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Blworths

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP285-SD/99

BETWEEN	E. ALEXANDER
	First Plaintiff
AND	G. CORNELL
	Second Plaintiff
AND	BETTALIFE INTERNATIONAL (NZ) LIMITED
	Third Plaintiff
AND	COFIE HOLDINGS PTY LIMITED
	Fourth Plaintiff
AND	G. CLEGG
	First Defendant
AND	NEW IMAGE INTERNATIONAL LIMITED
	Second Defendant

021505

Hearing: 7 May 2002

Counsel: J. G. Miles QC and Z. G. Kennedy for Plaintiffs
A. H. Waalkens and C. Garvey for Defendants

Judgment: 8 May 2002

ORAL JUDGMENT OF SALMON J

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A. H. Waalkens, PO Box 4338, Auckland

[1] These proceedings claim damages for alleged defamatory statements said to have been made by the defendants in respect of the plaintiffs.

[2] The plaintiff seeks a ruling that the doctrine of issue estoppel arising from a decision of the Court of Appeal in *New World Property Ltd V New Image International Limited* (CA1 5 1/02, judgment 26 March 2002) prevents the defendants from contending that Mr Cornell, one of the plaintiffs in these proceedings, solicited distributors of New Image (Hong Kong) to persuade them to join his company, Bettalife.

[3] The defendant submits that the facts and the evidence in the two cases are different. Mr Waalkens notes the caution expressed in the High Court decision of *X* v Y [1996] 2 NZLR 197 that it is a drastic step to deprive a litigant of a defence and he refers to the need for identity of issues before such a step should be taken. Mr Waalkens notes that the issue was only raised yesterday but, I am satisfied that that is because the decision of the Court of Appeal was delivered relatively recently and the defendants' evidence, through no fault of the defendant, was received by the plaintiff only early last week. It was not until the receipt of the evidence that the plaintiff appreciated that evidence was being given which could potentially raise the question of issue estoppel

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[4] The law in relation to issue estoppel is sufficiently stated for the purpose of this ruling in *The Laws of New Zealand* at paragraph 20 of the title *Estoppel.* It is said there:

> Under issue estoppel, a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been determined against that party even if the objects of the first and second actions are different. The matter must, however, have been directly at issue in the first action rather than collaterally or incidentally in issue. Although the principle applies whether the point involved in the earlier decision as to which the parties are estopped is one of fact, one of law, or one of mixed fact and law, it is fundamentally important that it be the same question.

> The earlier decision relied upon must determine, not the existence or non-existence of the cause of action, but some lesser issue which is necessary to establish (or demolish) the cause of action set up in the later proceedings. An issue estoppel can only be founded on the determinations which are fundamental to the earlier decision and without which it cannot stand.

[5] I refer too to the decision of the Court of Appeal in *Shiels v Blakeley* [1986] 2 NZLR 262. In the headnote point 2 this is said:

> The next requirement before there could be an issue estoppel was that it must be possible to say positively and without room for doubt that the issues in the two proceedings were identical.

And in headnote point 3:

> For there to be privity for the purposes of issue estoppel there must be shown such a union or nexus, such a community or mutuality of interest, such an identity between a party to the first proceeding and the person claimed to be estopped in the subsequent proceeding, that to estop the latter will produce a fair and just result having regard to the purposes of the doctrine of estoppel and its effect on the party estopped.

[6] In this case the defendants raise defences of truth and honest opinion and rely upon allegations that Mr Cornell, the second plaintiff, solicited distributors in Hong Kong. In the earlier proceedings, determined by the Court of Appeal which were brought in contract, solicitation by Mr Cornell in Hong Kong was raised as a defence to a claim for moneys due under a contract for the sale of shares.

[7] The Court of Appeal held in that case that there was no evidence of solicitation by Mr Cornell.

[8] The issue, seems to me, clearly to be identical. It is also the case that the determination was fundamental in the earlier proceedings and was directly in issue in those proceedings. Mr Waalkens says that the Court of Appeal found that the implied term in the earlier case operated for a very short period and he contrasted that with this case, where there is a contract imposing a restriction on soliciting for a longer period. I accept that that is so, but the evidence in the earlier case covered the wider period and the finding of the Court of Appeal was in relation to that period.

[9] I also note that leave has been granted to the appellant in the earlier case to appeal to the Judicial Committee of the Privy Council. I am satisfied, however, that that fact can only be relevant to an application for adjournment. No such application has been made in this case.

[10] There is the required identity of parties. Mr Cornell and his company in the first proceedings, Mr Cornell in the second proceedings, and in each case the allegation of solicitation relates to Mr Cornell.

[11] I conclude, that issue estoppel arises and that the defendants cannot contend contrary to the finding of the Court of Appeal. Similarly, with the findings of that Court as to the share sale agreement. The defendants are estopped from contending contrary to the finding of the Court.

[12] I emphasise, however, that this ruling is strictly limited to the issues determined by the Court of Appeal and referred to above. If the same evidence is relevant to matters other than the solicitation issue it may be called.