Macquarie Corporate Telecommunications Pte Ltd v Phoenix Communications Pte Ltd and Another
[2003] SGHC 314

Case Number : Suit 1515/2002

Decision Date : 30 December 2003

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : VK Rajah SC, Lionel Tan and Tan Min-Liang (Rajah and Tann) for plaintiff; Philip Lam (Foo Liew and Philip Lam) for first defendant; Lee Hong (Ng Cher Yeow and Partners) for second defendant

Parties : Macquarie Corporate Telecommunications Pte Ltd — Phoenix Communications Pte Ltd; Chuang Kwang Hwee

Contract – Contractual terms – Indemnity – Whether first defendant's settlement with plaintiff disentitled it to indemnity – Whether first defendant's defence that second defendant was the independent contractor estopped it from claiming indemnity

Tort – Defamation – Damages – Whether order for aggravated damages appropriate on the facts

Tort – Defamation – Defamatory statements – Whether statements made in e-mails from second defendant to plaintiff's customers defamatory

Tort – Defamation – Fair comment – Whether defeated by malice

Tort – Defamation – Justification – Whether defence of justification made out

Tort – Defamation – Qualified privilege – Whether defeated by malice

Judgment reserved

1. The plaintiff, Macquarie Corporate Telecommunications Pte Ltd is a Service-Based Operator licensed by the Info-Communications Development Authority of Singapore ("the IDA") to provide telecommunications services. It is a wholly-owned subsidiary of Macquarie Corporate Telecommunications Holdings Ltd of Australia.

2. The first defendant, Phoenix Communications Pte Ltd is incorporated in Singapore and is also a Service-Based Operator, and is a competitor of the plaintiff.

3. The second defendant was an Accounts Manager with the first defendant. In the agreement between him and the first defendant he was referred as an agent. He received commissions for business he brought to the first defendant and was one of its top accounts managers. He is a qualified accountant and has previously worked in a succession of jobs as investment analyst, securities dealer, fund manager, treasury manager and financial controller.

The action

4. The plaintiff sued the defendants for defaming it in three emails sent by the second defendant to customers of the plaintiff. The plaintiff identified the passages of each email it complained of.

Email dated 1 March 2002 (the first email)

5. This email was sent by the second defendant to Lucent Technologies Singapore Pte Ltd.

6. The plaintiff took objection from three passages in the email -

(Para 2)

Phoenix is the only service provider which has two 64E1 switches located at Comcentre with SingTel which can cater to high volume IDD traffic. It is offering premium quality IDD service unlike most of the other independent service providers which use VOIP and pass it round as premium service.

(Para 3)

For your information, Macquarie Corporate Communications (MCC) is a very small operator with one switch in Singapore. Its parent in Australia is a loss maker and had just reported A$17 million loss and its share price has collapsed from A$3.20 to A$0.10, reflecting its dire straits.

(Para 7)

In any case, you might be interested to know that MCC's one year contract is not legal under the SBO licence issued by Infocomm Authority of S'pore.

7. The plaintiff claimed that

In their natural and ordinary meaning, the above statements in the 1 March 2002 Email meant and/or would be understood to mean that the Plaintiffs:-

(a) Do no offer and/or are not capable of offering quality, premium IDD services to their customers;

(b) Provide Voice-over-IP ("VOIP") services to their customers instead of providing quality, premium IDD services and that they misrepresent or pass off such VOIP services to these customers as being IDD services;

(c) Run a crude and/or temporary operation devoid of any substance in Singapore, with only one switch in Singapore, that being a small number as compared to other telecommunications operators; and/or

(d) Are, as a result of their contractual arrangements or otherwise, operating in breach of the SBO licence issued and/or regulations enforced by IDA;

Email of 16 October 2002 (the second email)

8. This was sent to another of the plaintiff's customers, Citibank.

9. The plaintiff complained that 11 passages of the email are defamatory:

(Para 2)

With two switches, this will offer stability and also be a better guard against system breakdown,

unlike Macquarie which cannot afford to spend millions of dollars on switches as it is a makeshift operation and thus only a PC located at its offices. PC cannot handle high volume traffic and is unstable. Because of its small size, Macquarie cannot afford to offer you quality service at low rates. Among the SBOs, Macquarie's pricing is the highest.

(Para 3)

Compared to Macquarie's pricing of 50% discount on SingTel 001 rates … (but offering inferior quality under 1591 dialling code), Phoenix IDD service will enable your company to shave off 40% over Macquarie's billings.

(Para 4)

BTW, Macquarie contract is not enforceable under IDA regulations.

(Para 5)

According to SingTel's internal analysis, they do not expect Macquarie to survive very long as their cashflow is under strain. SingTel will have no hesitation cutting off all their lines the moment Macquarie do not pay their bills on time. This means your whole office will suffer a blackout for overseas calls. SingTel has no obligations to your company since you have signed up with Macquarie. According to SingTel, Macquarie has asked for additional grace period for paying their arrears.

(Para 6)

For your information, Singapore is Macquarie's first and only overseas testbed and it's a failure.

(Para 8)

Wilson Hoe, telecom manager of JP Morgan Chase told me his bank is not that foolish and that Macquarie are a bunch of liars who go round quoting his bank as a customer.

(Para 10)

Winnie Lee of Daimler Chrysler South East Asia said that through her company's independent checks on Macquarie, they found them not to be truthful.

(Para 11)

The regional logistics manager of Siemens Advanced Engineering, Tina Cheam told me that they have received a written letter from SingTel questioning Macquarie's honesty. According to her, the negative language used by SingTel is very direct and strong, leaving no doubt about Macquarie's unscrupulous sales methods all the way from Macquarie's CEO in Australia down to the bottom sales staff in Singapore.

(Para 14)

According to the general manager of Evergreen Marine, the service quality of Macquarie is no good and there is no savings.

(Para 15)

Russell Tang (tel: 6486 3037), the regional telecom manager for Motorola would like to hear separately from you if Macquarie sales staff has been quoting Motorola's name because Macquarie has been repeatedly warned that Motorola do not want to be embarrassed by association.

10. The plaintiff pleaded that

In their natural and ordinary meaning, the above statements in the 16 October 2002 Email, meant and/or would be understood to mean that the Plaintiffs: -

(a) Do not offer and/or are not capable of offering quality, premium IDD services to their customers;

(b) Run a crude and/or temporary operation devoid of any substance in Singapore;

(c) Are incompetent as their operations and/or business in Singapore have failed;

(d) Are facing such serious financial difficulties that their prospect of continuing business as a going concern is not certain;

(e) Are facing such serious financial difficulties that they may be unable to pay the bills of their supplier;

(f) Do not operate switches in Singapore but use personal computers, which are unable to handle high volume traffic and are unstable;

(g) Are not a reliable service provider and that any customer who signs up with them will face disastrous consequences should SingTel decide to stop services to Macquarie for non-payment of their bills;

(h) Do not provide a service which will enable their customers to save any money;

(i) Do not possess equipment which is located in specifically designed, secure and controlled environments;

(j) Are liars and make false statements to their customers about their capabilities; and/or

(k) Engage in unscrupulous and dishonest business practices and behaviour.

Email dated 18 October 2002 (the third email)

11. This email was also sent by the second defendant to Citibank.

12. The plaintiff claimed that it was defamed in two passages of the email which stated

(Para 2)

Phoenix corporate philosophy is the opposite of Macquarie's and the management strongly emphasise underselling its service unlike Macquarie which oversells. Whenever a client discovers its lies, Macquarie has superb damage control in place to pacify and convince the clients to stay. Macquarie has perfected the art of damage control post-sales for all its lies. Phoenix has a long term strategy as the biggest SBO to uphold its reputation and do not have carefully thought-out lies to entice clients like Macquarie.

(Para 3)

BTW, Macquarie has been aggressively using your bank's name in their pitch to potential clients.

13. The plaintiff pleaded that

In their natural and ordinary meaning, the above statements in the 18 October 2002 Email meant and/or would be understood to mean that the Plaintiffs:-

(a) Deliberately and/or dishonestly sell more telecommunications capacity than they can provide;

(b) Would be unable to efficiently service their customers due to the alleged overselling of their services;

(c) Conduct their business in a deceitful and/or fraudulent manner;

(d) Fabricate facts and generate lies in their dealings with customers;

(e) Are untrustworthy and should be avoided at all costs;

(f) Employ underhand tactics in acquiring customers; and/or

(g) Have no regard whatsoever for their customers' confidentiality.

14. The plaintiff claimed damages against the defendants and an injunction to restrain them from making the same or similar statements against it.

The first defendant's defence

15. The first defendant denied that the emails were defamatory and also denied that it was liable for the statements made by the second defendant. In the course of the hearing, the first defendant abandoned the position and arrived at a settlement with the plaintiff.

16. However it made a claim against the second defendant for an indemnity and costs from him in respect of any sum that the plaintiff may recover from it.

The second defendant's defence

17. The second defendant's first line of defence is that the words complained of were not defamatory.

18. The other defences raised are

(i) the statements were true in substance and fact (the defence of justification);

(ii) the statements were fair comments on matters of public interest, and

(iii) the statements were published on occasions of qualified privilege.

Whether the statements are defamatory

19. Each of the statements that the plaintiff alleged to be defamatory must be considered to establish whether it is defamatory. For that purpose the test set by Lord Atkin in *Sim v Stretch* [1936] 3 All ER 1237, "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally" is a good starting point.

20. The defence denied that each of the email "bore or were understood to bear or were capable of the meanings pleaded" without elaboration. The closing submissions merely repeated that the second defendant "denies that the words used bored the meanings pleaded by the Plaintiffs". More detailed consideration should be given to the statements.

21. When I did that, I found some of the statements were indeed not defamatory. The cited passages of each email were read individually and collectively to ascertain their meaning and effect. I will explain why I do not find some of the statements defamatory, and note those which are defamatory. It is not necessary to explain why the latter statements are defamatory, as that is evident on the face of the statements. For ease of identification the defamatory statements are indicated by the underlining of the paragraph numbers in paras 6, 9 and 12.

22. The first email.

(i) Para 2 makes no reference to the plaintiff at all. There is reference to "most of the other independent service providers which use VOIP and pass it around as a premium service". On a plain reading, it does not imply that the plaintiff was one of the operators referred to.

(ii) Para 3. The first sentence refers to the plaintiff as a very small operator with one switch. The plaintiff complained that "a plain reading of this sentence will bear the meaning that the Plaintiffs run a rudimentary operation with limited capabilities."[1] The plaintiff has read too much into the sentence. While it does described the plaintiff as a small operator, it does not disparage its services.

(iii) Para 7 is defamatory.

23. *The second email.*

(i) Paras 3, 4 and 14 are not referred to in the plaintiffs' closing submissions and I take them to be abandoned.

(ii) Para 15 refers to Motorola's reluctance to be associated with the plaintiff. As no reason was given for Motorola's alleged embarrassment this statement is not defamatory of the plaintiff.

(iii) Paras 2, 5, 6, 8, 10 and 11 are defamatory.

24. *The third email.*

(i) Para 3 is not defamatory because it was not stated or implied that the use of Citibank's name was in breach of confidence as the plaintiff had alleged.

(ii) Para 2 is defamatory.

Defence of Justification

The first email

25. The second defendant asserted that the plaintiff's contracts are illegal because they have a minimum contractual period of one year which infringes subsection 7.4.1 of the IDA's Code of Practice for Competition in the Provision of Telecommunication Services[2] that

> A Licensee must not make any claim or suggestion regarding the availability, price or quality of its telecommunication service or equipment, or of the telecommunication service or equipment of another Licensee, that is not supported by objective evidence or that is reasonably likely to confuse or mislead End Users.

26. He admitted that he made the statement that fixed term contracts were illegal under that provision without checking with the IDA or other parties,[3] and he did not produce any support for his assertion even at the trial.

The second email

27. Para 2. The thrust of this passage is that the plaintiff cannot offer a proper level of service because it is a makeshift operation relying on a personal computer. In the closing submissions, it was contended that the comments are substantially true in substance and in fact.[4]

28. This was asserted although there was no evidence that the plaintiff was a makeshift operation or that it was operating through a personal computer in October 2002. In the further and better particulars to his defence, the second defendant disclosed that "one Abraham working for the Plaintiffs … said that the Plaintiffs do not use a switch as the Plaintiffs are linked to a SingTel partition." He deposed in his affidavit of evidence-in-chief that this was disclosed to Lloyds TSB Bank on or before March 2002. In cross-examination, he admitted that he did not know how many switches the plaintiff had at that time.[5] He did not disclose Abraham's full name or identify the Lloyds TSB Bank officer Abraham spoke to, and no attempt was made to establish that what he was alleged to have said was true.

29. The plaintiff's evidence that it had installed its own switch in October 2001 was not disputed.

30. Para 5 was entirely hearsay. No analysis report or any other evidence was produced. When pressed, the second defendant said he had obtained the information from SingTel sales staff, but he did not name them, much less call them as witnesses.

31. Para 6. The second defendant had no evidence to support his claim that the plaintiff was a failure. The plaintiff's managing director's evidence that the plaintiff has been successful in Singapore with about 500 corporate clients was not challenged.

32. Paras 8, 10 and 11. The persons who were the alleged sources of the information were not called as witnesses either to confirm that they had made the statements or that the statements were factually correct.

The third email

33. Para 2. The second defendant raised justification on the ground that

> The statement that the plaintiffs have superb damage control, is time in substance and in fact, as despite virtually all 143 odd customers complaining about the Plaintiffs poor quality of IDD telecommunication services, the Plaintiffs managed to placate and retain most of their customer, as indeed the Plaintiffs have attempted to portray.[6]

without any explanation as to how that could substantiate the charge that the plaintiff lied to its clients.

34. He called two witnesses who gave evidence that the plaintiff's employees misrepresented the services it offered. Neither of them had been referred to in his emails. The first witness was Tricia Ong of Rockwell Collins South East Asia Pte Ltd. She deposed that an employee of the plaintiff, Patrick Scaramozzino misrepresented to her that the plaintiff sold SingTel 001 service. Under cross-examination, she conceded that Scaramozzino had not spoken to her before the agreement was entered into, and that another person Yolanda Tay had spoken to her.[7] She could not explain why she had named Scaramozzino in her affidavit and did not refer to Yolanda Tay.

35. The other witness was Stephanie Tan Lay Peng of Ricoh Asia Pacific Pte Ltd who deposed that

> My boss, Mr Nagi, who is an administrative manager with Ricoh Asia Pacific Pte Ltd, and I were approached by one Miss Anna Hu Aun Ting, an accounts manager of Macquarie Corporate Telecommunications Pte Ltd (the Plaintiffs). The said Miss Anna Hu Aun Ting offered, on Macquarie Corporate Telecommunications Pte Ltd (the Plaintiffs') behalf, to sell SingTel 001 Service to our company at 15% discount. Due to the attractiveness of this offer, our company signed a one (1) year service agreement with Macquarie Corporate Telecommunications Pte Ltd.

36. In her evidence in court, she changed that, and said Anna Hu did not approach her and make the representation, and that another person, Claire Kwan did.

37. Neither witness offered any reason for changing her sworn evidence, nor gave any indication of the changes before she went to the witness stand. Their evidence that they had been lied to by Yolanda Tay or Claire Kwan cannot in these circumstances carry any weight, and do not provide justification for any allegation of lying by the plaintiff or its employees.

38. The defence of justification failed in respect of each of the statements.

Defence of Fair Comment

39. The elements of this defence is discussed in *Gatley on Libel and Slander* 9th Edn ("*Gatley*") at para 12.2

> To succeed in the defence the defendant must show that the words are comment and not a statement of fact. However, an inference of fact from other facts referred to may amount to a comment. He must also show that there is a basis for the comment, contained or referred to in the matter complained of. The comment must satisfy the test of being "objectively fair" in the sense that an honest or fair-minded person could hold that view. The defence is not, however, inapplicable because the comment was prejudiced or exaggerated or "unfair" in the ordinary sense of that word. Finally, the defendant must show that the comment is on a matter of public interest, one which has been expressly or implicitly put before the public for judgment or is

otherwise a matter with which the public has a legitimate concern. If the plaintiff can show that the comment was actuated by malice, he will defeat the plea.

40. A review of the defamatory statements show that they were assertions of fact, e.g., the licences are illegal, the plaintiff is a makeshift operator relying on a personal computer, and it lies to its clients.

41. The defence of fair comment does not stand if there is malice. The discussion on malice in the defence of qualified privilege also applies to this defence, with the same result.

Defence of Qualified Privilege

42. *Gatley* explains the basis of this defence at para 14.1

> There are occasions upon which, on grounds of public policy and convenience, less compelling than those which give rise to absolute privilege, a person may yet, without incurring liability for defamation, make statements about another which are defamatory and in fact untrue. On such occasions of privilege a person is protected if the statement was fairly warranted by the occasion (that is to say, was reasonably necessary to achieve the purpose for which the law grants the privilege) and so long as it is not shown that he made the statement with malice, i.e. knowing it to be untrue or with some indirect or improper motive. These occasions are called occasions of qualified privilege, for the protection which the law, on grounds of public policy, affords is not absolute but depends on the honesty of purpose with which the defamatory statement is made. The rule being founded on the general welfare of society, new occasions for its application will necessarily arise with continually changing conditions, though the long established statutory protection for various reports has reduced the need to extend the common law.

and continues at para 14.3 that

> To gain protection, the statement must be fairly warranted by the occasion, that is to say it must be reasonably necessary for the performance of the duty or the protection of the interest which underlies the privilege. This may exclude the publication of some irrelevant matter, but it also means that the court may have to balance the relative harm to the defendant if the statement is not published and to the plaintiff's reputation if it is.

and at para 14.5 that

> (M)ost privileged occasions under the common law may be very broadly classified into one of two classes: where the maker of the statement has a duty (whether legal, social or moral) to make the statement and the recipient has a corresponding interest to receive it; or where the maker of the statement is acting in pursuance of an interest of his and the recipient has such a corresponding interest or duty in relation to the statement or where he is acting in a matter in which he has a common interest with the recipient.

43. The first question is whether the three emails were published on occasions of qualified privilege. As accounts manager the second defendant has to seek out potential clients, including the clients of the plaintiff, and inform about the services offered by his principals, and compare them with those provided by its competitors. In so doing it may be relevant and proper to refer to the financial standing and stability of the competitors where that may affect their operations. There is a mutuality of interest between the second defendant and the recipients of the emails in these matters.

44. Malice defeats the defences of qualified privilege and fair comment. The defence will stand only if a statement is made honestly. As Lord Diplock explained in *Horrocks v Lowe* [1975] AC 135 at 150

> What is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief'. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes [the absence of honest belief] is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true.

45. There are standards for the belief to meet. *Gatley* points out at para 16.15 that the defence will not hold when there is knowledge that the statement is untrue or knowing indifference to whether it is true or false, and goes on to state at para 16.16 that

> (W)here the defendant purposely abstains from inquiring into the facts or from availing himself of means of information which lie at hand when the slightest inquiry would show that the imputation was groundless, or where he deliberately stops short in his inquiries in order not to ascertain the truth, a jury may rightly infer malice.

46. When the second defendant asserted that the plaintiff's minimum term contracts are illegal, he did not take the simple step of checking with the IDA. He insisted that he came to that belief on the basis of subsection 7.4.1 of the IDA Code, although it does not refer to the length of contracts. Likewise, he claimed that he believed that the plaintiff had no switches because an employee of the plaintiff had admitted to that that sometime before March 2002. Although that information did not come to him directly, he took no steps to ascertain the full name of that person, whether he made the admission, and whether conditions had changed when he sent his second email in October 2002.

47. Similarly, while he repeated the complaints he claimed were made by the customers of the plaintiff namely Wilson Hoe, Winnie Lee, Tina Cheam, Russell Tang, he did not call them as witnesses, or explain why they were not called. He claimed that he had spoken with each of them and had made notes of the conversations. If he had the notes, he did not produce them during discovery, and did not offer to produce them at the trial.

48. The crucial question is whether he can be believed when he said he honestly believed that the statements were true. If he had the honest belief, his defence will succeed, but it would not succeed just because he says that he had the belief. He has to persuade the court that he truly held the belief.

49. He is not a simple person. He is a qualified accountant, and has held responsible positions in a merchant bank and stockbrokers in which care must be taken in coming to a decision or conclusion. He must know that it is necessary to record and verify loose undocumented information received before accepting and disseminating it as the truth, and cause injury to a third party.

50. The second defendant's account of the basis on which he made the statements did not persuade me that he honestly believed in the truth of the statements when he made them, and his defence of qualified privilege fails.

51. As his defences have failed, judgment will be entered for the plaintiff against him with costs, and damages to be assessed by the Registrar.

Damages

52. Are damages to be assessed on the normal basis, or should that be the aggravated damages the plaintiff sought?

53. Counsel for the plaintiff submitted that aggravated damages be awarded against the second defendant. It complained that even after the action was commenced, he visited Lucent Technologies on 1 April 2003 and spoke to its officers. He asked them to check on the plaintiff's financial status and health on its website, and told them that it was being sued by SingTel. Subsequently Lucent Technologies invited five operators including the plaintiff to tender for the provision of telecommunication services, and did not renew its contract with the plaintiff when it ran out in June 2003.

54. There was nothing objectionable about the second defendant visiting Lucent Technologies *per se*, he was not restrained from doing that. What he told the officers during the visit was also unobjectionable, the first part being a proper suggestion, the second part being a true statement of fact. The visit could not be said to have caused the plaintiff's loss of the Lucent contract or to justify an award of aggravated damages.

55. There was more substance in the plaintiff's complaint over the manner in which the second defendant conducted his defence. He showed himself to be unyielding and defiant throughout. He condemned the plaintiff's minimum-term contracts as illegal without checking with the IDA, and maintained that position at the trial, even after acknowledging that other operators also incorporated minimum-period terms in their contracts. He continued to stand by his allegation in the email of 16 October 2002 that the plaintiff could not afford to operate a switch, despite admitting he did not know how many switches the plaintiff had at that time, and even after the plaintiff has stated that it had installed its own switch in October 2001.[8]

56. He stuck by all his statements and raised every defence available to him, regardless of the shortcomings in his case, the evidence the plaintiff presented, and with the knowledge that he was not going to call the persons who were vital witnesses for his defence. He was not prepared to consider that he may have wronged the plaintiff in any way, and would not make the smallest retraction or concession.

57. I find that his conduct justified an order for aggravated damages against him.

Injunction

58. The plaintiff sought an order that the second defendant be restrained from publishing the same or similar defamatory statements of the plaintiff.

59. Bearing in mind what he has done, and in the absence of any indication that he would change his ways, I grant the injunction sought.

Claim by first defendant for indemnity

60. The first defendant's claim was founded on the terms of appointment of the second defendant as its agent. The parties agreed *inter alia*

> 4.2 In marketing and promoting the Services, the Agent shall faithfully comply with the instructions and policies which Phoenix Comms may from time to time implement;

4.9 The Agent shall ensure that the sale and marketing of any designated Telecommunication Services do not cause any annoyance, embarrassment, harassment or nuisance of any kind whatsoever to the public or any person whomsoever; and

8.1 The Agent shall indemnify and keep indemnified Phoenix Comms from and against all claims, losses, damages, costs or liability whatsoever suffered or incurred by reason of:

(a) any breach or negligent performance of the provisions of this Agreement including but not limited to any act, neglect or default of the Agent/Sub-Agent, employees, Licensees or customers in the course of carrying out the obligation under this Agreement.

(b) any claim by any third party alleging libel or slander in respect of any matter arising from the performance by the Agent/Sub-Agent of his obligations hereunder.

61. The second defendant admitted that those conditions applied to their relationship and restricted his defence to a bare denial of liability.

62. The first defendant's executive director deposed in his affidavit of evidence-in-chief that

Even before March 2002, I had told the second defendant before not to run down other parties, including competitors, in trying to sell or market the first defendants' Services.

and was not cross-examined by the counsel for the second defendant.

63. The second defendant did not refer to the first defendant's claim in his affidavit of evidence-in-chief or evidence in court.

64. Instead his counsel submitted that the settlement between the first defendant and the plaintiff extinguished the first defendant's entitlement to indemnity. This point was taken without reference to any authority, or to the express words of clause 8.1 of the agreement which refer to claims and do not exclude settlements.

65. It was also argued that the first defendant was estopped by its defence that the second defendant was an independent contractor for whose actions no vicarious liability attached to the first defendant. There is no basis for the assertion that a party is estopped from changing any position taken in its pleadings. The second defendant was entitled to question the first defendant's and the plaintiff's witnesses on the change of position and the settlement, if necessary, by recalling them, but he did not.

66. On the basis of the foregoing, I order that the second defendant indemnifies the first defendant against the plaintiff's claim. The claim was settled for a lump sum $250,000 inclusive of costs. The plaintiff sued the first defendant on the basis that the second defendant was its "agent and/or employee and/or representative." In view of the fact that he was appointed and named as an agent, and that he canvassed business for the first defendant and not for himself, the first defendant's decision to accept a settlement was not unreasonable. There was also no reason for doubting that the first defendant acted in good faith and in the protection of its interests in arriving at the settlement at that sum, as it had to make payment to the plaintiff, and face the uncertain prospect of recovering it from him.

67. I also order that the second defendant pays the first defendant costs on its claim against him. The costs are to be taxed on the High Court scale as the claim was properly made before the High Court following the plaintiff's claim.

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[1] Plaintiffs' Closing Submissions para 46

[2] Notes of Evidence page 132

[3] Notes of Evidence page 133

[4] Second Defendant's Closing Submissions para 35

[5] Notes of Evidence pages 142-3

[6] Second Defendant's Closing Submissions para 44

[7] Notes of Evidence page 128

[8] Notes of Evidence pages 142-3