**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 32/2006**
[2006] NZSC 46

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

Court: Elias CJ, McGrath and Anderson JJ

Counsel: B O'Callahan and A FitzHerbert for Applicant
C J Hodson QC and C M Brick for Respondent

Judgment: 26 June 2006

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## JUDGMENT OF THE COURT

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1. **The application for leave to appeal is dismissed.**

2. **The applicant must pay to the respondent $2,000.00 in costs plus any reasonable disbursements, to be fixed by the Registrar.**

**REASONS**

[1] From about 1975 the applicant and the respondent were in business together with operations in a number of countries. They agreed to part company around 1990 but differences emerged over the division of their jointly owned assets including whether certain New Zealand investments were part of their joint undertaking.

[2] The applicant issued proceedings in the High Court against the respondent in 1996 seeking an accounting for assets which the applicant claims to be jointly owned. The respondent contends that all rights between the parties in relation to jointly owned assets were conclusively settled by three agreements which they entered into in 1990 and 1991. The third of these agreements provides that monies paid by the respondent to the applicant pursuant to the second agreement constituted a settlement of all disputes between the parties and a full and final settlement of all

claims each had against the other. The third agreement also stipulates that it is to be governed by the law of South Africa.

[3] In 1997 the High Court granted an application by the respondent for a limited stay of the applicant's proceeding pending a judgment of the South African Courts which either determined the validity of the second and third agreements, or declined jurisdiction to do so. The High Court also reserved leave to the parties to apply on notice at any future time to the High Court in respect of its stay order.

[4] The applicant then brought proceedings in the High Court of South Africa which were the subject of an interlocutory judgment in 2004 on a preliminary issue. That Court held that it had jurisdiction to determine the meaning and effect of the second and third agreements. Neither party has appealed against that judgment. The applicant, however, applied to the High Court of New Zealand seeking that it lift the 1997 stay of the New Zealand proceeding. That application was heard by Allan J in 2005. Allan J accepted that it had become certain as a result of the South African Court's judgment that, if the applicant were successful in challenging the validity of the agreements in South Africa, the merits of the applicant's claim would have to be addressed in New Zealand. He decided, however, that this and other changes of circumstances in relation to the litigation since 1997 were not such as to warrant the Court lifting the 1997 order. Accordingly Allan J dismissed the application.

[5] The applicant appealed and, in a judgment delivered on 23 March 2006, the Court of Appeal dismissed his appeal. In giving its reasons, the Court of Appeal differed from Allan J on a number of points. In particular it accepted that the extent of possible duplication of evidence in the two jurisdictions was now more significant than had been contemplated in 1997. This did not, however, necessarily mean that the circumstances, as opposed to recognition of them, had changed. The Court of Appeal's net assessment of the impact of factors it saw differently was that it did not require a reappraisal of the overall reasoning of Allan J. Overall there was no injustice in maintaining the stay. As well, the need to interpret and apply South African law in relation to the third agreement was a factor which went beyond mere practical convenience and supported the stay of the New Zealand proceedings continuing.

[6] The applicant now seeks leave to appeal to this Court against the Court of Appeal's judgment. A central issue which the appellant has asked this Court to address is the test to be applied when a Court is asked to lift a stay order which had been granted in the Court's discretion. Although developed in a number of ways, the central feature of the applicant's argument is that the Court of Appeal misapplied the principle as to when a stay should be removed when it erroneously referred to the judgment of Allan J as saying "that the stay ought to be removed if its continuance *would* produce injustice or prejudice". The applicant submits, with reference to authority, that a correct statement of principle requires that the word *could* is used rather than *would*. A further submission on the application for leave is that the points on which the Court of Appeal differed from Allan J required it to reappraise afresh the factors for and against a stay.

[7] We have reached the conclusion that none of the factors raised in the applicant's submissions satisfy us that it is necessary in the interests of justice for this Court to hear and determine the proposed appeal.

[8] The Court's description of the test in lifting a stay was not central to its reasoning nor to its determination that in this case there was no injustice in maintaining the 1997 order. No issue of principle affecting the Court of Appeal Judgment accordingly arises on that count. The Court of Appeal conclusion that although it had taken a different view from the High Court Judge on some of the circumstances of the case, it was nevertheless not persuaded that the net effect was such that the discretion had been wrongly exercised, also gives rise to no point of principle in the circumstances of this case.

[9] The application for leave to appeal is accordingly dismissed.

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