IN THE COURT OF APPEAL OF NEW ZEALAND

CA247/2015
[2015] NZCA 574

BETWEEN	ALEXANDER PIETER VAN HEEREN Appellant
AND	MICHAEL DAVID KIDD Respondent

Hearing: 23 November 2015

Court: Harrison, Stevens and Wild JJ

Counsel: B D Gray QC and A J Wakeman for Appellant
S J Mills QC, B O'Callahan and E J H Morrison for Respondent

Judgment: 27 November 2015 at 10 am

JUDGMENT OF THE COURT

A The application for a stay of execution is dismissed.

B The appellant is to pay the respondent costs as for a standard application for leave calculated on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] In 1996 the respondent, Michael Kidd, issued a proceeding in the High Court of New Zealand against the appellant, Alexander van Heeren. Mr Kidd claimed that the parties had been equal partners in a worldwide enterprise which had operated principally from South Africa; and that Mr van Heeren had misappropriated

partnership funds to acquire valuable assets in New Zealand. He sought various remedies including the taking of accounts. Mr van Heeren did not file a statement of defence but appeared under protest to jurisdiction.

[2] Mr van Heeren applied to have Mr Kidd's proceeding struck out or stayed. His opposition was based on a deed of indemnity signed by Mr Kidd in Randburg, South Africa, in January 1991. Mr van Heeren claimed that it was an absolute answer to Mr Kidd's claim because it provided for a full and final settlement of all issues between the parties.

[3] In 1998 the High Court stayed Mr Kidd's proceeding until such time as a Court of competent jurisdiction in South Africa upheld his challenge to the validity of the indemnity.[1] Many years later, in May 2013, Justice Satchwell of the South Gauteng High Court of South Africa declared the indemnity was void and of no force and effect.[2] The Judge was satisfied that Mr van Heeren had made a number of misrepresentations which induced Mr Kidd to sign the indemnity. While he was represented by counsel at the trial in South Africa, Mr van Heeren did not give evidence in his defence or appeal against Satchwell J's judgment.

[4] In the course of her judgment Satchwell J found that Messrs Kidd and van Heeren were partners in a joint enterprise which yielded substantial profits from steel trading; and that the partnership entity acquired assets throughout the world including valuable real estate and other property in New Zealand.

High Court

[5] The effect of the South African judgment was to set aside the stay of Mr Kidd's proceeding made in New Zealand in 1998. In reliance on Satchwell J's judgment, Mr Kidd revived that proceeding and his application for remedies against Mr van Heeren including a taking of accounts.

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1 *Kidd v van Heeren* [1998] 1 NZLR 324 (HC) at 342.
2 *Kidd v van Heeren* South Gauteng HC 27973/1998, 21 May 2013.

[6] Following a defended hearing, Fogarty J delivered a comprehensive judgment on 14 April 2015, concluding with these orders:[3]

> [171] This Court declares that, by reason of the decision of the South Ganteng High Court of South Africa (27975/1998, 20 May 2013, Satchwell J), the defendant is issue estopped from denying the partnership and the accumulated worldwide assets of the partnership, as found by the Judge, particularly in [126] and [132] of her judgment.
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> [172] The following orders are made:
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> (a) An account is to be taken between the plaintiff and the defendant to determine the amount due to the plaintiff arising out of the plaintiff's claim as a partner against the defendant.
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> (b) That any amount certified by the High Court on the basis of that account be paid.
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> (c) The defendant, as the principal accounting party, is required to account to the plaintiff by filing in the High Court and serving on the plaintiff within 30 days of this judgment a complete list of all assets of the partnership, not confined to the list in [132] of the South African judgment, other than any held by the plaintiff, including:
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> (i) a description of the entities holding the assets;
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> (ii) a description of the assets; and
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> (iii) the current value of the assets.
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> (d) In addition, if any assets have been disposed of or otherwise he has lost control of, they should be listed with details of loss of control, advice as to the his knowledge as to who has control of those assets, a description of those assets and his estimated current value of those assets.
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> (e) I direct that no further work need be done by the plaintiff in the meantime until the defendant has accounted in the manner ordered by this Court, or until any further order of this Court.
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> (f) That the defendant pay the sum of USD25m in equivalent New Zealand dollars as at the date of payment into Court at the latest, being one calendar month from the date of this judgment, with leave to apply for an extension of time.
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> (g) Further in respect to order (e) within two calendar months of this judgment, and after the payment is made by the defendant into Court, the plaintiff is to submit to the Court a plan of investment and/or use of the interim payment pending completion of the final accounts.

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3 *Kidd v van Heeren* [2015] NZHC 517.

(h) On receipt of the plaintiff's proposal the Court will have a case management conference between the parties to timetable the process of approving or varying that proposal, enabling release of the whole or part of the funds to the plaintiff and the investment of the balance, coupled with a timetable on completion of the account.

(i) The defendant shall pay the plaintiff's cost of this application.

[7] On 5 May 2015 Mr van Heeren filed an appeal in this Court against Fogarty J's judgment.[4] Since then there has been considerable interlocutory activity in the High Court about Mr van Heeren's compliance with Fogarty J's orders. An application filed by Mr van Heeren on 11 May 2015 to vary the judgment progressed to an application on 11 September 2015 for a stay pending determination of his substantive appeal. In a series of judgments Fogarty J has dismissed Mr van Heeren's applications,[5] in particular the application for stay of enforcement.

[8] Mr van Heeren has sworn a number of affidavits in support of his applications, first for variation of the orders and then for stay. Their essence is that he no longer owns or has possession or control of assets allegedly acquired by his use of partnership funds in New Zealand and the Pacific Islands. He says he has transferred ownership of the relevant assets to the trustees of the Timbavati Foundation based in Liechtenstein which then transferred them to the Gerda Foundation, also based in that country. He says also that, apart from a fund of about USD 1 million set aside to meet legal costs here and in South Africa, he has no assets available to satisfy the order for payment into Court of USD 25 million.

[9] Fogarty J was apparently unimpressed by Mr van Heeren's failure to comply with his orders. The Judge's views are exemplified by these passages from his 31 August 2015 judgment:

> [42] It is possible that when swearing his two affidavits, Mr van Heeren considered that he was able to depose that assets were no longer in his [direct] power or control consistent with him having ultimate and effective control by one of these mechanisms. On this basis he possibly drew the distinction … between requesting that the trustees of the Timbatavi Foundation settle the assets previously vested in it upon the Gerda Foundation and controlling this process. He therefore considered he could

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4 The appeal is due to be heard on 22 and 23 March 2016.

5 *Kidd v van Heeren* [2015] NZHC 2082, *Kidd v van Heeren* [2015] NZHC 2455 (Judgment No 6), *Kidd v van Heeren* [2015] NZHC 2475 (Judgment No 7).

> distinguish these Foundation managed assets, and assert that he had not accumulated assets in his personal name.
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> [43] It was not and could not be suggested that para [172] of the judgment containing the orders intended them to be confined to accumulated assets held in the personal name of Mr van Heeren. Submissions of abuse of the Court's processes are very serious. If accepted they can result in the Court accessing other powers. In the course of the argument I was left unsure as to whether Mr van Heeren was deliberately obstructing disclosure of assets under his control or, rather, knowing and disclosing of the function of the Timbavati Foundation and the Gerda Foundation, and the Worldwide Leisure Limited's shareholding etc, felt able to swear that the partnership assets listed, and carefully listed by Satchwell J in her para [132] were not under his control so that he was unable to make a payment of USD25m.
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> …
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> [46] The defendant has not made out the merit of an application for variation of the orders. On the contrary, his two affidavits are quite unsatisfactory and not significantly persuasive.

[10] Furthermore, in a judgment delivered on 9 October 2015,[6] the Judge said this:

> [29] In my view, the defendant's argument has grossly overstated the burden placed on the defendant by these orders in [172]. In doing so, it has lent strength to the plaintiff's argument that the defendant's response to the judgment so far shows he has no intention of complying with the orders of the High Court. The proposition that the defendant has no intention of complying is the fundamental argument underpinning the plaintiff's application currently before the Court and currently adjourned, requiring the defendant to appear for examination. One of the reasons for the adjournment of that application to examine the defendant is to test this proposition.

[11] On 3 November 2015 Mr van Heeren applied directly to this Court for an order staying enforcement of the High Court orders pending determination of his appeal. He raises a number of grounds in support. Principal among them are that the legal issues are novel and complex; that the merits of the appeal are strong; and that without a stay his rights will be rendered nugatory. Mr Kidd opposes.

Decision

[12] This Court has a discretionary power to order a stay of execution of orders pending its determination of substantive appeal,[7] to be exercised by balancing the competing right of the successful party to the fruits of success in litigation against

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6 Judgment No 7, above n 5.

7 Court of Appeal (Civil) Rules 2005, r 12.

the need to preserve an appellant's position against the event of a successful appeal.[8] A number of factors are potentially relevant. It is not in dispute, for example, that Mr van Heeren's appeal is reasonably arguable. Ultimately, as Mr Gray QC emphasised for Mr van Heeren, we are concerned with doing what is just in the circumstances of the case.

[13] However, we disagree with Mr Gray that when refusing to grant a stay Fogarty J placed undue weight on whether Mr van Heeren's rights will be rendered nugatory. In our judgment the starting point is Mr Kidd's entitlement to the benefits of a favourable judgment, even if its terms are, as Mr Gray observed, "largely unprecedented" in New Zealand. We are satisfied that Mr van Heeren's only arguable ground for a stay is that compliance with the High Court orders would negate his rights of appeal.

[14] The constant theme of Mr van Heeren's four affidavits is that he has divested himself of legal and beneficial ownership and control of all assets which might possibly be the subject of an order to take accounts. As noted, Fogarty J was sceptical about this evidence. We are not sufficiently informed to comment. But the weakness in Mr van Heeren's application for stay emerges when his evidence is analysed in the context of the orders made by Fogarty J.

[15] Mr Gray submits that Fogarty J has effectively treated the Timbavati and Gerda Foundations as if they are shams and of no legal effect. Mr Gray says that compliance with the orders would require Mr van Heeren to take steps to dismantle the trusts and enforce resumption of ownership in his name. He points out that Mr van Heeren's former wife is a beneficiary who has refused to authorise the trustees' requests for approval to provide information to the Court. In correspondence with Mr van Heeren's counsel, the Gerda Foundation's counsel has referred to its regulations and bylaws, together with statutory and regulatory provisions in Liechtenstein governing the activity of such foundations. In reliance on these instruments, the trustees refuse to disclose information unless and until they are satisfied disclosure is in the beneficiaries' best interests. Mr van Heeren has also referred to what he calls the difficulties of his separation and subsequent divorce as

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[8] *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85 (CA) at 87.

impediments to his ability to influence his former wife's decision making progress on whether to consent to disclosure.

[16] Fogarty J made a number of sequential orders. The first and substantive order is for a taking of accounts of partnership assets ([172](a) and (b)). The succeeding orders (para [172](c) and (d)) are designed to provide the factual framework for that exercise: in the absence of compliance and provision of the relevant information, the High Court will be unable to order a meaningful accounting. Mr van Heeren's assertion is that he is presently unable, and is always likely to be unable, to comply because the foundations refuse to disclose information to him. In that event, as Fogarty J envisaged, Mr Kidd would be entitled to apply to examine Mr van Heeren on his affidavit.

[17] The orders at [172](f), (g) and (h) appear designed to secure Mr van Heeren's performance of the primary remedy or, if a taking of accounts is not possible, payment of a sum equivalent to the current value of the assets allegedly owned by the partnership. Mr van Heeren's assertion is that, even if his appeal is unsuccessful and the orders remain undisturbed, he will never be able to satisfy a judgment for USD 25 million or any part of it. Again, if that is the case, Mr Kidd is also entitled to apply to examine Mr van Heeren on oath on his financial circumstances. He will then be in a position to determine what, if any, steps he wishes to take to quantify and ultimately enforce a money judgment.

[18] However, steps taken by Mr Kidd consequent upon Mr van Heeren's failure to comply with the orders at [172](c), (d), (f) and (g) will not render his appeal rights nugatory. In particular, they will not necessarily require him to enforce a dismantling of the trusts which own relevant assets. In view of the state of the information supplied by Mr van Heeren, it is for Mr Kidd to decide what steps he wishes to take to quantify and enforce the High Court judgment. If Mr Kidd takes steps, Fogarty J will have to determine what, if any, orders should be made. Whatever happens, the parties are still at a relatively formative stage in settling and implementing final orders.

[19] Mr Gray is correct that Mr van Heeren will have been put to a degree of unnecessary time and expense in complying with Fogarty J's orders and continuing to participate in interlocutory activity in the High Court if his appeal is ultimately successful. But in our judgment the dominant contrary factor is that Mr Kidd, at the age of 74 years, is entitled to the fruits of his judgment by taking the next steps along what on Mr van Heeren's evidence promises to be a long and expensive road in quantifying and enforcing Fogarty J's orders. He is entitled to that benefit now, not having to await indefinitely on the result of further appeals to this Court and possibly further as if the High Court judgment does not exist.

[20] We are not satisfied that the interests of justice favour granting a stay pending determination of this Court's judgment on Mr van Heeren's appeal.

Result

[21] Mr van Heeren's application for a stay of execution is dismissed.

[22] Mr van Heeren is to pay Mr Kidd costs as for a standard application for leave calculated on a band A basis together with usual disbursements.

Solicitors:
Fee Langstone, Auckland for Appellant
Kirkland Morrison O'Callahan and Ho, Auckland for Respondent