IN THE COURT OF APPEAL OF NEW ZEALAND

CA191/05

	BETWEEN	MICHAEL DAVID KIDD Appellant
	AND	ALEXANDER PIETER VAN HEEREN Respondent

Hearing: 9 March 2006

Court: Glazebrook, Hammond and O'Regan JJ

Counsel: B O'Callahan and A E Fitzherbert for Appellant
C J Hodson QC and C M Brick for Respondent

Judgment: 23 March 2006

JUDGMENT OF THE COURT

A The appeal is dismissed.

B We award costs of $6,000 plus usual disbursements to the respondent.

REASONS

(Given by O'Regan J)

Introduction

[1] This is an appeal from a decision of Allan J, in which he dismissed Mr Kidd's application to lift an order for stay of the proceedings commenced by Mr Kidd against Mr van Heeren which had been made by Smellie J in October 1997. The decision under appeal is *Kidd v van Heeren* HC AK CIV 2004–404-6352 16 August 2005. The decision of Smellie J imposing a stay is *Kidd v van Heeren* [1998] 1 NZLR 324.

Background

[2] The background is set out in some detail in the judgment of Smellie J at 326-327, and this is amplified in the judgment under appeal. We will not repeat the detail here: reference should be made to the judgments of Smellie J and Allan J if necessary.

[3] For present purposes, the following summary will suffice. Mr Kidd commenced proceedings against Mr van Heeren in the High Court of New Zealand in 1996. He alleged that the parties had a partnership which ought to have been divided equally when the partners agreed to terminate it, but that Mr van Heeren had failed to account to Mr Kidd for his half share. He said he received assets worth only about US$3,000,000 when the value of the assets in the alleged partnership were in excess of US$30,000,000.

[4] The parties entered into an agreement in February 1990 which provides that Mr Kidd agreed to sell to Mr van Heeren his shares in the company which was the vehicle for much of the alleged partnership. They also entered into two documents in January 1991 in Randburg, South Africa. The first of these is an agreement which provided that Mr van Heeren transferred to Mr Kidd all his shares in various companies for a nominal consideration, and the second is a document which describes itself as an "indemnity", and which provides that the amount paid by Mr Kidd to Mr van Heeren for those shareholdings constitutes settlement of all disputes between them anywhere in the world and is full and final settlement of all

claims which either may have against the other. This document is expressed to be governed by the law of South Africa. Mr Kidd made various claims about the Randburg documents, the essence of which is that they do not preclude his present claim against Mr van Heeren.

[5] Mr van Heeren argued that the Randburg documents were a complete answer to Mr Kidd's claim.

[6] Mr van Heeren applied to the High Court of New Zealand in 1997 for a stay of Mr Kidd's proceedings against him. Ultimately Smellie J granted a limited stay requiring that the validity of the Randburg documents should be determined by the Courts of South Africa, if the Courts of South Africa accepted jurisdiction. Thus the stay was to remain in place either until it was established that the South African Court declined jurisdiction or until the South African Court dealt with Mr Kidd's challenge to the validity and scope of the Randburg indemnity and upheld his challenge. However, Smellie J reserved leave for either party to apply on 21 days notice.

[7] The parties then embarked on South African proceedings. Initially Mr Kidd sought an order from the High Court of South Africa declaring the Randburg indemnity to relate only to claims between the parties in respect of the particular transaction preceding the Randburg indemnity evidenced by the Randburg agreement, or declaring the indemnity to be void, voidable (and avoided) or of no legal force and effect. Subsequently Mr Kidd amended his proceedings in the High Court of South Africa by adding additional claims. The result was that his claims were as follows:

(a) He introduced a new claim (Claim A) asking the South African High Court to decline to exercise its jurisdiction to hear the proceeding;

(b) In the alternative he made a series of cascading claims in relation to the indemnity: these are referred to as Claims B1-B4. Claim B1 is to the effect that the proper construction of the indemnity is that it has the limited effect suggested by Mr Kidd, Claim B2 is that the parties

made a common mistake, the upshot of which is that the real intention of the parties was that the indemnity would have the limited effect suggested by Mr Kidd, Claim B3 is a similar claim based on iustus error (unilateral mistake) and Claim B4 is a claim that the indemnity is invalid on the grounds of misrepresentation;

(c) A new Claim C was pleaded as an alternative to Claims A and B. In essence Claim C was a claim that certain entities and property be excluded from the ambit of the indemnity, which, if successful, would result in the indemnity having the limited interpretation suggested by Mr Kidd;

(d) A new Claim D was pleaded as an alternative to the earlier claims. It was a claim for rectification of the indemnity so that it has the limited effect suggested by Mr Kidd.

[8] In a judgment dated 25 June 2004, a Judge of the High Court of South Africa, Joffe J, rejected Claim A, and held that the High Court of South Africa did have jurisdiction to consider matters going to the meaning, effect and application of the Randburg documents. This means that Mr Kidd will need to pursue Claims B, C and D in the High Court of South Africa. Mr Kidd did not appeal. However, after the decision of Joffe J was released, Mr Kidd filed an application in the High Court of New Zealand for an order discontinuing the stay granted in 1997 by Smellie J. It was that application which led to the decision of Allan J which is the subject of the present appeal.

High Court judgment

[9] Having analysed the judgment of Smellie J and described the progress of the South African litigation, Allan J directed himself on the legal principles to be applied. He concluded that the stay ought to be removed if its continuance would produce injustice or prejudice. However, he noted that there had been no appeal against the judgment of Smellie J, and cautioned himself against lifting the stay where there had been relatively minor changes of circumstance, as that would be in

effect a review of the discretion originally exercised by Smellie J. He determined that any change of circumstance which the appellant must establish would need to be "real and palpable".

[10] The Judge then recited the four alleged changes of circumstances raised by Mr Kidd in support of his application.

[11] The first of these was that the scope of the evidence which would need to be called in South Africa to determine the scope and validity of the Randburg agreements was much greater than envisaged by the parties or by Smellie J in 1997. Mr Kidd's counsel said that Mr van Heeren had belatedly accepted that the issues involved in the proceedings in South Africa might require Mr Kidd to call many witnesses, including as many as 15 from New Zealand. The evidence will need to traverse the extent and value of the assets said to be owned in partnership by the parties, which will then also be the subject of the New Zealand proceeding when the matter proceeds back to New Zealand (if Mr Kidd succeeds in the South African proceedings). The Judge said he did not think this was a significant change of circumstances. Smellie J had not given particular weight to the number of witnesses or the extent of the evidence, and while the parties may have been somewhat optimistic in 1997 this was not a factor which required a revisiting of Smellie J's decision.

[12] The second ground raised by Mr Kidd in the High Court was that Mr van Heeren now denies in the South African proceedings that there ever existed a partnership between the parties. Allan J said he did not think this was a change of circumstance. He accepted the submission by Mr Hodson QC, counsel for Mr van Heeren, that it was inevitable that the true nature of the relationship between the parties would be put in issue when the merits came to be debated.

[13] The third matter raised by Mr Kidd in the High Court was that there had been a settlement between Mr van Heeren and a Mr Cooper, a private investigator engaged by Mr Kidd with whom Mr van Heeren had been in dispute. Mr van Heeren had been very critical of Mr Cooper and had alleged that Mr Cooper and Mr Kidd were engaged in a campaign of extortion against Mr van Heeren. As a

result of the settlement, it was suggested that Mr van Herren would now be precluded from pursing that contention. Allan J said he doubted that the settlement would necessarily create such a restriction, but that, in any event, Smellie J had seen the credibility issues between the parties as of limited significance and that he therefore did not accord this aspect of the plaintiff's application any real weight at all.

[14] The fourth factor advanced by Mr Kidd in the High Court was that he alleged that Mr van Heeren's conduct of the South African litigation demonstrated that Mr van Heeren's reliance on the exclusive jurisdiction clause in the Randburg indemnity was only for tactical advantage. Counsel for Mr Kidd had alleged that Mr van Heeren's filing of a "special plea" in the South African proceedings, seeking a stay of proceedings in respect of Claim C pending determination by the New Zealand Court, and his subsequent withdrawal of the special plea was not only a relevant change of circumstance but also an abuse of process. The Judge considered affidavits from the South African attorneys for Mr Kidd and Mr van Heeren, and also considered the judgment of Joffe J in which Joffe J held that Mr van Heeren's conduct in relation to the filing of the special plea was not necessarily inconsistent with his conduct in the New Zealand Court. The Judge was unconvinced that the filing and subsequent withdrawal of the special plea amounted to an abuse of process of the South African Court (he thought it could not amount to an abuse of process of the New Zealand High Court) or to a significant change in circumstance. He therefore said this factor did not add weight to Mr Kidd's argument.

[15] The Judge then considered the factors which had been relied upon by Smellie J in 1997 when he granted the stay. There factors were:

(a) *Domicile*: Smellie J noted that neither party resided in South Africa or had a domicile there at the time of his decision. It appears that both parties now have residences in South Africa which Allan J said meant they had a closer connection with South Africa than existed at the time of the judgment of Smellie J.

(b) *Jurisdiction*: In 1997, Smellie J had before him evidence that the South African Courts may decline jurisdiction in relation to the Randburg documents. The judgment of Joffe J now confirms that the South African Courts accept jurisdiction.

(c) *Execution*: Smellie J took into account that any judgment obtained by Mr Kidd in South Africa would have to be executed in another jurisdiction. That remains the case.

(d) *Foreign law*: Smellie J took into account that, irrespective of where the claims were heard, foreign law would be involved, given the wide geographical spread of the assets in dispute. Allan J noted that this position remained unchanged.

(e) *New Zealand connections*: Smellie J took into account the strong connections the parties had with New Zealand at the time of the hearing before him. Allan J noted that those connections had now become relatively tenuous: some New Zealand assets had been sold and there were now fewer relevant New Zealand companies in existence than there had been in 1997.

[16] Allan J then considered the progress of the litigation in South Africa. He noted that there had been considerable progress, with the jurisdictional issue having been cleared away so that the challenge to the Randburg documents could now proceed in the High Court of South Africa. He noted that if the stay were lifted, there would need to be a determination by the High Court of New Zealand of the validity of the Randburg documents according to South African law. He said Mr van Heeren ought not to be asked to turn its back on the South African litigation and start again in New Zealand unless the clear weight of relevant factors was in favour of adopting that course. He said the need to return to New Zealand for the litigation of the substance of the dispute was a matter which was canvassed as a possibility at the time of the argument before Smellie J, although in 1997 it was not clear that the law of prescription in South Africa would prevent a determination of the merits in that jurisdiction. Now that this was clear, Allan J accepted there was a change of

circumstance to the extent that it was now certain that, if Mr Kidd was successful in challenging the Randburg documents in South Africa, the merits would have to be litigated in New Zealand.

[17] Allan J then considered issue estoppel. He noted that it was now apparent that extensive evidence would need to be called in the High Court of South Africa as to the commercial matrix against which the Randburg documents were executed by the parties This could lead the High Court of South Africa to reach conclusions as to matters such as the nature, extent and value of assets said to come within the purview of the parties' joint commercial arrangements. He noted that it had been said that difficulties might arise in this Court in the event that any finding made in South Africa gave rise to an issue estoppel in the New Zealand proceedings. But he noted that this did not cause undue difficulty because, if the proceedings were to be dealt with in the High Court of New Zealand in their entirety, then it would be likely that the challenge to the Randburg documents would be dealt with here as a preliminary issue. Thus the possibility of issue estoppel arguments arising would be as strong, although of course the issues would have been determined by a New Zealand Court rather than a South African Court.

[18] Allan J then considered costs. He recorded that evidence before him indicated that the costs of each party in the South African litigation were likely to be in the order of NZ$600,000, and the costs in the New Zealand litigation likely to be at least of that order. He said he did not find that surprising. He accepted that if the Randburg documents issues were determined in South Africa and the merits determined in New Zealand, there would undoubtedly be a duplication of costs to some degree. However, if a two-staged approach were adopted in New Zealand there would be some duplication in New Zealand as well. The Judge said he had no detailed evidence to the likely costs comparison, and while he accepted that the parties would be better off if all issues were determined in New Zealand from a costs point of view, the extent of the financial advantage was not before him so some care was needed in giving the cost issue significant weight.

[19] The Judge then considered matters of convenience raised by counsel for Mr Kidd, namely:

(a) The necessity for a greater number of witnesses to travel from New Zealand to South Africa for the hearing of the South African challenge to the Randburg documents;

(b) The need to procure from New Zealand a significant quantity of documentary material, as opposed to the relatively simpler task of procuring what necessary documentation there is in South Africa for a hearing in New Zealand;

(c) The delay which would be compounded by the availability of appeals from any decision at first instance in South Africa;

(d) Prejudice inherent in having matters litigated in New Zealand following the findings of the High Court of South Africa.

[20] The Judge noted that all of these factors were entitled to a certain amount of weight. But he noted that they had to be balanced against the possibility that the High Court of South Africa might uphold the Randburg documents, with the result that the dispute may never proceed to trial on its merits. He thought that the delay factor would arise wherever the argument on the Randburg documents took place.

[21] Having considered all of the above factors the Judge concluded that he had "come to the clear view that there has not been such a change of circumstance as to justify an order lifting the stay granted by Smellie J in 1997". He noted that some changes favoured the lifting of the stay, but others strongly pointed to the opposite effect. He therefore declined to lift the stay.

Issues on appeal

[22] Mr O'Callahan accepted that the High Court Judge had applied the appropriate test as to whether the stay should be lifted (see [9] above) and we agree.

[23] However Mr O'Callahan argued that the Judge had underestimated the extent of the prejudice, cost, inconvenience and delay resulting from the duplication of

effort arising from the preliminary issue being heard in South Africa but the merits being heard in New Zealand. He said that this arose because the Judge:

(a) Wrongly held that, if the matter returned to New Zealand, the validity of the Randburg documents would be determined here as a preliminary issue; and

(b) Failed to recognise that rulings in Mr Kidd's favour in the South African proceedings would not produce issue estoppels that would simplify the New Zealand proceedings.

[24] In addition, Mr O'Callahan said that the Judge had erred in his assessment of the abuse of process argument because he failed to critically analyse the explanations offered by Mr van Heeren's South African attorney for the making and subsequent withdrawal of the special plea.

[25] We will consider each of those three issues, before turning to the overall merits of the appeal.

Preliminary issue

[26] Mr O'Callahan was critical of the Judge's finding that, if the whole of the proceeding were to be dealt with in the High Court of New Zealand, it was "highly likely" that the challenge to the Randburg documents would be dealt with as a preliminary issue. Later, the Judge said it would be inevitable. The comment was made by the Judge in the context of his evaluation of the possibility that issue estoppel may arise in the determination of the substance of the dispute in relation to findings made in South Africa in the course of the decision in relation to the challenge to the Randburg documents. It does not therefore appear to have been of particular significance to the Judge's finding about cost and prejudice of duplication arising from part of the proceeding being dealt with in South Africa. Nevertheless Mr O'Callahan said the Judge's conclusion on this point was wrong, and that it must have influenced his assessment of the extent of cost and prejudice.

[27] Mr O'Callahan said that, if the challenge to the Randburg documents were to be heard in New Zealand, there would be no proper basis for an order being made under r 418 of the High Court Rules to have that challenge decided separately from the substantive dispute between the parties. He said that the extent of the duplication of evidence which would be involved would make an order under r 418 inappropriate.

[28] Mr Hodson said that any determination of a hearing of the challenge to the Randburg documents as a preliminary issue could be made only after Mr Kidd had provided proper particulars of his claim, which he had yet to do.

[29] We accept that if the entire proceeding were heard in the High Court New Zealand, it would not necessarily follow that the challenge to the Randburg documents would be dealt with as a preliminary issue. Even it were dealt with as a preliminary issue, steps could be taken to ensure that duplication of evidence would be minimised. For example, it may be that the same Judge would hear both the challenge to the Randburg documents and the substantive issues, with evidence at the hearing of the former being taken into consideration in the determination of the latter. For present purposes, the important point is that we accept Mr O'Callahan's submission that the duplication of evidence arising from the hearing of the challenge to the Randburg documents taking place in South Africa may well be able to be avoided if the entire proceeding were heard in New Zealand.

Issue estoppel

[30] Mr O'Callahan's argument in this Court was that issue estoppel would not apply to findings made by the High Court of South Africa in relation to the challenge to the Randburg documents when similar issues arose in the High Court of New Zealand when considering the substantive dispute. He said the findings of the High Court of South Africa on the nature, extent and value of the assets held in the partnership between Mr Kidd and Mr van Heeren would be essentially background to the determination of the principal issue before the Court, namely the effect and scope of the Randburg documents. Thus, he argued issue estoppel would not apply to the determination of the same factual matters in the context of the assessment of

the substantive dispute. He said that this argument had been made in the High Court but the High Court Judge had misinterpreted the argument, and it had not therefore been properly taken into account.

[31] Mr Hodson did not directly engage with this argument, simply noting that there was no reason to suppose that the findings of a South African Judge would be couched in terms which was unhelpful in the context of the New Zealand proceeding. He accepted that it was possible that there would be findings made in South Africa which did not give rise to issue estoppels in New Zealand, but said that was a matter of speculation. And he said if this did occur, it did not follow that the point would be relitigated in New Zealand: the possible futility of doing so may be practical impediment to that happening.

[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 challenge to the Randburg documents. 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 Randburg documents.

Abuse of process

[33] Mr O'Callahan argued that Allan J was wrong not to have found that the filing of the special plea on Mr van Heeren's behalf in the South African proceeding was not an abuse of process of the New Zealand Court. Mr O'Callahan said that the making of the special plea was in effect a request to the South African Court that an issue relating to the Randburg documents be decided in New Zealand, which was incompatible with Mr van Heeren's stance before Smellie J. He said this amounted to an abuse of the process of the New Zealand Court.

[34] We can see nothing in this point. An argument along the same lines was made in the South African proceeding, and Joffe J found that the filing of a special plea was not an abuse of process of the South African Court. As Mr Hodson correctly pointed out, the expansion of Mr Kidd's claim in the South African Court to include Claim C could be seen as a broadening of what was contemplated by the judgment of Smellie J. So it can be argued that the filing of the special plea was not incompatible with Smellie J's decision.

[35] The withdrawal of the special plea, following the decision of Joffe J in which he indicated it would be unlikely to succeed, means that there has been no particular prejudice to Mr Kidd. The fact that the special plea was made in circumstances which it was unlikely to be accepted indicates that the filing of the special plea was an unsuccessful litigation tactic. But that is a far cry from an abuse of the process of the South African Court or the New Zealand Court.

Overall assessment

[36] While we have taken a different view from that of Allan J in relation to preliminary issue and issue estoppel, we do not consider that this calls for any substantial reappraisal of Allan J's analysis. In our view, he correctly identified that, of the issues which were important to the decision of Smellie J, most were either unchanged or had changed in a way which greater justification for the stay.

[37] At the outset, we note that, if we were to accept Mr Kidd's position, the issues relating to the Randburg documents would be decided in the High Court of New Zealand. This would require a New Zealand Judge to determine issues of some complexity under South African law. We do not think the difficulties this would entail should be underestimated. It is obviously preferable that such issues be decided by the South African courts.

[38] The key difference between the position in 1997 and now is that the duplication of evidence between the South African proceeding and the New Zealand proceeding appears to be more significant than may have been contemplated at the time of Smellie J's decision. We are unclear as to why the need to adduce

voluminous evidence in the South African proceedings was not apparent to Mr Kidd's advisers in 1997. We were told by Mr O'Callahan that the need did not become apparent until some three years after the South African proceeding was commenced in 1998. It was only at that point that Claim A was made in the South African proceeding with a view to reconsolidating the proceedings in the New Zealand jurisdiction.

[39] We accept that there is a real possibility that some duplication will occur, and that this will increase the cost and inconvenience of the proceedings to both parties. As the High Court Judge noted, the extra cost has not been quantified.

[40] Mr O'Callahan put greater weight on prejudice than cost. He said some witnesses would be cross-examined in South Africa, and credibility findings may be made, but the exercise would need to be repeated in New Zealand with no certainty of a similar result. He referred us to an affidavit sworn by Mr Kidd for the South African proceedings in May 2003 in which Mr Kidd says he is likely to call 28 named witnesses and Mr van Heeren is likely to call a further eight. Mr O'Callahan said he could think of others who will be called, bringing the total number of witnesses in the South African proceeding to 50. He accepted that for overseas witnesses, it may be possible for them to give evidence by video, but said this would not be a panacea.

[41] The difficulty with assessing this information is that it did not permit the High Court, and does not permit us to undertake the quantification of prejudice with any precision. Many of the witnesses in the list in Mr Kidd's South African affidavit may be of only minor significance, and the cross-examination of them may be minimal. We do not know. We do not know whether they will give evidence voluntarily. We do not know if they will give evidence by video if they are not South African residents.

[42] We do know that there will be considerable cross-examination of the main protagonists, but that would have been anticipated by Smellie J in 1997.

[43] In the light of these considerations, we can conclude that there will be some prejudice to Mr Kidd that may not have been anticipated in 1997. But the fact that something has arisen which was not anticipated does not necessarily mean circumstances have changed. It could equally be said that the circumstances are unchanged, but Mr Kidd has only belatedly recognised them. We are not persuaded that Allan J was wrong to see the unanticipated prejudice as a less than decisive factor.

[44] Overall, we do not accept that the net effect of the changes identified by Mr Callahan, when considered in the light of the changes which reinforce the desirability of the stay, are of such a real and palpable nature as to indicate that there is injustice in maintaining a stay. In our view, the eight years of skirmishing in the High Court of South Africa ought not to be wasted, and that Court ought to be left to determine the challenge to the Randburg documents as expeditiously as possible.

Result

[45] We dismiss the appeal.

Costs

[46] We award costs of $6,000 plus usual disbursements to Mr van Heeren.

Solicitors:
Carter & Partners, Auckland for Appellant
Jones Fee, Auckland for Respondent