, swore an affidavit on 2 February 2005 in the High Court of New Zealand explaining that he had advised Mr van Heeren to abandon the special plea to claim C. The reasons included amendments made to Mr Kidd's South African pleading that had extended the scope of the South African litigation, and an affidavit sworn by Mr Kidd in support of an application he made on 24 June 2003 to separate out claim C from the balance of the claims on the basis that it need only be considered if the special plea failed. According to Mr Sinclair, that affidavit had set out the entire history of the business relationship between the parties, with the result that most of the issues dealt with in claim C would in any event be canvassed in the South African litigation. Moreover, the extension of the scope of the South African litigation meant "it might well be more cost effective to have claim C adjudicated in South Africa than in New Zealand". Mr Sinclair said that Mr van Heeren accepted his advice and the special plea and separation application were both withdrawn.

[43] Other features of Mr van Heeren's pleaded defence may be noted:

(a) In relation to claims B1–B4, there was in the main a series of what in New Zealand would be regarded as bare denials.

(b) In relation to claim C, there was a specific pleading in which Mr van Heeren denied "that there was a partnership between the plaintiff and the defendant as alleged or at all".

[44] As will be seen, some time was to elapse before the substantive hearing in South Africa of Mr Kidd's claims. In the meantime, further steps were taken in the High Court of New Zealand.

*Back in New Zealand*

[45] In 2004 Mr Kidd applied to the High Court to lift the stay ordered by Smellie J relying on a number of changes of circumstance since Smellie J's judgment. The changes of circumstance relied on included claims that the scope of the evidence needing to be called in South Africa in order to determine the scope and validity of the Indemnity was said to require many more witnesses to be called than had been appreciated when the parties were before Smellie J. Reference was also made to Mr van Heeren's denial in the South African proceeding that a partnership had ever existed between the parties. It was said as well that, having persuaded Smellie J to grant a stay in order to give effect to the exclusive jurisdiction clause in the Indemnity, Mr van Heeren had filed a pleading in the South African proceeding seeking that claim C be stayed pending the determination of the New Zealand Court.

[46] The application was argued before Allan J, who delivered judgment on 16 August 2005.[24] He held that these and other matters raised were insufficient to justify lifting the stay. He acknowledged the South African proceeding had become "somewhat more complex" than might originally have been envisaged.[25] However, he recorded that Smellie J had determined that the South African Court needed to hear the issue about the scope of the Indemnity. The fact that exercise would be rather more complex and wide-ranging than had been anticipated was not a change of circumstance of such significance as to justify lifting the stay.[26]

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24 *Kidd v van Heeren* [2006] 1 NZLR 393 (HC).
25 At [53].
26 At [53].

[47] As to Mr van Heeren's claim that the parties were never in partnership, Allan J held that could not amount to a relevant change of circumstance. In that respect, he recorded a submission made by Mr Hodson QC on behalf of Mr van Heeren that the "true nature of the relationship between the parties would inevitably be put in issue when the merits came to be debated".[27] The Judge considered this was an issue that was most unlikely to have been influential in Smellie J's decision.

[48] As to the issue concerning Mr van Heeren's pleading to claim C in South Africa, Allan J noted that the effect of the special plea would have been to lead the High Court of South Africa to decline jurisdiction to deal with an aspect of the claim in the South African Court on the basis that the relevant issue was properly subject to the jurisdiction of the New Zealand Court.[28] He recorded Mr Kidd's stance that Mr van Heeren's plea was "simply inconsistent" with the stance adopted by Mr van Heeren before Smellie J.[29] The subsequent withdrawal of the special plea suggested that it had been filed for tactical reasons associated with the conduct of the South African litigation.[30]

[49] Allan J was unconvinced that the filing and subsequent withdrawal of the special plea amounted to a significant change of circumstance, or that it was an abuse of process as alleged by counsel for Mr Kidd.[31]

[50] Mr Kidd appealed to this Court, but on 23 March 2006 the appeal was dismissed.[32] In the course of his judgment for the Court, O'Regan J dealt with an argument that had been traversed concerning the effect on the New Zealand proceeding of decisions made by the South African Court, observing:

> [32] It is difficult to determine at this stage of the proceeding the extent to which issue estoppel will apply. It is equally hard to determine whether relitigation of issues resolved in South Africa could amount to an abuse of process. To some extent the answers will depend on the issues which the South African Court considers to be crucial to its determination of the

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27 At [54].
28 At [58].
29 At [58].
30 At [58].
31 At [68].
32 *Kidd v van Heeren* CA191/05, 23 March 2006.

> challenge to the [Sale Agreement and the Indemnity]. We are prepared to accept that there is doubt as to the extent to which issue estoppel and/or abuse of process will arise, and that there is therefore a possibility that evidence heard and considered by the Court in South Africa will need to be considered and heard again by the court in New Zealand if Mr Kidd succeeds in his challenge to the [Sale Agreement and the Indemnity].

*Pre-trial procedures in South Africa*

[51] The South African trial was preceded by a substantial amount of interlocutory activity. That was addressed in affidavits that were before Fogarty J sworn by attorneys acting for the parties in South Africa: Mr Alp for Mr Kidd and Mr Simon Pratt for Mr van Heeren. We do not need to address most of the content of those affidavits. It is, however, relevant to note that, despite his initial special plea in relation to claim C, Mr van Heeren did not pursue any issue about the appropriateness of trying the issues raised by Mr Kidd's particulars of claim in South Africa having regard to the claims already pleaded in the New Zealand litigation. We have already explained, by reference to Mr Sinclair's affidavit, the basis on which Mr van Heeren decided not to pursue the special plea. This indicates that Mr van Heeren proceeded to trial in South Africa knowing that the partnership issue would be canvassed.

[52] That conclusion is supported by the fact that Mr van Heeren's attorneys sought "further particulars for trial" including in relation to the partnership issue. The further particulars sought were expressed as follows:

> 17. <u>AD PARAGRAPH 23.1</u>
>
> 17.1 When did the dispute arise?
>
> 17.2 Where did it arise?
>
> 17.3 If the dispute is set out in any documentation, the Plaintiff is required to identify that document.
>
> 18. <u>AD PARAGRAPH 23.2</u>
>
> The Plaintiff is required to state the following in regard to the partnership referred to herein:
>
> 18.1 when it was concluded;
>
> 18.2 where it was concluded;

> 18.3 who represented each of the parties in concluding it;
>
> 18.4 whether it was concluded orally or in writing and, if in writing, whether wholly or in part, to furnish a copy of or identify the written portions thereof;
>
> 18.5 whether each of the entities and properties set forth in paragraphs (a) to (r) formed part of the partnership at its inception;
>
> 18.6 if not:
>
> 18.6.1 on what date did each of the entities or properties become part of the partnership;
>
> 18.6.2 did the entity or property become part of the partnership as a result of an agreement;
>
> 18.6.3 if so, the Plaintiff is required to answer the questions in regard to such agreement set out in paragraphs 18.1 to 18.4 above.

[53] In relation to the requests in paragraphs 18.1–18.3, Mr Kidd's attorneys responded: "The partnership was concluded during or about 1975 and was varied from time to time. The parties represented themselves in concluding it."

[54] The responses in relation to paragraphs 18.4 and 18.5 were respectively: "The partnership was entered into expressly, alternatively, tacitly, through their conduct." and "No."

[55] The response in relation to paragraph 18.6.1 was:

> On the date that the plaintiff or the defendant acquired the right or interest (either directly or indirectly) in the entities or properties. The exact dates of such acquisition constitutes a matter for evidence, alternatively, is not strictly necessary to enable the defendant to prepare for trial and is accordingly refused.

[56] In relation to paragraphs 18.6.2 and 18.6.3 it was said: "Yes, the initial partnership agreement as varied from time to time, more particularly with the creation of Genan."

[57] Another of the particulars sought drew the following response from Mr Kidd's attorneys:

> During September 1990 the basis upon which the parties would terminate their relationship and dissolve the partnership, was discussed. The specifics in relation to the purchase of the shares and companies listed in [the Sale Agreement] were discussed on or about 17 January 1991 and 18 January 1991 at Randburg. The material terms relied upon are contained in paragraph 26.1 read with annexures "A" and "B" as rectified (paginated p 57–60 of the pleadings). The remainder of the enquiries directed to the plaintiff constitute matters for evidence, alternatively, interrogatories, alternatively, is not strictly necessary to enable the defendant to prepare for trial.

[58] We note also that prior to the trial, as required by the South African Court's procedural rules, Mr Shane Browning, a New Zealand based forensic accountant instructed on behalf of Mr Kidd, met with Mr Alan Greyling, a South African based forensic accountant retained for Mr van Heeren. Under South African procedural rules, experts who are to be called are also required to deliver a summary of their proposed evidence prior to the trial.

[59] In this case notices were sent on 20 September 2011 and 12 April 2012 by lawyers acting for Mr Kidd attaching summaries of two reports prepared by Mr Browning detailing his investigation into the affairs of what Mr Kidd claimed was his partnership with Mr van Heeren. A similar notice was served by lawyers acting for Mr van Heeren, together with a report by Mr Greyling, on 31 July 2012. After a meeting between Mr Browning and Mr Greyling detailing matters that were agreed and those on which they disagreed, Mr Kidd's solicitors served a further report from Mr Browning (called a rebuttal report) on 18 December 2012.

*The trial in South Africa*

[60] The South African trial eventually took place over 23 sitting days in January, February and March 2013. Mr Kidd gave evidence in support of his claim, as did Mr Browning.

[61] According to Mr Alp, except in respect of proposed expert testimony, there is no requirement in South Africa for either party to give notice of the witnesses they propose to call or the evidence they intend to give. However, on the first day of the trial there was a conference in chambers in which counsel for Mr Kidd offered to present Mr Kidd's case from prepared statements, a proposal that was agreed to and

implemented. In the event it was only the plaintiff who called evidence, Mr van Heeren electing not to do so.

[62] In addition to the affidavits by Mr Alp, the evidence before Fogarty J included an affidavit by Mr Pratt. In accordance with South African practice, both Mr Alp and Mr Pratt did not appear but were present throughout the trial. Fogarty J also had in evidence the transcript of the South African proceeding.

[63] It was common ground between Mr Alp and Mr Pratt that before Mr Joubert SC, counsel for Mr Kidd, called Mr Browning there was an objection to his intended evidence. The transcript included only part of the argument that took place at the time, but what is there is sufficient to show that Mr Stockwell SC, for Mr van Heeren, objected to the breadth of Mr Browning's evidence about the partnership between the parties by reference to the pleadings. He noted that the only reference to partnership was in claim C and then only on a limited basis seeking a declaration that certain companies and other assets did not fall within the Indemnity. The objection was opposed by Mr Joubert on the basis that the Judge needed to hear the evidence Mr Kidd intended to call so the meaning of the Indemnity could be considered in its appropriate context.

[64] Satchwell J gave a brief ruling without reasons: "The ruling is that the plaintiff may proceed as planned, lead the evidence of Mr Browning and we will explore the factual matrix with regard to the claims."

[65] There were frequent references to the partnership in Mr Kidd's evidence. He was also repeatedly pressed on that issue in cross-examination: questions asked included requests that he say when the alleged partnership began, describe the terms of the partnership, and state the basis on which he asserted there was a partnership. It was put to him that the disputed assets were not partnership assets but assets acquired by Mr van Heeren with his own money, a contention he denied. Other witnesses called by Mr Kidd were also cross-examined on the partnership issue, including Mr Browning.[33]

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[33] *Kidd HC judgment*, above n 5, at [76]. Fogarty J set out one of the relevant passages from Mr Kidd's cross-examination at [77].

[66] Mr van Heeren, however, did not give evidence. It appears that a tactical decision was taken that he would not do so. In an affidavit sworn for the purposes of an application for leave to appeal to the Supreme Court of South Africa, Mr Pratt explained that the question whether Mr van Heeren should give evidence was discussed with counsel "at length". They concluded that Mr van Heeren did not need to give evidence, principally because Mr Kidd accepted in his evidence that he had read the Sales Agreement and the Indemnity before signing them. Nor was evidence called from Mr Greyling.

[67] Mr Goddard QC, counsel for Mr van Heeren before us, referred in argument to occasions during the trial where the Judge tested with counsel the relevance of the partnership issue, querying whether she had to make any decision on it and noting that a partnership had not been pleaded other than as part of claim C. However, as we will explain, what happened in argument is not material for present purposes; what matters is the conclusions expressed in the judgment.

*The South African judgment*

[68] The nature of the issues presented on the appeal requires a detailed consideration of the findings in the judgment of the High Court of South Africa.

[69] After setting out the terms of the Indemnity, Satchwell J dealt at length with the context in which it had been entered. Before turning to a detailed discussion of the evidence she explained the reasons for the approach she intended to take. First, she noted that Mr Kidd challenged the Indemnity on a number of legal bases, but:[34]

> All comprised his essential argument that he understood that the [I]ndemnity document was required by reason of the sale of the shares in the South African companies and pertained only thereto.

[70] Further:[35]

> Kidd maintained that he was, at all times, aware that he and Van Heeren had entered into a partnership which consisted in their steel trading activities and which was conducted through a number of entities in which they individually held shares or the partnership owned. Profits were either held in

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[34] *Kidd SA judgment*, above n 2, at [21], referring to the Sale Agreement.
[35] At [22].

> bank accounts across the world or were utilised to acquire other assets either in immovable properties, businesses, shares in other companies or assets such as gold. Kidd knew the value of this international partnership to be, at least, in the region of US$ 30 million. Under such circumstances, he says that he would never have abandoned his entitlement or claim to those international assets as this Indemnity document suggests. In fact, Kidd goes further to state that he and Van Heeren had entered into discussions for the termination of their partnership which would, in due course, include a valuation of all international assets, bank accounts and other worldwide entities and then allocation of such between the two of them.

[71] In the Judge's view, the meaning and import of the Indemnity could not be understood without regard to the Sale Agreement, which was signed immediately prior to execution of the Indemnity.[36] Also:[37]

> The [I]ndemnity document can only be understood in context: one must objectively view and understand the business matrix within which both parties operated and the circumstances attendant upon the [I]ndemnity coming into existence.

[72] It was on this basis that the business relationship between Mr Kidd and Mr van Heeren, the entities through which they operated, the acquisitions made through steel trading, the breakdown of their business relationship, the decision to separate South African businesses and assets, and the circumstances of signing the Sale Agreement and the Indemnity had all been covered in evidence.[38] The Judge recorded that she had been "continually reminded" by Mr Stockwell of the need to have regard to the relevance of the evidence that Mr Kidd sought to lead, and noted that Mr Stockwell had questioned the relevance of the history of the steel trading, the centrality of Prime NZ (a company in New Zealand used in the parties' steel trading activities) and other matters.[39] She recorded she had been mindful of this caution, and that the judgment would indicate which aspects of the evidence she had found to be relevant for the purposes of her decision.[40]

[73] She then summarised the evidence of Mr Kidd about the disputed assets as well as the circumstances in which he had come to South Africa in January 1991 and signed the Sale Agreement and the Indemnity. It was Mr Kidd's evidence that on

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36 At [22].
37 At [23].
38 At [24].
39 At [25].
40 At [25].

21 February 1990 during a meeting in Amsterdam, he and Mr van Heeren agreed on a profit or bonus distribution from Genan in the sum of USD 3,000,000 to be paid to each of them.[41]

[74] On the extent and nature of the business relationship between Mr Kidd and Mr van Heeren, the Judge was clearly influenced not only by what Mr Kidd said but also by Mr Browning's evidence. She recorded her view that he was an expert accountant with relevant expertise and that he had properly grounded his opinions on documents and available information.[42]

[75] The Judge recorded Mr Browning's conclusions in his first report:[43]

a. That "*there was a relationship based on commonality of ownership between Prime NZ, Genan, Tisco, Briar, Ferromar and Jocrow which is to be inferred from a host of facts*". These facts include that sales of steel via Jocrow or Tisco resulted in funds being remitted to Prime NZ bank accounts; some Tisco sales of steel were received into Briar's bank account; bank transfers by Jocrow to the Genan account were treated in the Tisco books as funds allocated the Prime NZ intercompany balance; Algerian shipments were purchased by Prime NZ but when shipped to the UK were invoiced by Genan and when shipped to the USA were invoiced by Prime NZ; Briar distributed funds to both Prime NZ and Genan; Prime NZ was used as a conduit for transfer of funds between Tisco and Northern Trust; Briar was interlinked through intercompany payments and loans with all of the entities including Tisco, Northern Trust, Genan and Prime NZ; [Tisco's] responsibility for most of the travel costs of the different companies; organizational structure, raising of invoices, involvement of both Kidd and van Heeren leads to the conclusion that "*the disputed companies were all related entities and part of one group with common ownership*".

b. There was "more than an arms-length commercial relationship" between Prime NZ and Genan since Genan's sales and profits could be channelled through Prime NZ bank account.

c. The financial statements of Genan do not comply with any financial reporting requirements of which Browning is aware, being deficient in a number of respects. It is noted that no steel trading profits were not reflected in the Genan accounts.

d. The ownership structure adopted for Prime NZ was "*almost certainly designed to conceal the South African connection to the outside world*".

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41 At [73].
42 At [92].
43 At [90].

e. Tisco was the hub for all business conducted by the Group worldwide.

f. Prime NZ (the seller into the USA and probably China and Korea) should have shown substantial revenue over the period of trade with Algeria; Genan received the bulk of the profits from Northern Trust; all profits generated by Import SSS were remitted to Genan and Prime NZ; profits generated by Briar had been paid to either Prime NZ or Briar. By March 1985 Genan and Prime NZ between them had received cash funds of at least US$8,966.420 available for investment.

g. The acquisition of Huka Lodge plus upgrades to the facility were funded by loan funds from Genan of over NZD 4 million. Some funds were provided by Prime NZ. The Genan investment in Worldwide during the period 1986 to 1991 was not recorded in the Genan accounts furnished. Prime NZ also received loans totalling US $1.5 million from Briar. Genan's loan to Worldwide Leisure was probably 'repaid' by the receipt by Genan of shares in Worldwide Leisure from Van Heeren in exchange for the transfer of its loan account.

h. Purchase of shares in Cromwell was concluded with Genan recorded as the shareholder. The swap of Cromwell shares to Wellesley was not recorded in the Genan accounts. Profit on these Wellesley shares yielded a net profit between NZ$29.7 million and NZ$30.1 million with potential interest thereon in the region of NZ$22.9 million. Profit on the sale of the Wellesley shares was not recorded in the Genan accounts for 1987 or any subsequent year.

i. Payments to Genan and Prime NZ for the entire period of the Kidd/Van Heeren association was US$16,858,463 less costs of US$3.4 million. [Browning pointed out that this was only "*the accumulation of cash which did not just sit there – there were investments made"*].

j. Prime NZ held shares in Optech.

k. The overall worldwide group financial assessment as at 17 January 1991 was calculated at between US$48,892,947 and US$55,585,026 and the overall worldwide group financial assessment based on assets forming part of the Kidd/Van Heeren business association as at 17 January 1991 was calculated at between US$47,263,501 and US$[51,812,643].

[76] Satchwell J recorded that in his second report Mr Browning had concluded that the investments in New Zealand and Dolphin Island could not have been funded exclusively from cash generated by trading activities carried out by Mr van Heeren separately from those he conducted in conjunction with Mr Kidd.[44]

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[44] At [91].

[77] A subsequent section of the judgment contained findings under the heading "Kidd as witness". The Judge noted that Mr Kidd had been "corroborated in certain important respects", and never challenged as a liar in cross-examination or through rebuttal evidence.[45] She described him as "somewhat passive in relation to Van Heeren in a number of important respects" and noted that he had not insisted on full financial information being made available to him in respect of the partnership's affairs.[46] However:

> [117] Whatever the criticism of Kidd as gullible or passive, logic and the evidence indicates nothing dishonest therein. There can be no doubt on the evidence that Kidd was a prime mover in the steel trading of Tisco, Prime NZ and Jocrow all of which produced profits for Genan and Prime NZ. There was certainly a division of labour between himself and Van Heeren — Kidd did the trading and Van Heeren opened doors and oversaw financials. It is difficult to find any great significance in Kidd's failure to involve himself in the finances of their businesses. As far as the acquisition of the assets is concerned, Kidd referred the court to his diary entries which it was never suggested were post litigation creations and Browning performed the task of sleuth with regard to those financials.

[78] It is also important to note what the Judge said in the following paragraph, describing Mr Kidd's trust in Mr van Heeren and effectively treating it as exemplifying the kind of trust the law contemplates will be reposed in partners:

> [118] Kidd placed much emphasis on his trust in Van Heeren. This may have appeared naïve to lawyers aware of the amount of litigation which arises out of business relationships which have gone sour. But such naivety does not mean that Kidd's explanation is to be rejected. Such 'trust' is, after all, the very basis in our law of the relationship between partners. It is a value much admired in all aspects of life. So Kidd referred to himself and Van Heeren as being "*body and shadow, shadow and body*". He repeatedly said that he left matters "*totally to Alex who had my implicit trust*.", "*he would do whatever was necessary*", I gave "*carte blanche to Alex*" and was "*satisfied Alex looked after*" their affairs. Much of Kidd's evidence was premised upon the words "*Alex told me so*". Much of Browning's evidence confirmed that the documentation existed to corroborate trustful Kidd's understandings.

[79] The next section of the judgment was headed "Conclusion", and within that there were various subheadings under which the Judge discussed her findings on particular issues.

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45 At [113].
46 At [115].

[80] The first of these was "Partnership". Here, the Judge noted at the outset that the issue of whether or not there was a partnership between Mr Kidd and Mr van Heeren was, as she put it, "not a highlight in the pleadings".[47] She noted that the only mention of partnership was in claim C of the particulars of claim, where Mr Kidd pleaded that "a dispute exists as to the scope of the [I]ndemnity i.e. which assets formed part of the partnership", and also that "the partnership as at 18 January 1991 included claims to and in respect of" the companies listed in the Sale Agreement as well as the disputed assets. The Judge then discussed Mr Kidd's evidence that he and Mr van Heeren had been partners and that the corporate vehicles they had used were no more than a convenient way of dealing with the outside world. Further, for reasons relating to the political situation in South Africa, they had decided that Mr Kidd should not appear in any New Zealand documentation.[48] The Judge found that Mr Kidd's evidence as to that was confirmed by the evidence of other witnesses.[49] She observed further:

> [123] On the pleadings, Van Heeren was asking the court to accept that Kidd had no connection with Prime NZ at all and had no beneficial interest therein. Yet the evidence is undisputed that Kidd worked incredibly hard for Prime NZ, specifically in the Algerian steel trading. Further, the evidence is undisputed that Kidd worked for Jocrow whence monies were paid into Prime NZ. Van Heeren was apparently asking the court to find that Kidd worked for the benefit of Prime NZ for no benefit whatsoever. This is inconceivable.

[81] She concluded:

> [125] I am satisfied, on the careful trawl through documents by Browning, that the monies involved in the steel trades were moved interchangeably between Tisco and other South African companies and entities as well as Genan, Ferromar, Briar and Prime NZ. It is clear from the documentation which has been led in evidence that, as Browning said "*these businesses were all related. They had significant intercompany transactions over the period. Not all of them* [the transactions] *are related to trading activities.* … [There was] *the intermingling and the ability to use the invoicing of one* [for the other] … *These sort of transactions show that these entities Prime, Genan and Jocrow were all related parties, were all inter related entities with a common ownership based on my analysis and the funds flow and the transaction flows*." I can find no fault in Browning's opinion which I am comfortable in adopting as my own that Tisco, Genan, Prime NZ, Briar and Jocrow "*are commonly owned by the same parties … It does not show on the legal registers because they use nominee shareholders for the legal register*

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47 At [119].
48 At [120]–[122].
49 At [125]–[126].

> *owners, for the legal documentation in many instances. But as far as the cash flows, the transactions and the ability to invoice in different names, depending on the circumstances the relationships between the entities is clear from a financial perspective*."
>
> [126] It is difficult to comprehend the joint enterprise of Kidd and Van Heeren constituting anything other than a partnership. This view is fortified when one has regard to more than the creation, movement and inter exchange of steel trading and funds. The acquisition of the worldwide assets by reason of these steel trading profits confirms the finding of a partnership.

[82] The next section of the judgment was headed "Worldwide assets". Here the Judge dealt with assets and investment in New Zealand and Fiji. She recorded herself satisfied that Mr Browning's evidence had established there was sufficient cash available from steel trading profits to have enabled Genan or Prime NZ to make the investments in the amounts and at the times Mr Kidd claimed.[50] She found that Genan was a joint business investment by Mr Kidd and Mr van Heeren, and it was a direct investor and ultimately the shareholder in Worldwide Leisure, Cromwell/Wellesley and Optech.[51] There was clear evidence justifying the inference that Genan had financed the acquisition of Dolphin Island[52] and no evidence that Mr van Heeren or his wife had acquired any of the disputed assets with their own funds.[53] She said:

> [132] I am more than satisfied that the partnership of Kidd and Van Heeren, through Genan and Prime NZ as also Tisco and Jocrow and the other entities, made acquisitions throughout the world. These include but are not limited to Prime NZ, Huka Island, Dolphin Island, Cromwell/Wellesley shares which ultimately became a substantial stash of monies, Optech, gold bars and bearer certificates, cash on hand in bank accounts. The full extent of the funds retained and the assets acquired is unknown to me.

[83] The next part of the judgment was headed "The Indemnity". The Judge here noted Mr Kidd's evidence that the "partnership was under strain during 1990 and that there had been discussions but no actual implementation of any dissolution".[54] She repeated the finding previously made that what she described as the "supposed agreement for sale by Kidd of his shares to Van Heeren in February 1990 had not

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50 *Kidd SA judgment*, above n 2, at [128].
51 At [129].
52 At [130].
53 At [131].
54 At [133].

been proven".[55] She found that there were persuasive reasons why Mr Kidd would not have concluded such an agreement.[56] She thought it would be "most improbable" for Mr Kidd's shareholding in Genan to be sold in the absence of a full valuation of the company's assets and shares.[57] Given the apparent concealment of Genan assets emerging from the evidence during the trial, it was clear there had been no such valuation or accounting. Although paragraph 3(a) of the 21 February 1990 agreement said that "[a]ll the joint partnership assets and shares of Genan from the date of the agreement shall be the sole property of VAN HEEREN" it was unclear what such assets were.[58]

[84] Satchwell J found that at the time of the parties' meeting in Randburg on 17 January 1991 there was in fact nothing to suggest that Mr Kidd did not, as he said in evidence:[59]

> … remain a partner in a worldwide partnership with monies and bank accounts, shares in companies and other investments which he believed amounted to as much as US$40 million in value.

[85] Further, Mr van Heeren had chosen not to give evidence countering what Mr Kidd said about the events prior to the meeting of 17 January, the discussions that took place that day, the agreements reached with respect to the South African assets and the final accounting that Mr Kidd claimed would take place in respect of "the worldwide partnership assets".[60]

[86] Then:

> [139] Kidd was presented with both the sale agreement and the indemnity document. His evidence is that he was told by Van Heeren that the sale agreement reflected that which they had agreed the previous day. He says that he was not told by Van Heeren and that the indemnity document went beyond the South African assets and Bramlin.

[87] The Judge then articulated her reasons for rejecting Mr van Heeren's argument that the Indemnity had been expressed in plain English, and was

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55 At [134].
56 At [135].
57 At [136].
58 At [136].
59 At [137].
60 At [138].

understandable, while Mr Kidd had not testified as to confusion about its terms and had accepted in cross-examination that no misrepresentation had been made to him. In summary, the Judge's reasons were:

(a) The history of the relationship was one in which Mr Kidd had functioned as the steel trader, and Mr van Heeren as the "financial partner".[61] On this basis, Mr Kidd had left documentation to Mr van Heeren, and the "partnership had done well as a result".[62]

(b) The Sale Agreement was very specific, referring to the South African companies as well as the Hong Kong company, and identifying them by name. The agreement did not purport to be a worldwide dissolution of the partnership. The Judge considered that on reading the opening lines of the Indemnity, a trusting reader would immediately perceive the document as "sequential to, dependent upon and constituting implementation" of the Sale Agreement. Mr Kidd's evidence had been that Mr van Heeren told him that the Sale Agreement reflected the oral agreement they had reached; the Indemnity commenced in a manner that confirmed Mr Kidd's understanding that both documents pertained to what had been discussed and agreed on the previous day.[63]

(c) Although cl 3 of the Indemnity referred to the monies paid by Mr Kidd to Mr van Heeren for the shareholdings constituting a settlement of all disputes between the parties anywhere in the world, it had not been suggested to Mr Kidd that he and Mr van Heeren had discussed the other assets and claims "anywhere in the world" on 17 January, and that the Indemnity was intended to reflect those discussions. As the Judge observed, such cross-examination could not have taken place because, on Mr van Heeren's version of events, there were by then no worldwide assets to discuss.[64]

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61 At [142].
62 At [142].
63 At [143].
64 At [144].

(d) The 17 January meeting had been called specifically because of the threat made by Mr van Heeren to liquidate Tisco and there were audited statements and valuations concerning Tisco. This was consistent with Mr Kidd's evidence that the "remaining worldwide partnership could not be disposed of until the same disclosure, valuations and accounting had taken place".[65]

(e) There was no evidence to suggest that anyone ever drew Mr Kidd's attention to the fact that the terms of the Indemnity were not limited to the South African companies and Bramlin as listed in the Sale Agreement. Mr van Heeren had himself sought legal advice and his attorney had prepared at least one draft of the document. Mr Kidd had never discussed the Indemnity other than with Mr van Heeren. Mr Kidd's evidence (implicitly accepted by the Judge) was that Mr van Heeren did not point out to him that the Indemnity was broad and extended beyond the companies named in the Sale Agreement.[66]

[88] In the following parts of the judgment the Judge applied her findings to the various causes of action in the particulars of claim, except for claims C and D. She said she did not need to deal with those claims because of the findings she was to make on claims B3–B4.[67] She had earlier rejected claim B1, based on the proper construction of the Indemnity.[68]

[89] Claim B2 was based on common mistake. It was alleged that the parties had laboured under the "common assumption" that the Indemnity related only to the business relationship between them pertaining to the companies listed in the Sale Agreement. That claim could not succeed because of the Judge's finding that Mr van Heeren had not been mistaken as to the import of the Indemnity.[69]

[90] The Judge dealt with claims B3 and B4 (iustus error and misrepresentation) together because of their overlapping nature. Common to both was the contention

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65 At [145].
66 At [147].
67 At [149] (Claim C) and [183] (Claim D).
68 At [20].
69 At [151].

that Mr Kidd had erroneously believed that the Indemnity was limited in its import to the assets dealt with in the Sale Agreement and that his mistake was the result of Mr van Heeren's conduct.[70]

[91] The Judge repeated her finding that Mr Kidd's trust in Mr van Heeren was not incongruent with their business practice. He had continued his "trusting reliance" on the man whom he considered his partner and with whom he had profitably done business for some 15 years.[71] For his part, Mr van Heeren knew that Mr Kidd trusted him to deal with their money and ensure it was properly managed for their benefit.[72] When presented with the Indemnity agreement Mr Kidd assumed that it was a "necessary ancillary" to the Sale Agreement.[73] It was not unreasonable for him to base his understanding of the document on that assumption.[74] The evidence established that the words "anywhere in the world" in cl 3 of the Indemnity were an addition to the original draft, made after Mr van Heeren had taken legal advice.[75] Mr van Heeren did not explain to Mr Kidd that he had taken legal advice, nor that the Indemnity would cover all assets "anywhere in the world".[76]

[92] There had in fact been no discussion between Mr Kidd and Mr van Heeren on the previous day as to the basis on which their worldwide assets and affairs could be finalised. The Indemnity bore no relationship to the discussions that had taken place on the previous day, and had been presented without explanation.[77] Mr van Heeren had:[78]

> … not gainsaid Kidd's evidence, and therefore Van Heeren knew, that his mandate was to procure a legal document which would cover their agreement and that there was, as yet, no agreement on the worldwide assets which were still to be ascertained (ie contents of bank accounts) and valued and allocated. Van Heeren knew that Kidd had always relied upon him in the past when dealing with documents. He knew that he and Kidd had not discussed the need for an indemnity, that Kidd was a layman in law and that Kidd had not been party to any of the discussions held and advice received

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70 At [154].
71 At [155].
72 At [155].
73 At [157].
74 At [159].
75 At [160].
76 At [160].
77 At [161].
78 At [162].

> from attorney and advocate. In these circumstances, Van Heeren still remained silent.

[93] The Judge was satisfied that Mr Kidd and Mr van Heeren were of different minds when the Indemnity was executed. Mr Kidd justifiably and reasonably considered the Indemnity related to the assets contained in the Sale Agreement and Mr van Heeren knew that the Indemnity agreement was much wider. There was no consensus.[79] Further, the Judge was satisfied that:[80]

> … Van Heeren took advantage of Kidd – in Kidd's trust in his partner, in Kidd's fifteen year reliance upon the financial acumen of his partner, in Kidd's worry over the fate of Tisco resulting in his sudden trip to South Africa, in Kidd's concern to ensure the security of his family home. I am satisfied that Van Heeren saw that he could indeed snatch a bargain from Kidd at the same time that the South African companies and the residence were resolved. It was a tremendous bargain to purport to resolve the South African companies and the Bristol residence and, at the same time, ensure that Kidd abandoned all claims to Prime, Genan, Worldwide Leisure, Fenton, Optech, bank accounts, gold certificates and bars, aquamarines, whatever other investments had been procured through the Wellesley funds.

[94] In the circumstances that had arisen, Mr van Heeren had been under an obligation to inform and enlighten Mr Kidd "whether as a business partner, a contracting party, the party who had procured legal advice and the drafting of the two contracts".[81] Had Mr Kidd known of the true content and import of the Indemnity, he would not have signed it.

[95] There had been what the Judge described as "an entire concatenation" of misrepresentations by Mr van Heeren to Mr Kidd:[82]

> Some were made expressly (that the [S]ale [A]greement was in accord with their discussions and agreement) some were made tacitly (that legal advice would be taken on the sale of the South African companies and Bramlin and the appropriate legal document prepared) some were made by words (that the document(s) were in accord with the previous days [sic] discussions and agreement) some by conduct (presentation of the indemnity document for signature) and some by silence (no mention of the content or import of the indemnity document).

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79 At [164].
80 At [165].
81 At [166].
82 At [167].

[96] The misrepresentations were deliberately made.[83] Mr van Heeren's behaviour over a period of years suggested that he had started treating Genan and Prime NZ profits "for the benefit of himself alone and, in so doing, cheating Kidd".[84] Mr Kidd had been induced to enter into the Indemnity by reason of Mr van Heeren's misrepresentations.[85] In consequence, the Judge found in favour of Mr Kidd in respect of both claims B3 and B4 and held that the Indemnity was void and of no force and effect.[86]

*Appeal to the Supreme Court of South Africa*

[97] Mr van Heeren sought leave to appeal to the Supreme Court of South Africa. Under the relevant procedural rules the application was first made to Satchwell J but she declined it.[87] Mr van Heeren then sought leave directly from the Supreme Court but the application was also declined by that Court.[88] In a brief order dated 21 October 2013 the Court said that the application for leave to appeal was dismissed with costs. The order explained that it was not the Court's practice to give full reasons for such an order and the only substantive reason for the decision was expressed as follows:

> [2] Dismissal of an application for leave to appeal signifies that this court is of the view that the intended appeal has no reasonable prospects of success and that there is no other compelling reason why it should be heard. This court therefore, in general terms, concurs in the reasoning set out in the judgment of the High Court.

## The appeal

[98] Mr van Heeren now appeals from the finding that he is prevented by issue estoppel from defending the claims against him in the High Court of New Zealand on the merits. In particular, he wishes to dispute Mr Kidd's claim that there was a partnership and that the disputed assets were jointly owned assets of the partnership.

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83 *Kidd SA judgment*, above n 2, at [168].
84 At [169].
85 At [170].
86 At [172]–[173].
87 *Kidd v van Heeren* SGHC Johannesburg 27973/1998, 13 August 2013.
88 *van Heeren v Kidd* SCA 717/13, 21 October 2013.

[99] Mr van Heeren argues that before he can be denied the opportunity to defend those issues on the merits on the basis of an issue estoppel arising from the South African judgment, it must be clear that the issues were necessary for Satchwell J's decision and were in fact decided by her. Mr Goddard submitted that these tests could not be met in the present case.

[100] Mr Goddard submitted that the inquiry must be focused on what was necessary to determine claims B3 and B4, the claims on which Mr Kidd succeeded in South Africa, and that issues addressed in the context of other claims are irrelevant.

[101] He relied on a number of authorities as establishing the relevant law. First, he referred to *Talyancich v Index Developments Ltd* in which McKay J, writing for the Court, summarised the law of issue estoppel.[89] As formulated in that judgment:[90]

> Issue estoppel arises where an earlier decision is relied upon, not as determining the existence or non-existence of the cause of action, but as determining, as an essential and fundamental step in the logic of the judgment, without which it could not stand, some lesser issue which is necessary to establish (or demolish) the cause of action set up in the later proceeding.

[102] That statement was based on the then current edition of *Spencer Bower and Turner: The Doctrine of Res Judicata*.[91] Later, McKay J emphasised that an issue estoppel can only be founded on "determinations which are fundamental to the decision and without which it cannot stand".[92] The issue must be one that it was necessary to decide, and that was actually decided.[93]

[103] On the question of ascertaining what issues were necessary for the decision, Mr Goddard noted that McKay J quoted from a further extract from *Spencer Bower and Turner: The Doctrine of Res Judicata* discussing an approach based on asking whether it was possible to appeal against a finding put forward as founding an estoppel; if there could be no effective appeal against the particular determination, it

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89 *Talyancich*, above n 1, at 37–39.
90 At 37 (citation omitted).
91 Alexander Kingcome Turner *Spencer Bower and Turner: The Doctrine of Res Judicata* (2nd ed, Butterworths, London, 1969) at [191].
92 *Talyancich*, above n 1, at 38.
93 At 38.

would be impossible to regard it as fundamental to the judgment.[94] Mr Goddard referred us to the fourth edition of that work, *Spencer Bower and Handley: Res Judicata*, where there is a similar discussion.[95]

[104] Mr Goddard also emphasised the statement of the relevant law by Dixon J in *Blair v Curran*, in particular his observations that:[96]

> Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue-estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. … [T]he judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue.

[105] Mr Goddard submitted these passages articulate a "necessity test", so that the issue said to be precluded by the estoppel must be one that was not only actually decided, but one that it was necessary to decide. That test could be applied in the present case by asking whether a finding in New Zealand that there was a joint venture would be inconsistent with Satchwell J's judgment upholding claims B3 and B4 (the inconsistency test). Since the proper answer to that question would be in the negative, there could be no issue estoppel.

[106] Mr Goddard noted that Dixon J's approach had been treated as authoritative in *Spencer Bower and Handley: Res Judicata*,[97] and *Res Judicata, Estoppel, and Foreign Judgments.*[98] He submitted that the law required an objective approach to ascertaining what was in fact necessary for the decision. Fogarty J had wrongly approached the issue on the basis of examining what Satchwell J had in fact decided when the approach he should have taken was to ask not only what was actually decided, but whether it was necessary for the particular issue to be decided.

[107] Mr Goddard emphasised that the claims (B3 and B4) on which Mr Kidd had succeeded before Satchwell J were pleaded on the basis that the parties had been in a

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94 At 38–39, citing Turner, above n 91, at [211].

95 KR Handley *Spencer Bower and Handley: Res Judicata* (4th ed, LexisNexis, London, 2009) at [8.25].

96 *Blair v Curran* (1939) 62 CLR 464 at 532.

97 Handley, above n 95, at [8.23]–[8.25].

98 Peter R Barnett, *Res Judicata, Estoppel and Foreign Judgments* (Oxford University Press, Oxford, 2001) at [5.113].

business relationship, and did not assert a partnership. While claim C referred to a partnership, the Judge had not decided that claim in favour of Mr Kidd. It followed that there could be no issue estoppel based on a finding of partnership.

[108] In summary, applying the correct approach, there could be no issue estoppel in respect of the partnership finding or the assets finding. In relation to the partnership finding, Mr Goddard submitted:

(a) Mr Kidd had to prove the existence of a misrepresentation as to the scope of the Indemnity and that the misrepresentation induced him to sign the Indemnity. He could prove either a positive misrepresentation as to the scope of the Indemnity, or that Mr van Heeren owed him a duty to explain its scope and failed to do so. The first requirement did not depend on any finding of a business relationship, let alone that of a partnership. While the second required a finding of a relationship giving rise to a duty to explain the scope of the Indemnity, the relationship need not have been a partnership; a joint venture, or some other relationship of trust and confidence would be sufficient.

(b) Satchwell J's conclusion about misrepresentation was not based on her finding that the relationship between the parties was one of partnership. Rather, on a proper reading of the judgment, the duty to explain the scope of the Indemnity was derived from the circumstances immediately attendant upon its execution, including the underlying agreement between the parties made the previous day, the interrelationship between the Indemnity and the Sale Agreement, and the express representations made by Mr van Heeren in relation to the Sale Agreement. The duty was not dependent on the earlier finding of partnership but was expressly held to arise on alternative grounds, namely "whether as a business partner, a contracting party, the party who had procured legal advice and the drafting of the two

contracts".[99] Fogarty J's conclusion that those words were cumulative, as opposed to alternatives, was inconsistent with the context.

(c) The fact that the finding of misrepresentation was founded on alternative bases means that no single basis for the duty to speak out could be said to be "legally indispensable to the conclusion" or the "essential foundation or groundwork of the judgment".[100] The appeal test discussed in *Talyancich*[101] would not be satisfied: even if a challenge to the partnership finding could be pursued on appeal, success would not result in the appeal against the judgment on claims B3 and B4 succeeding. The finding of misrepresentation would still stand on one or more of the alternative bases expressed by Satchwell J.[102] The Judge's observation that Mr van Heeren knew Mr Kidd relied upon him and believed he was signing the Indemnity in respect only of the assets in the Sale Agreement was not dependent on a finding of partnership, as distinct from some other form of business relationship giving rise to a duty of good faith.[103] Here it was significant that the particulars of claim relevantly referred not to a partnership, but to a business relationship, a broad term capable of encompassing various arrangements that would give rise to a context-specific relationship of trust and confidence.

[109] As to the assets finding, Mr Goddard submitted Satchwell J's identification of partnership assets was not necessary and fundamental to her finding of misrepresentation.[104] The true scope of the Indemnity (and hence the truth of the representations) was not dependent upon the identification of particular partnership assets. All the Judge needed to be satisfied about was that there were assets included in the business relationship of the parties in addition to the entities that were the

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99 *Kidd SA judgment*, above n 2, at [166].

100 Mr Goddard based this submission on Handley, above n 95, at [8.25] and *Good Challenger Navegante SA v Metalexportimport SA (The "Good Challenger")* [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep 67 at [69]–[74].

101 *Talyancich*, above n 1.

102 *Kidd SA judgment*, above n 2, at [166].

103 At [170].

104 At [132].

subject of the Sale Agreement. In that respect, Mr van Heeren had conceded prior to the trial that Prime NZ was a vehicle for the parties' steel trading activities and that should have been sufficient for the South African proceeding. It was not necessary for her to have made additional findings in respect of the "voluminous factual matrix evidence" that Mr Kidd chose to lead in evidence. The fact that the Judge may have regarded the identification of specific partnership assets as important to her reasoning was beside the point having regard to the requirement for an objective assessment of what was necessary for the decision.

[110] The appeal test in *Talyancich* could also usefully be applied in respect of the assets finding.[105] Mr Goddard submitted that even if an appeal against the identification of one or more of the assets as partnership assets was successful, the finding of misrepresentation would still stand on one or more of the alternative bases Satchwell J had identified in her judgment.[106]

[111] Further, Mr van Heeren had no reason to expect that the ownership of particular assets by a partnership between him and Mr Kidd would be finally determined in the South African proceeding. There had been no pleading to that effect, and the history of the dispute demonstrates a consistent expectation that such matters would be determined by a New Zealand court in the New Zealand proceeding.

**Analysis**

*The principal issue*

[112] The principal issue raised on appeal centres on the approach taken by Fogarty J in deciding whether Satchwell J's findings that there was a partnership and that the disputed assets were partnership property were determinations that could be the basis of issue estoppels as matters fundamental to her decision that it was necessary for her decide. Fogarty J rejected arguments made for Mr van Heeren by Mr Gray QC similar to those advanced by Mr Goddard on appeal. In the course of doing so, he rejected the statement by Dixon J in *Blair v Curran* that in matters of

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105 *Talyancich*, above n 1.
106 *Kidd SA judgment*, above n 2, at [166].

fact an issue estoppel is "confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established".[107] He considered the statement was obiter and contained a limitation not to be found in other decisions.[108]

[113] After analysing the findings in Satchwell J's judgment he concluded that the partnership finding and the assets finding were both essential contributors to the Judge's conclusion that the Indemnity should be declared null and void,[109] emphasising in this context the high threshold Mr Kidd had to meet to have the Indemnity set aside.[110] The authorities did not support an approach that such important aspects of the factual matrix could not support issue estoppels.[111] The findings on those issues were made having been distinctly raised and challenged over the course of the six-week trial.[112]

[114] Fogarty J expressed his conclusion it had been necessary for Satchwell J to resolve the partnership and assets issues:[113]

> … before she could find that [Mr van Heeren] owed a duty as [Mr Kidd's] partner to explain the scope of the indemnity, and so could find that his conduct and his silence were deliberately misleading. The groundwork of her decision was a detailed examination of the joint business affairs of the two men, operating through a myriad of entities worldwide. It culminated in unequivocal and detailed findings that they were partners, and a list of known and very valuable partnership assets. These findings of mixed fact and law underpinned and were necessary for her reasoning to justify finding the indemnity to be void. Issue estoppel applies to prevent the defendant contradicting those findings in this Court, and seeking this Court to itself contradict those findings of the South African High Court.

[115] As has been seen, Satchwell J made specific findings that Mr Kidd and Mr van Heeren had been in a partnership, and that the partnership property included the disputed assets. We consider it is clear her decision on those matters formed an integral part of the reasoning that led her to give judgment in Mr Kidd's favour on claims B3 and B4.

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107 *Blair v Curran*, above n 96, at 532.
108 *Kidd HC judgment*, above n 5, at [28].
109 See at [81]–[83], [98]–[99] and [111]–[117].
110 At [111].
111 At [73]–[74].
112 At [75]–[83] and [110]–[117], citing *New Brunswick Railway Co v British and French Trust Corp Ltd* [1939] AC 1 (HL) at 19–20.
113 *Kidd HC judgment*, above n 5, at [117] (footnotes omitted).

[116] Claim B3, the allegation of iustus error, was a cause of action with no direct equivalent in New Zealand. In essence, it combines elements of mistake and misrepresentation, so that if a justifiable and reasonable mistake is made by one party as to the terms of a contract and the other party either knew of the mistake, should have done so, or was directly or indirectly involved in inducing the mistake, the resulting contract would be a nullity and set aside. An iustus error is a mistake that is reasonable and justifiable.[114] It has also been referred to as an error where the party making the mistake is not to blame for it. It has been said that in broad terms iustus error will be found where there is:[115]

> … a mistake as to terms on the part of the party seeking to escape the contract which was either known to the other party at the time of contracting, or ought to have been known to him, or which was in fact induced by him, either through a positive misrepresentation or by remaining silent in circumstances in which there was a duty to speak, because of a prior misrepresentation or where a term in the contract constitutes a 'trap for the unwary'.

[117] South African judgments show that a mistake will be described as reasonable, justifiable or both where A has misled B (whether fraudulently, negligently or innocently) as to the meaning of the words to which B is asked to indicate assent because it is understandable that B will be mistaken about the proposition that A is putting forward.[116] It is also part of South African law that there is iustus error if there has been a failure to disclose in circumstances where there is a duty to do so.[117]

[118] Consistent with this summary, the particulars of claim in respect of claim B3 asserted:

(a) Mr Kidd reasonably believed and assumed that the Indemnity related only to the business relationship between them pertaining to the companies referred to in the Sale Agreement;

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114 *Logan v Beit* (1890) 7 SC 197 at 216.

115 Helen Scott "The Requirement of Excusable Mistake in the Context of the Condictio Indebiti: Scottish and South African Law Compared" (2007) 124 SALJ 827 at 861 (footnotes omitted).

116 *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471; *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* 1994 (2) SA 518 (C) at 524; and *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) at 315.

117 *Spindrifter*, above n 116, at 316–317.

(b) Mr Kidd's belief and assumption arose from the representations of Mr van Heeren and his attorney. Such representations were made expressly, alternatively tacitly and by words, alternatively by conduct, or silence; and

(c) Mr Kidd was unaware, and Mr van Heeren deliberately or negligently failed to disclose to Mr Kidd or draw to his attention as he had been obliged to do, that the Indemnity contained provisions that did not limit the Indemnity in the manner in which Mr Kidd assumed it was limited, and that purported to provide for the full and final settlement of all claims between the parties.

[119] In the case of claim B4, misrepresentation, the key allegations were that:

(a) Mr Kidd was induced to enter into the Indemnity by reason of negligent or deliberate misrepresentations made by Mr van Heeren and his attorney that the Indemnity related only to the business relationship concerning the companies included in the Sale Agreement;

(b) the misrepresentations were made in the same manner as was alleged in respect of the iustus error claim; and

(c) they were false, such as would have induced a reasonable person to enter into the Indemnity, intended to induce Mr Kidd to sign it and did in fact induce Mr Kidd to sign it.

[120] The elements of this claim as pleaded appear to be equivalent to a claim that could be alleged in reliance on ss 6 or 7 of the Contractual Remedies Act 1979. In this case, because the remedy sought was a declaration that the Indemnity was voidable or of no legal force and effect, the claim would be for cancellation under s 7(3)(a) of the Contractual Remedies Act.

[121] Claims B3 and B4 were advanced for the purpose of setting aside an indemnity that stated in clear and uncomplicated language that Mr Kidd indemnified Mr van Heeren against all claims that Mr Kidd, or any company of which Mr van Heeren was previously a shareholder, might have against Mr van Heeren. The terms of cls 2 and 3 have earlier been set out in full.[118] Going simply on the language used, it was clear that Mr Kidd could have no surviving claim "of any nature whatsoever" against Mr van Heeren, and that the money paid in respect of the shareholding in the companies listed in the Sale Agreement constituted a settlement of "*all* disputes between the parties anywhere in the world", and were in "full and final settlement of *all* claims", which either might have against the other, including *any* companies in which they were involved.[119]

[122] Given the breadth and clarity of this language, it is clear that Mr Kidd could only succeed on claims B3 and B4 if he was able to establish that the Sale Agreement dealt with only part of the assets that he and Mr van Heeren jointly owned. It was of the essence of the allegation of misrepresentation made by Mr Kidd against Mr van Heeren that there was a residue of jointly owned property not subject to the settlement constituted by the Sale Agreement and the Indemnity.

[123] Satchwell J's findings as to the existence of a partnership and as to the assets of the partnership must be seen in this light. In our view, the decision on both matters was such as to fall readily within this Court's description of the circumstances giving rise to an issue estoppel in *Talyancich*.[120] In other words, like Fogarty J, we consider that the partnership finding and the assets finding constituted essential and fundamental steps in the logic of Satchwell J's judgment. While the findings did not determine the existence or non-existence of the cause of action, they were essential and fundamental steps that led to the conclusion that Mr van Heeren had misrepresented the effect of the Indemnity.

[124] We are not persuaded that the appeal test, discussed by Mr Goddard, points to a different conclusion. The Judge has chosen to express her conclusion that the business relationship of the parties was a partnership, and then as a second

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118 At [17](b)-(c).
119 (Emphasis added.)
120 *Talyancich*, above n 1.

determination she has decided what the assets of the partnership were. Assuming there were proper grounds to do so, we see no reason why an appeal on either issue could not have been advanced. The conclusion that there was a partnership, as we have seen, was based on a closely reasoned analysis of the evidence. The principal evidence bearing on that issue was from Mr Kidd and from Mr Browning. It was the latter's conclusions on which the Judge relied for the detail of the assets determination, effectively adopting them in her judgment.[121]

[125] If the Judge's findings on either the partnership or the assets issues were capable of effective challenge on the evidence, success on one or the other of them might very well have been fatal to the judgment because the findings were an essential part of the Judge's reasoning. If the partnership finding had been set aside on appeal, there would have been no finding extant about the nature of the business relationship between the parties, and in those circumstances the finding as to the assets notionally owned by the partnership would also fall away. Mr Kidd's claims of iustus error and misrepresentation would in those circumstances lack essential elements of the factual setting on which he relied to establish his claims.

[126] We do not consider it is appropriate to analyse separately the partnership finding and the assets finding, and there would be a degree of artificiality in doing so. Both findings were essential aspects of Satchwell J's reasoning. We note, however, that the extent of the partnership assets that the Judge found to exist added to the strength of her conclusion that there had been misrepresentations about what was covered by the Indemnity. It was inherently unlikely that Mr Kidd would have signed away his claim to assets of such potential value on the terms set out in the Sale Agreement and Indemnity. It was not a situation where it would have been sufficient for the Judge to find that one or two assets previously jointly owned had not been taken into account when the Sale Agreement and Indemnity were signed. The extent and value of the assets, which had not been subject to any accounting or agreement as at 18 January 1991, was a fundamental fact lending great strength to Mr Kidd's argument that the effect of the Indemnity had been misrepresented by Mr van Heeren.

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[121] *Kidd SA judgment*, above n 2, at [125].

[127] This reasoning is amply justified by the terms of the judgment we have already discussed. These include the Judge's observation that when the parties met in Randburg on 17 January 1991 there was nothing to suggest that Mr Kidd did not, as he testified:[122]

> … remain a partner in a worldwide partnership with monies in bank accounts, shares in companies and other investments which he believed amounted to as much as US$40 million in value[.]

[128] The Judge found in fact that the 17 January discussions had as their context the South African assets.[123] She clearly accepted Mr Kidd's evidence ("not really challenged in cross-examination") that there was to be a final accounting in respect of the worldwide partnership assets.[124] The Sale Agreement was specific, referring to the South African companies as well as the Hong Kong company and there had been no discussion about settling claims concerning the other worldwide assets.

[129] We have earlier discussed the other relevant findings of the Judge in relation to claims B3 and B4. We do not need to repeat that discussion at this point. It is sufficient to say that it is clear the Judge's conclusion that Mr van Heeren had deliberately misrepresented the scope of the Indemnity had as its essential context the facts that the Indemnity purported to deal with all of the partnership assets when Mr van Heeren had created in Mr Kidd the false belief that it was limited to the South African and Hong Kong companies. The more assets that were found to be jointly owned, the stronger the logic of the finding that there had been relevant misrepresentations as to the scope of the Indemnity.

[130] It is appropriate to address the necessity test on which Mr Goddard relied in this setting. As we have noted, his submission was that that test should be applied here by asking whether a finding in New Zealand that there was a joint venture would be inconsistent with Satchwell J's judgment on claims B3 and B4. He argued that there would be no such inconsistency, and it follows the partnership finding cannot give rise to an issue estoppel. We reject that submission, for a number of reasons.

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122 At [137]. It was common ground between the parties that the reference to 17 January 1990 in the judgment here was an error and the Judge clearly intended 1991.

123 At [137]–[147].

124 At [138].

[131] The Judge found on the evidence that the parties were partners.[125] It was a finding effectively compelled if she decided that Mr Kidd was a credible and reliable witness, which she clearly did.[126] While the pleading of claims B3 and B4 simply referred to the parties being in a business relationship, a partnership such as the Judge found existed was obviously a kind of business relationship. It cannot be suggested that the Judge erred in deciding, as a matter of fact, that there was a partnership and the partnership finding became the essential context for the judgment on claims B3 and B4. It was the partnership relationship that gave rise to Mr van Heeren's duty not to misrepresent the effect of the Indemnity.

[132] We accept that a business relationship in the nature of a joint venture may give rise to fiduciary obligations similar to those that arise from a partnership, although given the nature of the parties' ongoing business activities (Mr Kidd trading in steel, Mr van Heeren seeing to the investment of the proceeds) the finding of partnership does not appear inappropriate.[127] Mr Goddard submits that it would be wrong for Mr van Heeren to be deprived of the opportunity of asserting that the relationship was that of a joint venture in the New Zealand Court as part of a defence to Mr Kidd's claim. However, the possibility that the parties were in a joint venture was not one that was pursued with any real focus in the South African litigation. It was not mentioned in Mr van Heeren's pleading, which simply denied the partnership allegation made in Mr Kidd's claim C. Nor did Mr van Heeren call any evidence suggesting that the relationship was that of a joint venture.

[133] In addition, it is clear from the closing address by Mr Stockwell in the South African trial that Mr van Heeren's defence did not comprise any suggestion that the parties were in a joint venture such as might, theoretically, have given rise to obligations of trust and confidence. Rather, the case was Mr Kidd had no right or interest in any of the alleged partnership assets. Mr Stockwell's written argument included the submission that:

> … the only conclusion to be drawn is that Kidd has no right or interest in any of these assets. The attempt to introduce a partnership as a basis for

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125 At [119]–[126].
126 At [113]–[118].
127 See *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [91]–[92]. In essence a joint venture involves parties working together towards the achievement of a common objective.

> laying claim to these assets must also fail as it is not supported by the evidence of Kidd. It has also not been pleaded. The attempt to introduce the concept of *uberrimae fides* is also misplaced.
>
> (Footnote omitted.)

[134] As we will go on to discuss, it is wrong to suggest that the issue of partnership had not been pleaded. For present purposes, however, we mention Mr Stockwell's submission because it suggests that any joint venture that might be asserted in New Zealand would in fact be describing a very different relationship to that which Satchwell J found to exist. We do not accept Mr Goddard's submission that there would be no inconsistency.

[135] However, the appellant appears to contend that because the Judge might have found there was a joint venture rather than a partnership, that necessarily means that the partnership finding was one that was not objectively necessary as a basis for her decision. The submission is that this Court should examine the intrinsic nature of the claims upheld in the South African judgment to ascertain what steps in the Judge's reasoning were essential as a matter of law in order to found the conclusions reached.

[136] The principal basis for this argument was the judgment of Dixon J in *Blair v Curran*,[128] to which we have already referred. We have already set out particular passages from the judgment. Although Dixon J was clearly intending to summarise the relevant law, we doubt he intended that everything he said would be universally applicable to cases involving claims of issue estoppel. The statement on which Mr Goddard placed emphasis, that in matters of fact the issue estoppel is "confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established", is clearly easier to apply in some contexts than others. Importantly, however, it needs to be read alongside other observations Dixon J made in the same paragraph of the judgment, emphasising that the estoppel is not confined to the final legal conclusion expressed in a judgment, decree or order. He said:[129]

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128 *Blair v Curran*, above n 96.
129 At 532.

> In the phraseology of *Coleridge* J in *R. v. Inhabitants of the Township of Hartington Middle Quarter*[130] the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.

[137] In the present case, for reasons we have already given, we agree with the submission made by Mr Mills QC for Mr Kidd that the partnership and assets findings were both necessary groundwork of, and cardinal to, the decision that Mr van Heeren had misrepresented the effect of the Indemnity. That brings this case within the circumstances established by this Court's decisions for issue estoppel to apply.[131]

[138] We consider the approach of this Court is consistent with the leading Australian and English authorities, including *Blair v Curran*.[132] We note that in that case Starke J held that it was well settled that a judgment:[133]

> … concludes not merely the point decided but matters which were necessary to decide and which were actually decided as the groundwork of the decision itself though not then directly the point at issue[.]

Further, a judgment is:[134]

> … conclusive evidence not merely of the facts directly decided but of those facts which are necessary steps to the decision — so cardinal to it that without them it cannot stand.

He went on to list a number of authorities that were in turn discussed in this Court's decision in *Talyancich*.[135] The same cases were relied on by Lord Reid in *Carl Zeiss Stiftung v Rayner & Keeler Ltd.*[136] The focus is not on the pleadings, or logical necessity, but on what the Judge actually decided and the reasons underpinning the decision.

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130 *R v The Inhabitants of the Township of Hartington Middle Quarter* (1855) 4 EL & BL 780 at 794, 119 ER 288 (QB) at 293.

131 *Talyancich*, above n 1; *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 40–41; and *OY v Complaints Hearing Committee* [2013] NZCA 107 at [26].

132 *Blair v Curran*, above n 96.

133 At 510.

134 At 510 (citations omitted).

135 *Talyancich*, above n 1, at [38].

136 *Carl Zeiss Stiftung*, above n 3, at 914–915.

[139] *Telesto Investments Ltd v UBS AG*,[137] a decision of the New South Wales Supreme Court on which Mr Goddard also relied in this part of the argument, does not advance matters any further than Dixon J's judgment in *Blair v Curran*.[138] In referring to that judgment, Sackar J emphasised in *Telesto Investments Ltd* that an issue estoppel covers only those matters that the prior judgment necessarily established as the legal foundation or justification of the conclusion.[139] He went on to refer to observations of Fullagar J in *Jackson v Goldsmith* that where res judicata is relied on, only the actual "record" is important, but for a plea of issue estoppel "reasons given for the judgment pronounced are likely to be particularly important for this purpose".[140] The purpose referred to is establishing the legal foundation or justification for the conclusion reached in the judgment said to give rise to the issue estoppel. Sackar J went on to state:[141]

> There are numerous authorities which emphasise that in order to establish issue estoppel it is necessary to closely scrutinise the reasons behind the ultimate conclusion reached in order to identify those steps which were actually relied on to reach the conclusion.

[140] Here there is no doubt that the relevant partnership findings were steps actually relied on to reach the conclusion the Indemnity must be set aside. We do not see in any of these passages support for Mr Goddard's argument that the court before which an issue estoppel is claimed must come to its own objective conclusion that the first judge correctly decided that it was necessary to decide an issue in a particular way (partnership) and could not have justified the decision on some other basis (joint venture).

[141] We accept Mr Goddard's submission that the question of whether there has been an issue estoppel requires examination not only of what the first court decided but also as to whether what was decided was necessary for the decision. However, Mr Goddard seeks to go further. He is critical of Fogarty J for having focused on the reasoning of Satchwell J and whether her findings about the partnership and its assets were necessary to her process of reasoning, rather than on whether the

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137 *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503, (2013) 94 ACSR 29.
138 *Blair v Curran*, above n 96.
139 *Telesto Investments*, above n 137, at [202].
140 *Jackson v Goldsmith* (1950) 81 CLR 446 at 467.
141 *Telesto Investments*, above n 137, at [218].

findings were objectively necessary for determination of the challenges to the validity of the Indemnity before the South African Court. Mr Goddard submitted that an issue will only be properly considered as one it was necessary to decide if it was legally indispensable to the result reached. That could be tested by applying the appeal test or the inconsistency test. As part of his argument he submitted that the nature and extent of an issue estoppel cannot be enlarged merely because a party presents a case that goes beyond what is strictly essential to the result contended for, or by a judge making findings on such matters, however certain or definite.

[142] Mr Goddard's approach is exemplified by a submission he made that, to be satisfied Mr van Heeren had misrepresented the scope of the Indemnity, Satchwell J only needed to find there were some assets included in the "business relationship" in addition to those listed in the Sale Agreement. Mr van Heeren had conceded prior to the trial that Prime NZ was a vehicle for the parties' steel trading activities and that should have been sufficient. It was not necessary for her to make additional findings in respect of the factual matrix evidence that Mr Kidd had chosen to lead in evidence.

[143] Mr Mills submitted that Fogarty J had taken an entirely orthodox approach and that the test for which Mr van Heeren contends would have the effect of placing a court asked to decide whether certain findings gave rise to an issue estoppel in the position of a quasi-appellate court reviewing the reasoning of the first court to identify errors of fact or logic or both.

[144] We accept the submission made by Mr Mills that, on Mr Goddard's approach, issue estoppel would no longer reflect the goal of finality that is one of its principal objects. Judgments said to give rise to an issue estoppel would effectively be subjected to subsequent analysis so as to ascertain whether the judgment could have been reasoned in a more limited way. He submitted that none of the authorities relied on required that approach. We agree.

[145] There may be cases where a decision said to create an issue estoppel has dealt with matters that were obviously too broad or extraneous to any issue that it was necessary to decide. That criticism, however, cannot be applied to the partnership

and assets findings of Satchwell J. We consider it was legitimate for her to decide that the parties were in a partnership. It was that relationship that gave rise to Mr van Heeren's duty to point out that the wording of the Indemnity ranged much more widely than the companies referred to in the Sale Agreement. It was also the source of Mr van Heeren's obligation not to mislead. In our view, it was also legitimate for the Judge to make findings about the extent of the partnership assets; her decision that they included all of the disputed assets gave strength to her conclusion that there had been misrepresentations of the relevant kind. On the only evidence before the Judge the disputed assets all fell into the same broad category as assets in which Mr Kidd had a proprietary interest. We see no reason why the Judge should have excluded some assets from her finding and included others, and a rational basis has not been proffered for why she might have distinguished between particular assets or categories of assets.

[146] Mr Goddard's argument suggests that Satchwell J should have been satisfied that Prime NZ had been a vehicle for the parties' steel trading activities. However, in the context (that partnership was denied by Mr van Heeren who claimed that Mr Kidd did not have a proprietary interest in any of the disputed assets) it was clearly legitimate for the Judge to make the findings she did. It would have been inappropriate for her to decide there was a "business relationship" without saying what the nature of the relationship was. And, as we have already explained, the assets finding was directly relevant to the reasons the Judge gave for finding there had been misrepresentations by Mr van Heeren.

[147] All this leads readily to a conclusion that the partnership and assets issues determined by Satchwell J were determinations fundamental to the decision and part of its essential groundwork. We do not accept, given the nature of the arguments in the South African trial, that the Judge made findings that went beyond what was required.

[148] It would be very artificial to hold now that Fogarty J should have confined any issue estoppel to a smaller number of assets than Satchwell J determined were partnership assets, on the basis of an appreciation he should have formed about what extent of assets was objectively necessary for her decision. We do not consider that

is what the law requires. It would be impractical and, as Mr Mills submitted, not calculated to achieve the finality objective of the doctrine of issue estoppel.

[149] Mr Goddard submitted, in a further argument, that Satchwell J had not based her determination on the issue of misrepresentation on her prior finding that the relationship between the parties was one of partnership. He contended that her reasoning at the relevant point showed that she derived the duty to explain the scope of the Indemnity from the circumstances immediately attendant on the Indemnity coming into existence. He submitted those circumstances included the underlying agreement between the parties made on the previous day, the interrelationship between the Indemnity and the Sale Agreement, and express representations made by Mr van Heeren in relation to the Sale Agreement. Mr Goddard also noted that the duty to explain was expressly held to arise on alternative grounds relating to Mr van Heeren's role "whether as a business partner, a contracting party, the party who had procured legal advice and the drafting of the two contracts".[142]

[150] We do not consider that submission, based on one sentence of a lengthy judgment, rests on a fair representation of what the Judge decided. The passages to which we have already referred clearly establish that the findings as to the existence of the partnership and its assets were central to the Judge's reasoning. In our view, all the Judge was doing in the passage quoted was referring to various descriptions that could be applied to Mr van Heeren. Read as a whole, however, the judgment would not stand without the partnership and assets findings.

[151] We note also that, although the Judge referred at this point to the circumstances in which Mr Kidd had travelled to South Africa and the underlying oral agreement between the parties made on the previous day,[143] the submissions made by Mr van Heeren appear to overlook the fact it was a key part of the Judge's reasoning that, according to Mr Kidd, matters discussed the day before included the need for an accounting between the parties in respect of the balance of the worldwide assets. As the Judge observed:[144]

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142 *Kidd SA judgment*, above n 2, at [166].
143 See at [156], [158] and [161].
144 At [162].

> [Mr van Heeren] has not gainsaid Kidd's evidence, and therefore Van Heeren knew, that his mandate was to procure a legal document which would cover their agreement and that there was, as yet, no agreement on the worldwide assets which were still to be ascertained (ie contents of bank accounts) and valued and allocated.

[152] For the reasons discussed we do not accept the primary argument advanced in support of the appeal. We can deal more briefly with some other arguments that Mr van Heeren relied on.

*Failure to plead partnership*

[153] Mr Goddard emphasised that the only explicit reference to partnership in the particulars of claim was in relation to claim C. However, it is clear that an issue may be the subject of issue estoppel without being specifically pleaded, and we were not referred to any authority expressing a contrary view.

[154] Issue estoppel is a doctrine separate from res judicata or cause of action estoppel. The focus of the authorities on issue estoppel is on whether the asserted estoppel relates to a point that has been distinctly put in issue and determined by the first court. Answering that question may well involve looking at the pleadings, but not necessarily so and it may also require a wider inquiry. As Lord Guest observed in *Carl Zeiss Stiftung*:[145]

> In operating issue estoppel it may be necessary, in order to ascertain what issues have been inferentially or incidentally decided, to look, not only at the judgment, but also at the pleadings and, it may be, at the evidence.

[155] Fogarty J rejected an argument that before an issue estoppel arises the precise point must be pleaded.[146] On appeal, a slightly different point appears to be made. That is that a New Zealand court should look with considerable scepticism on a claim such as that made by Mr Kidd that an issue it was not necessary to plead in a foreign court was nevertheless fundamental to its case to the extent that the foreign court's findings on the issue give rise to an estoppel.

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145 *Carl Zeiss Stiftung*, above n 3, at 938.
146 *Kidd HC judgment*, above n 5, at [53].

[156] We observe here that while claim C, where there was a specific reference to the partnership and a pleading that its assets included the disputed assets, was not resolved by the Judge, that was explicitly on the basis that she did not need to do so because of the findings she made in respect of claims B3 and B4.[147] She also referred to the drafting of claim C, which, as we noted above, sought an order declaring the claims that formed the subject of the Indemnity to have excluded the disputed assets (which were specifically set out in the claim), ending: "and the Plaintiff is accordingly entitled to approach the New Zealand Court for a determination of his claims in respect of the assets".

[157] Satchwell J observed she found it very difficult to comprehend how declaration of a dispute would take the matter any further.[148] The Judge's observation that she did not need to deal with claim C because of the findings she was making on the other claims is readily understandable. It was in dealing with claims B3 and B4 that she made her findings about the partnership and the partnership assets.

[158] There is no doubt that the existence of the partnership and its assets were matters distinctly put in issue prior to and at the South African trial. Quite apart from the reference to partnership in claim C, there was the evidence of Mr Kidd that there was a partnership and that was supported by the investigation and evidence of Mr Browning. As noted earlier, in interlocutory procedures Mr Kidd had been required by Mr van Heeren to give particulars of the partnership and he had done so. When the matter went to trial, Mr van Heeren was not to know that the Judge would be able to decide she did not need to resolve claim C and, presumably, prepared on the basis that the partnership and partnership assets issues would be reached. The scepticism that Mr Goddard encouraged is not called for.

[159] That means also that there is no force in Mr Goddard's related suggestion that holding the South African judgment gave rise to the relevant issue estoppels breaches the audi alterem partem rule or s 27 of the New Zealand Bill of Rights Act 1990.

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147 *Kidd SA judgment*, above n 2, at [149].
148 At [149].

*Genan*

[160] Mr Goddard submitted that one finding of the Judge in relation to the partnership assets was particularly problematic. He was referring to a paragraph in the judgment in which the Judge expressed herself as "more than satisfied" that the partnership of Mr Kidd and Mr van Heeren made acquisitions throughout the world through, amongst other entities, Genan.[149]

[161] Mr Goddard focused on the fact that the Judge had noted that the agreement of 21 February 1990, which provided amongst other things that Mr van Heeren would pay Mr Kidd the sum of USD 3,000,000 "in full and final payment of all KIDD'S shares in Genan", had not been proved.[150] He submitted that the Genan share sale had not been pleaded in South Africa, and could not be said to be necessary and fundamental to the finding of misrepresentation. Nevertheless, Mr Kidd's application in the High Court of New Zealand claimed that Mr van Heeren was estopped from denying that the shares in or assets of Genan were partnership assets as at 17 January 1991.

[162] Fogarty J addressed a specific argument advanced by Mr van Heeren that one of the issues that should be tried in New Zealand was the "consequences of the sales of Mr van Heeren of all of his shares in Genan in February 1990". He noted that the disputed sale of Genan's shares had been explored during Mr Kidd's evidence at the trial in South Africa, both in anticipation of evidence that Mr van Heeren might give and through cross-examination where Mr van Heeren's version of events was put to Mr Kidd.[151] He then referred to the fact that Satchwell J had dealt with the issue in her judgment.

[163] In summary, Satchwell J noted that Mr Kidd disavowed any knowledge of the document and denied signing it.[152] She found the purported sale of Genan shares had not been proved, noting that neither Mr van Heeren, who had supposedly signed it, nor his assistant who witnessed it, had given evidence about it.[153] In addition, the

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149 At [132].
150 At [75]–[77].
151 *Kidd HC judgment*, above n 5, at [88].
152 *Kidd SA judgment*, above n 2, at [74].
153 At [75].

basis on which Mr van Heeren gave instructions that the transfer of USD 3,000,000 from a Prime NZ bank account be marked "share transfer" was unexplained.[154] It was Mr Kidd's evidence that the USD 3,000,000 payment was a distribution of profits from Genan, and was not for the sale of shares.[155] The Judge clearly accepted Mr Kidd's disavowal of the document, for the reasons set out in her judgment.[156] These included the salient facts that there had never been a valuation of the Genan assets, and that the money had been paid by Prime NZ. Since Prime NZ was a partnership asset, it did not make sense that payment for the Genan shares would come from that source; Mr Kidd's own money would have been used to buy his shares.

[164] Fogarty J considered that Satchwell J's determination that the sale of the Genan shares was not proven had to be read alongside her positive findings as to the ongoing partnership and the presence of "valuable worldwide partnership assets" after the supposed sale of the Genan shares.[157] He observed that Satchwell J did not consider the "not proven" Genan sale should disturb her findings as to what the partnership assets were.[158] Further, she had found that Genan had been used as a conduit of partnership funds accumulated from steel trading to purchase assets.[159]

[165] The points raised by Mr van Heeren have not persuaded us that Fogarty J was in error in the way he approached this issue.

*Alternative bases for decision*

[166] We have already referred to the argument founded on Satchwell J's finding that Mr van Heeren was under an obligation to "inform and enlighten" Mr Kidd about the unlimited nature of the Indemnity, "whether as a business partner, a contracting party, the party who had procured legal advice and the drafting of the two contracts". We have recorded our view that, properly considered, the Judge's conclusion as to Mr van Heeren's duties was based on the partnership finding.

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154 At [75].
155 At [73].
156 At [76].
157 *Kidd HC judgment*, above n 5, at [93].
158 At [93].
159 At [94].

In this part of the argument, however, Mr Goddard contended that because the Judge had expressed the duty as arising from not only the partnership relationship, but also the other matters referred to in this particular sentence, it could not be said that any one of them was a finding indispensable to the decision. For this reason, none of them could be said to give rise to an issue estoppel.

[167] As noted above, in advancing this submission Mr Goddard relied on the appeal test discussed in *Talyancich*, and *Good Challenger Navegante SA v Metalexportimport SA (The "Good Challenger")*.[160] The essential proposition is that even if a challenge to the partnership finding could have been pursued on appeal in South Africa, the appeal test would not be satisfied because alternative bases for the judgment would remain.

[168] In *The Good Challenger* the England and Wales Court of Appeal had to consider an argument that where a judgment had two ratios, neither ratio could satisfy the issue estoppel requirement that the issue decided be one that was fundamental to the decision. In the result, the Court of Appeal agreed with the High Court Judge that that issue did not properly arise because one of the alleged ratios was not a primary basis for the decision. Clarke LJ said that in the circumstances it was not appropriate to express a view on the point. He observed, however: "There is a good deal to be said on both sides of the question."[161]

[169] This is a similar case. The conclusion we have reached that the partnership finding was fundamental means that we do not have to express a view on this proposition. However, for our part, we would have thought that the better view was that where there are two ratios both should be treated as fundamental to the decision. We say that because both issues would have been decided by the first court, and notionally both issues would have been distinctly raised and the subject of evidence and/or argument by the parties. The twin bases of the law of issue estoppel, the principles that there should be finality and that litigants should not be required to argue the same issues twice, clearly support that approach.

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160 *Talyancich*, above n 1; and *The Good Challenger*, above n 100.
161 *The Good Challenger*, above n 100, at [71].

*Caution in the case of foreign judgments*

[170] A theme emphasised in various parts of Mr van Heeren's argument is that the issue estoppels claimed in this case arose from a South African judgment. Although it is clear that the judgment of a foreign court may give rise to an issue estoppel, there are statements in the authorities emphasising that care is needed before deciding that a relevant issue estoppel has arisen in such a judgment. Here, Mr Goddard submitted Fogarty J's failure to have regard to the cautionary principle led him to take at face value the finding of a partnership and to reach conclusions about the nature of Satchwell J's reasoning in a manner unsafe in the context of a foreign judgment given in a foreign legal system. Mr Goddard claimed that there are significant procedural and substantive differences between the New Zealand and South African (Roman Dutch) systems that should not be underestimated and should have resulted in a cautious approach to drawing inferences about the South African Court's reasoning.

[171] In this context, reference is often made to the judgments in *Carl Zeiss Stiftung*.[162] It is sufficient to mention observations made by Lord Reid:[163]

> I can see no reason in principle why we should deny the possibility of issue estoppel based on a foreign judgment, but there appear to me to be at least three reasons for being cautious in any particular case. In the first place, we are not familiar with modes of procedure in many foreign countries, and it may not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral or obiter. Secondly, I have already alluded to the practical difficulties of a defendant in deciding whether, even in this country, he should incur the trouble and expense of deploying his full case in a trivial case: it might be most unjust to hold that a litigant here should be estopped from putting forward his case because it was impracticable for him to do so in an earlier case of a trivial character abroad, with the result that the decision in that case went against him. These two reasons do not apply in the present case. … But the third reason for caution does raise a difficult problem with which I must now deal.

Lord Reid went on to describe the third problem, which was to ascertain whether the former judgment was a "final judgment on the merits".[164] Where an issue estoppel was alleged, it would be necessary for the court to be satisfied that the issues in

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162 *Carl Zeiss Stiftung*, above n 3.
163 At 918.
164 At 918–919.

question could not be relitigated in the foreign country.[165]

[172] Those reasons for caution do not cause a difficulty in the present case. The South African judgment is a fully reasoned one and it is clearly possible to see what was decided and the reasons for the decisions made. Obviously, there are differences between the legal system of New Zealand and that of South Africa. But in examining the record of the South African proceeding for the purposes of this appeal, we have found ourselves in territory that does not appear to be unfamiliar. Even in relation to rules of pleading, there are distinct parallels between the relevant rules in both countries. Documents equivalent to statements of claim and statements of defence are filed in South Africa, and there are requests for particulars that were made and answered in this case, for example on the partnership issue. Our attention was also not drawn to any difference in partnership law applicable in the two jurisdictions of significance for present purposes.

[173] The claim of iustus error made in South Africa does not have a direct counterpart in New Zealand, but its general elements are able to be ascertained from the judgment itself and from relevant South African authorities. The law of actionable misrepresentation is also similar, although it does not have the gloss of our Contractual Remedies Act. Consequently, the first reason for caution does not arise.

[174] As to the second, there is no suggestion that it would have been impracticable for Mr van Heeren to present his case, for example as to the nature of his business relationship with Mr Kidd in the South African Court. As has been seen, he made a tactical decision not to do so even though he had previously surveyed the course of their dealings in an affidavit filed in support of an application made to separate out claim C from the balance of issues to be dealt with at the South African trial. Further, although the matter eventually proceeded to trial in South Africa on a wider basis than was envisaged when Smellie J stayed the New Zealand proceeding, that too took place without any challenge by Mr van Heeren. In any event, Mr Goddard did not seek to argue that Mr van Heeren could rely on the second kind of difficulty

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165 At 918.

referred to by Lord Reid. Nor is there any suggestion that the issues decided by Satchwell J could be relitigated in South Africa.

[175] Mr Goddard referred us to a decision of the England and Wales Court of Appeal in *Kirin-Amgen Inc v Boehringer Mannheim GmbH*.[166] In that case, having discussed the law generally applicable to issue estoppel, Aldous LJ said:

> Cases where a party seeks to relitigate a matter may amount to an abuse of the process of the court and if so the courts have not been slow to provide an appropriate remedy. But it cannot be right to bind a party to a finding of fact by a court where there was no need for that party to produce evidence to the contrary in that court. Certainly it would be wrong to do so in a case where the estoppel relied on appears in a judgment of a foreign court.

Aldous LJ continued by referring to Lord Reid's judgment in *Carl Zeiss Stiftung*.

[176] We do not consider that this statement assists Mr van Heeren. He was confronted with a claim alleging that the Indemnity, on which he relied as a complete defence to the claims made against him in New Zealand, was said to be invalid and of no effect. Mr Kidd's case in the South African Court asserted partnership, iustus error and misrepresentation because the wording of the Indemnity was such as to absolve Mr van Heeren for liability to account to Mr Kidd for his share of the substantial assets plainly in dispute. If he wished to assert that Mr Kidd's claims were false or misconceived, he needed to counter the evidence on which Mr Kidd relied. He failed to do so.

*Standing back*

[177] Mr Goddard submitted issue estoppels should not be applied mechanically. Even if the preconditions for an issue estoppel are present, since the purposes of such estoppels is to do justice between the parties the court should stand back and ask whether it would be just to deny the defendant a hearing on the merits of the issue as a result of the foreign court's finding.[167] He contended the true origin of the law of issue estoppel lay in the audi alterem partem rule and was reflected in s 27 of the New Zealand Bill of Rights Act.

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[166] *Kirin-Amgen Inc v Boehringer Mannheim GmbH* [1997] FSR 289 (CA).
[167] *Carl Zeiss Stiftung*, above n 3, at 947 per Lord Upjohn.

[178] There may be merit in this approach, although at a lower level of abstraction the real guides to application of the rule are the twin objectives of finality and protection of litigants from repeated suits. The perspective afforded by standing back in the present case simply serves to emphasise that it would be unjust to deny Mr Kidd the fruits of his success in the South African proceeding where the partnership and assets issues were squarely in issue, as Mr van Heeren well knew. There was nothing to prevent him calling evidence in relation to any of the issues he now says he wishes to contest.

**Interim orders**

[179] On the basis of his findings of issue estoppel regarding the partnership and its assets, Fogarty J ordered, among other things, that an account be taken between the parties and that Mr van Heeren make an interim payment to Mr Kidd in New Zealand Dollars the equivalent of USD 25,000,000.[168]

[180] Mr van Heeren challenged these orders on appeal. His primary basis for doing so was because no issue estoppel arises. Mr van Heeren further argued that even if the findings of issue estoppel stand, there remain preliminary issues to be determined before an account can proceed. These preliminary issues include the proper law of the partnership, the terms of the partnership and the impact of the mutual accounting process.

[181] The terms of this judgment are such that we see no basis for disturbing Fogarty J's orders. Mr van Heeren's other arguments do not persuade us otherwise.

[182] As we have said, no pertinent difference in the law of partnership between the two jurisdictions has been brought to our attention. Regardless, that argument is more appropriately levelled at the finding of an issue estoppel from a foreign judgment and has been considered above. The effect of the issue estoppel is that Mr van Heeren is precluded from disputing the existence of the partnership. As Fogarty J found,[169] it is unlikely that Mr van Heeren will be able to displace the presumption that the partnership anticipated equal sharing in the profits.

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168 *Kidd HC judgment*, above n 5, at [172].
169 At [155].

Finally, because the order for payment of USD 25,000,000 was conservative, we think it unlikely that it would need to be disturbed in the event that the mutual accounting process proves Mr Browning's estimate wrong.

[183] In terms of r 7.71(1)(c) of the High Court Rules, we see no reason to depart from Fogarty J's finding that it is likely Mr Kidd will obtain judgment against Mr van Heeren for USD 25,000,000. Mr van Heeren's appeal against these orders accordingly fails.

**Result**

[184] The appeal is dismissed.

[185] Mr Kidd is entitled to costs. The parties were agreed that the appropriate order in favour of the successful party should be for costs on a complex appeal calculated on a band B basis. We make an order accordingly. We certify for two counsel and the usual disbursements, including the travel costs of Auckland-based counsel.

Solicitors:
Fee Langstone, Auckland for Appellant
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