IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA757/2023
[2024] NZCA 609

BETWEEN	KENNETH DAVID WIKELEY Appellant
AND	KEA INVESTMENTS LIMITED First Respondent
	WIKELEY FAMILY TRUSTEE LIMITED (IN INTERIM LIQUIDATION) Second Respondent
	ERIC JOHN WATSON Third Respondent
	WIKELEY INCORPORATED Fourth Defendant
	USA ASSET HOLDINGS INCORPORATED Fifth Defendant

Court:	Courtney, Muir and Cull JJ
Hearing:	20 May 2024 (further information received 8 November 2024)
Counsel:	Appellant in Person with McKenzie friend J Sheffield J B M Smith KC, M C Harris, J L W Wass and S T Coupe for First Respondent M D Arthur and J Marcetic for Second Respondent No appearance for Third, Fourth and Fifth Respondents
Judgment:	21 November 2024 at 3 pm

JUDGMENT OF THE COURT

A The appellant's application to amend the notice of appeal is declined.

B The appellant's application to admit further evidence is declined.

C **The first respondent's application to admit further evidence is granted in respect of the affidavits of Toby Graham dated 10 January 2024 and Andrew Hagerman dated 30 August 2024. The first respondent's application to admit further evidence is otherwise declined.**

D **The second respondent's application to admit further evidence is granted in respect of the affidavits of interim liquidator Natalie Burrett dated 3 May 2024 and 17 May 2024.**

E **The appeal is allowed in part by discharge of:**

(i) **the permanent anti-suit and anti-enforcement injunctions in [156(a)(i) to (iv)] of the First Judgment ([2023] NZHC 3260); and**

(ii) **the permanent injunctions in paragraph [7] of the Second Judgment ([2023] NZHC 3532).**

F **The orders in E above are to lie in Court and not become operative for a period of 20 working days from delivery of this judgment.**

G **We reserve to the first respondent the right to reapply to the High Court for further injunctive relief if required and reserve to the interim liquidators the right to apply to the High Court for any further order considered appropriate in the context of the interim liquidation.**

H **The appeal is otherwise dismissed.**

I **There is no order as to costs.**

REASONS OF THE COURT

(Given by Muir J)

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Introduction

[1] This proceeding concerns claims by Kea Investments Ltd (Kea), a British Virgin Islands (BVI) company associated with Sir Owen Glen (Sir Owen), against Mr Kenneth Wikeley and others associated with him. Kea says that Mr Wikeley is party to a global fraud instigated and driven by Mr Eric Watson. At issue is the enforcement of a default judgment obtained in January 2022 in the Commonwealth of Kentucky Circuit Court (the Kentucky Default Judgment) by entities associated with Mr Wikeley against Kea.[1] Mr Wikeley says that he is an international entrepreneur with many business successes who has been falsely maligned by Sir Owen's interests.

[2] Mr Wikeley appeals the decision of Gault J dated 17 November 2023 (the First Judgment) on Kea's claims, heard by formal proof.[2] The Judge granted Kea permanent worldwide anti-suit and anti-enforcement injunctions in respect of the Kentucky Default Judgment, among other orders. Mr Wikeley also appeals a supplementary judgment (the Second Judgment) dated 5 December 2023 in which the Judge made further orders restraining the defendants from taking steps in relation to the Wikeley Family Trust (WFT) because of concerns Mr Wikeley would cause steps to be taken in violation of the previous injunctions.[3]

[3] The dispute has its genesis in the January 2022 Kentucky Default Judgment for USD 123,750,000 plus interest and costs, obtained against Kea by Wikeley Family Trustee Ltd (WFTL), a New Zealand incorporated company of which Mr Wikeley is the sole director and shareholder.[4] The basis for the Kentucky Default Judgment was an asserted breach by Kea of a purported contract from 2012 styled "Coal Funding and JV Investment Agreement" between Kea and WFTL (referred to by all parties as the Coal Agreement). WFTL obtained the Kentucky Default Judgment following failure on the part of Kea's BVI registered agent to notify it of WFTL's claim. A subsequent

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1 *Wikeley Family Trustee Ltd v Kea Investments Ltd* 21-CI-02508 (2022) Ky Cir LEXIS 12 (USA) (31 January 2022) [Kentucky Default Judgment].

2 *Kea Investments Ltd v Wikeley Family Trustee Ltd (in interim liq)* [2023] NZHC 3260 [First Judgment]. See High Court Rules 2016, r 15.9.

3 *Kea Investments Ltd v Wikeley Family Trustee Ltd (in interim liq)* [2023] NZHC 3532 [Second Judgment]. These orders were applied for pursuant to a reservation of leave: see First Judgment, above n 2, at [156(a)(v)].

4 WFTL was subsequently placed in interim liquidation on Kea's application by Gault J, prior to the formal proof hearing: see *Kea Investments Ltd v Wikeley Family Trustee Ltd* HC Auckland CIV-2022-404-2086, 6 April 2023 (Minute of Gault J).

application by Kea to set aside the Kentucky Default Judgment on the basis that the claim was fraudulent was denied on the grounds Kea had been "properly served".[5] A further application to amend, alter or vary the Circuit Court's dismissal of the motion to set aside was also denied.[6] Kea commenced appeals against these judgments to the Kentucky Court of Appeals on 9 November 2022.[7]

[4] Kea responded to dismissal of its applications in Kentucky by filing, on 31 October 2022, an ex parte application for interim worldwide anti-suit and anti-enforcement injunctions in the New Zealand High Court. That application was granted by Gault J on 4 November 2022.[8] Mr Wikeley did not file a statement of defence. As a result, the proceeding ultimately came before Gault J for a formal proof hearing on 17 May 2023.

[5] In the First Judgment Gault J granted permanent worldwide anti-suit and anti-enforcement injunctions. He did so having found the Coal Agreement to be "void because it is a forgery" and, as such, "null and void ab initio".[9]

[6] Mr Wikeley vigorously disputes that characterisation, and now seeks to adduce affidavit evidence that the Coal Agreement was, as it purports to be, signed by Kea's authorised representative Mr Dickson, in Paris in October 2012. He says that provided the Kentucky Default Judgment can be sustained, his interests are entitled to enforce it and that the permanent worldwide anti-suit and anti-enforcement injunctions of the New Zealand High Court represent an unprecedented breach of international comity.

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5 Identified as a "motion" in the United States. *Wikeley Family Trustee Ltd v Kea Investments Ltd* 21-CI-02508 (2022) Ky Cir LEXIS 11 (USA) (18 October 2022) [Kentucky set aside judgment].

6 *Wikeley Family Trustee Ltd v Kea Investments Ltd* 21-CI-02508 (2022) Ky Cir LEXIS 13 (USA) (9 November 2022) [Kentucky MAAV judgment].

7 Those appeals are currently stayed with a rolling 90-day return date: see *Kea Investments Ltd v Wikeley Family Trustee Ltd* Court of Appeals 2022-CA-1311-MR, 26 May 2023 (Ky).

8 *Kea Investments Ltd v Wikeley Family Trustee Ltd* [2022] NZHC 2881 [interim injunction judgment].

9 First Judgment, above n 2, at [143].

[7] The issues we are required to address are:

(a) whether Mr Wikeley should now be permitted to engage with the merits of Kea's claim that the Coal Agreement is fraudulent which we will consider in the context of his applications to amend the notice of appeal and adduce further evidence;[10]

(b) the validity of 44 challenges to the evidence relied on by the Judge to support his findings of forgery and of the existence of an international conspiracy to defraud;

(c) whether the High Court was correct to assert jurisdiction in respect of Kea's claims;

(d) if it was, whether it nevertheless breached international comity by granting worldwide anti-suit and anti-enforcement orders;

(e) whether damages for legal costs should have been awarded in respect of overseas proceedings (in Kentucky and Queensland) which were still pending; and

(f) whether the High Court had jurisdiction to issue the Second Judgment pursuant to the reservation of leave in the First Judgment or was precluded from doing so as it was functus officio.

Background

[8] The background to these proceedings is comprehensively set out in the First Judgment, at least down to a point shortly before the application for formal proof was heard. We do not intend to repeat the Judge's 15-page narrative.[11] What follows is a relatively brief summary of the facts. We acknowledge Mr Wikeley's claims that parts

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10 An application which has in turn, invoked a similar application from Kea seeking, inter alia, to introduce additional evidence it says is relevant to determination of Mr Wikeley's application.

11 First Judgment, above n 2, at [9]–[65].

of the Judge's narrative relied on inadmissible evidence. We will deal with those objections in due course.

The Coal Agreement

[9] On its face, this is an agreement between Mr Wikeley as trustee for "Wikeley Family Trust New Zealand" and Kea "represented by Mr Peter Dickson". It purports to be dated 23 October 2012.[12] Both the signatures of Mr Wikeley and Mr Dickson were ostensibly witnessed by Mr Watson.

[10] It is common ground that the document was not prepared by legal advisors. It contains typographical errors, for example, a reference to "£125 m USD" and another reference to "£375m" when the currency is presumably meant to be USD.

[11] It includes a number of "background" recitals, including that:

(a) Mr Wikeley is involved in the coal business, primarily in the United States and has developed a "unique pipeline of investments, opportunities and relationships working with owners and promoters of proprietary deals". Examples are given of "an ASX IPO listing of a Coal asset in the Kentucky Area, and a significant coal project purchase in the form of a development called GREENFIELDS", the latter forecast to provide returns of five to seven times invested capital.

(b) Mr Wikeley has "provided [Kea] with, and [Kea] acknowledges in this agreement that it and its advisors have now accessed and assisted with, the financial models and analysis required to satisfy their due diligence over the past several months".

(c) Kea "acknowledges that their advisors have done a feasibility study and found this Greenfields deal and the overall pipeline of investment deals developed and those to be identified to provide a valuable and well above market investments [sic] return".

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[12] Being the same date appearing under each of the signatures of Mr Wikeley, Mr Dickson and Mr Watson.

(d) It has been proposed by Kea to "reverse list this Greenfields project and others into publicly listed vehicles" and that Kea will "have exclusive access to all [Mr Wikeley's] deals in the coal and energy sector" with the parties using "best endeavours to acquire a significant shareholding in 'Greenfields'".

(e) As part of the agreement, Mr Wikeley will give Kea "exclusive investment rights on all future Coal deals that [he] procures".

(f) The parties agree that "this JV arrangement will be the start of an extremely rich and rewarding long term partnership, with [Mr Wikeley] providing management and deal flow and [Kea] providing capital".

[12] The agreement then identifies under the headings "Terms", "Royalty", "Indemities and Guaurenties [sic]" and "Put and Call Option" the following essential provisions:

(a) Kea will "commit and provide capital to the venture as required for the benefit of both parties with a minimum of US$75million over the next eight years … by way of 20-year loans repaid back as investments are sold, or placed in listed vehicles, from time to time in stock or cash at an interest rate per annum of 3% …".[13]

(b) Mr Wikeley is stated to have "full authority to invest the funds in the ventures [he] deems appropriate providing [Kea] is the exclusive investment partner".

(c) Kea is to receive 60 per cent of profits "from all the projects" and Mr Wikeley 40 per cent of the profits "after repayments to [Kea] of any loans or interest outstanding".

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[13] Gault J referred to these as loans to "Mr Wikeley": see First Judgment, above n 2, at [32(a)]. We consider the better interpretation is that the loans are to be provided to the joint venture. Elsewhere, the agreement refers to the provision of "$75m USD of capital" and to provision of capital by loan.

(d) Payment of a royalty of USD 1.5 million per year for the next 20 years from the time of the first investment. This payment "is guaranteed [by Kea] and shall be paid irrespective as to whether production has commenced or not, or if for any reason investment has been delayed".[14]

(e) Royalty payments would be "on-charged to the listed vehicles" with a margin for Kea.

(f) Kea agreed to indemnify Mr Wikeley "for any losses and lost profits" if for any reason it failed to "provide a minimum of $75m USD of capital".

(g) The capital commitment and royalty agreement stated to be guaranteed "in all circumstances including negligence by [Mr Wikeley]".

(h) Kea agreed to indemnify Mr Wikeley for liabilities arising out of the investment opportunities and to reimburse Mr Wikeley for his costs "in building the deal opportunities" and to "fund the deal costs with these costs being deducted prior to the 60/40 split of profits".

(i) In any case Kea agreed that the amount indemnified "will be the greater of 25% of £375m [sic] or 25% of the actual profits generated by third parties …".

(j) Mr Wikeley can "at any time after the seventh anniversary of this agreement, put his shares/this agreement in the venture to [Kea] for £125m USD [sic]". Further, he can "call the option and pay [Kea] $125 million at any time over 20 years which will include any outstanding Royalties payments".

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[14] Despite the ambiguity of the provision, the Judge identified this as a commitment *by* Kea to make the identified payment to Mr Wikeley: see First Judgment, above n 2, at [32(b)]. That is consistent with a subsequent provision in terms: "In any case [Kea] underwrites and promises to pay the agreed royalty directly to [Mr Wikeley]."

[13] The agreement then provides:

> **SUMMARY/MINIMUM GUARANTEE**
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> For simplicity and avoidance of doubt, [Kea] has agreed to guarantee [Mr Wikeley] all its just reward. This agreement is a full and final agreement of the terms between the parties.
>
> **JURISDICTION**
>
> The parties have agreed that the jurisdiction shall be the USA. The contract will be governed by the laws in Lexington, Kentucky and any applicable Federal law.

[14] On the basis of the additional evidence which Mr Wikeley seeks to introduce there are real issues as to whether, even if it is an authentic document, the Coal Agreement was intended to create binding legal relations. Mr Watson says he saw it as "more of a non-binding heads of agreement that delivered optionality". Mr Wikeley refers to it as something which in 2021 he thought "might have some teeth" so "reached out" to Mr Watson to obtain a copy of it.[15] In oral submissions he also referred to it as a "heads of agreement". We will return to these issues later.

Kea and Project Spartan

[15] In early 2012, interests associated with Sir Owen sold a logistics company, which Sir Owen had built up over a number of years, for approximately USD 350 million. The proceeds were held in the Corona Trust (based in Nevis). At that time Kea was owned by the Corona Trust, the corporate trustee of which was Pizarro Company Ltd (Pizarro), a company run by Mr Dickson. Mr Dickson was also the sole director of Kea.

[16] In March 2012, Sir Owen was introduced to an investment opportunity promoted by Mr Watson called Project Spartan. He was attracted to the proposal and instructed Mr Dickson and Mr Miller (the Corona Trust's protector) to pursue it. However, they failed to keep Sir Owen informed of developments and ultimately committed Kea to a different transaction from that which Mr Watson had first promoted, with Kea agreeing to lend £129 million to Spartan Capital Limited (SCL), a joint venture company between Kea and Mr Watson's interests.

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[15] Having, he says, lost all his own documents when he left the United States in December 2015, was subsequently denied a business visa to re-enter and his Kentucky landlord threw out "all [his] belongings, including [his] clothes and the filing cabinet containing the Coal Agreement".

[17] Following disputes regarding the control of the Corona Trust, on an application by Sir Owen's daughter Ms Jennifer Connah, the Nevis Court made orders in February 2013 suspending the powers of Mr Miller and Mr Dickson and appointing a new professional trustee — Harneys (Nevis) Ltd (HNL). The orders directed Pizarro, Mr Miller and Mr Dickson to provide to HNL all information and records concerning the Corona Trust together with details of all assets of Kea and all documents, correspondence and communications in connection with or relating to the administration at Kea, including all contractual documents.

[18] As a result of the disclosure which followed, HNL identified features of the Project Spartan transaction (and another involving an oil and gas company incorporated in Florida), which led to a falling out between Sir Owen and Mr Watson and a new director was appointed to Kea in or about April 2013.

[19] After a period during which Kea and Sir Owen attempted to work with Mr Watson in relation to the investment, Kea in April 2014 filed a petition in the BVI to wind up SCL on just and equitable grounds. Mr Watson then brought a proceeding in England alleging breach of contract and breach of fiduciary duty in relation to the Spartan agreements. Evidence filed in that proceeding led to Kea discovering fraudulent conduct on Mr Watson's part in respect of the joint venture and in 2015 Sir Owen and Kea in turn commenced proceedings in England against Mr Watson and related entities.

[20] The proceedings were heard together. In a judgment delivered on 31 July 2018 (Spartan Judgment), Nugee J found that Kea's entry into project Spartan had been procured by the deceit of Mr Watson.[16] Mr Dickson was also found to have engaged in serious misconduct, including accepting unauthorised inducements from Mr Watson and backdating a loan agreement so that it appeared to have been signed before the Nevis Court had suspended Mr Dickson's powers and frozen Kea's assets.[17]

[21] On 14 September 2018, Nugee J ordered Mr Watson to make an interim payment of approximately £25 million towards the Spartan judgment debt and an interim payment of around £3.8 million towards Kea's costs. Mr Watson has not met the

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16 *Glenn v Watson* [2018] EWHC 2016 (Ch) [Spartan judgment] at [358].
17 At [429]–[431] and [492].

judgment debt. In 2020 he was ordered to disclose certain records to Kea and having failed to do so, was imprisoned for contempt.[18] Kea subsequently brought a further proceeding against Mr Watson in relation to a Florida oil and gas company investment. Mr Watson did not file a defence and so in 2019 judgment in default was entered against him for USD 6,370,483.30 in relation to that transaction.

Mr Wikeley and the Kentucky Default Judgment

[22] Mr Wikeley is a New Zealand citizen. He claims not to have lived in New Zealand since 2002 and to have lived in Kentucky between 2012 and 2015. He says that his permanent home is in Ukraine but that, for the moment, he lives with his sister north of Brisbane. However, the New Zealand Companies Register discloses multiple directorships and shareholdings after 2002 in respect of which Mr Wikeley's place of residence is given as New Zealand.

[23] Mr Wikeley and Mr Watson have a long history of business dealings together, including in relation to the Florida oil and gas company venture.

[24] On 23 July 2021, Mr Wikeley incorporated WFTL in New Zealand. The company is the corporate trustee of the WFT. The WFT was settled on 1 May 2005 with Mr Wikeley and his wife appointed as trustees. Discretionary beneficiaries include Mr Wikeley and his children. The final beneficiaries are his children. Mr Wikeley also appointed himself sole director and shareholder of WFTL.

[25] In August 2021, WFTL filed a proceeding in the Kentucky Circuit Court based on the Coal Agreement. An amended claim followed on 3 December 2021. In the proceeding WFTL alleged that Mr Dickson, on Kea's behalf, had entered into the Coal Agreement and that Kea had breached it by failing to provide USD 75 million in funding to WFTL and failing to pay royalties of USD 30 million, among other things.

[26] The proceeding was served on Kea's registered agent in the BVI, but as a result of negligence on its part, was not brought to the attention of Kea, Sir Owen or their advisors.

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[18] *Kea Investments Ltd v Watson* [2020] EWHC 2599 (Ch) [contempt committal judgment]; and *Kea Investments Ltd v Watson* [2020] EWHC 2796 (Ch).

[27] On 31 January 2022, the Circuit Court issued the Kentucky Default Judgment.[19] It did so without any hearing and without reasons beyond reference to the Court having "reviewed the record and being otherwise sufficiently advised".

[28] On 29 June 2022, Kea and its English solicitors received correspondence from a BVI-based law firm attaching a statutory demand seeking payment of the judgment debt which, with interest and costs, totalled USD 136,240,994. This was the first that Kea had heard of both the Coal Agreement and the Kentucky proceeding. A copy of the agreement and the Kentucky Default Judgment was not provided until 7 July 2022.

[29] Kea considered the Coal Agreement and the claim made under it to be fabrications conceived by Mr Wikeley and Mr Watson to defraud Kea. On 12 July 2022, it applied to set aside the statutory demand in the BVI. It also instructed Kentucky lawyers to apply to set aside the Kentucky Default Judgment. The relevant motion was filed on 21 July 2022, with Kea recording that it entered a limited appearance for the purpose of contesting the jurisdiction of the Kentucky Court.

A third party becomes involved

[30] On 7/8 August 2022,[20] while Kea's application to set aside the Kentucky Default Judgment was pending, Kea's solicitors received several communications from a person identified as David Michael Tabet (which Kea claims is a pseudonym for well-known English fraudster Mr Rizwan Hussain) claiming that he and four Marshall Islands companies had been appointed "Protective Directors" of Kea and informing Kea's solicitors that they were no longer instructed and that Mr Tabet was authorised to settle the Kentucky proceeding for USD 100 million. The four Marshall Islands companies had all previously been annulled.

[31] Kea says that Mr Hussain was imprisoned at the same time, in the same prison and on the same charge (contempt) as Mr Watson. Its case is that the pair met while in prison.

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19 Kentucky Default Judgment, above n 1.

20 The dual dating reflects the respective time zones of Kentucky and New Zealand.

[32] Mr Tabet also corresponded with the Circuit Court, purporting to withdraw Kea's motion to set aside the Kentucky Default Judgment. On 8/9 August 2022, WFTL's lawyers notified the Kentucky Court that the case had settled and sought to vacate the hearing of Kea's motion to set aside the Kentucky Default Judgment. Kea's true directors did not authorise any such settlement. At the same time, letters sent by "Mr Tabet", in the name of Kea, tried to stop Kea's Kentucky lawyers from acting for Kea against Mr Wikeley.

[33] Kea saw all of this as an attempt to replace the Kentucky Default Judgment (which it was challenging) with a debt due under a settlement agreement, so as to further the conspirators' attempts to wind up or extort money from Kea (or by this stage, the insurers of Kea's BVI registered agent). It alleged that Mr Tabet's modus operandi and the wording of the documents sent by him demonstrated that his real identity was Mr Hussain and that he could only have known of the Kentucky proceedings through Mr Watson.

[34] When the validity of Mr Tabet's letters was questioned, the annulled Marshall Islands companies purported to sue Kea's English and BVI solicitors in England. Kea says this again reflected Mr Hussain's modus operandi. Those proceedings and other Hussain-backed proceedings against (or purportedly by) Kea, were all struck out in September 2022. Mr Watson was not a party to those proceedings, but he was held liable for Kea's costs on the basis that they had been conducted for his benefit. In making those orders the Judge accepted that Kea had "good grounds for thinking that Mr Watson and Mr Hussain in these proceedings were acting in concert".[21]

[35] In the same period another annulled Marshall Islands company which was found by the English Courts to be connected to Mr Hussain, FVS Investments Limited (FVS), wrote to WFTL's Kentucky solicitors claiming to be a secured creditor of Kea in the sum of USD 483 million. FVS was not a creditor of Kea. Kea contends that this too was part of the fraudulent scheme, being an attempt to create a paper trail which would justify WFTL paying to FVS part or all of any recoveries obtained for Mr Watson (and Mr Hussain's) benefit.

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21 *Kea Investments Ltd v Farrer & Co LLP* [2022] EWHC 2449 (Comm) at [7].

[36] On 15 September 2022, WFTL offered to settle its Kentucky Default Judgment for USD 10 million, that being the sum which WFTL believed Kea's BVI registered agent would carry by way of indemnity insurance. The offer was expressed to expire at the beginning of the hearing of Kea's motion to set aside.[22]

[37] Kea's motion to set aside the Kentucky Default Judgment was heard on 7 October 2022. It was denied in a judgment dated 18 October 2022 on the basis that Kea had been "properly served". The reasons comprised of two paragraphs of three lines each.[23]

[38] On 21 October 2022, Kea applied to amend, alter or vary the denial of its application. The hearing took place on 28 October 2022. The Court denied the motion.[24]

The New Zealand proceedings

[39] Kea then commenced its proceeding in the New Zealand High Court on 31 October 2022. It pleaded a conspiracy by lawful or unlawful means and a second cause of action that the Kentucky Default Judgment not be entitled to recognition in New Zealand.[25] It also filed appeals to the Kentucky Court of Appeals against denial of its motion to set aside and denial of its motion to amend, alter or vary.

[40] In the interim, WFTL had issued subpoenas in the United States against multiple banks seeking disclosure of various records relating to Kea, the Corona Trust and Sir Owen. On 21 December 2022, the Kentucky Circuit Court denied a motion that these be quashed. It also denied in part a motion seeking a protective order staying post-judgment discovery pending the outcome of its appeals.[26] It indicated that

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22 Gault J noted that WFTL had suggested it would, in the context of the New Zealand proceedings apply for an order that the settlement offer not be read, but that it never did so. His Honour held that the fraud exception to settlement privilege applied and that there was a "prima facie" case of dishonesty: First Judgment, above n 2, at [45]

23 Kentucky set aside judgment, above n 5.

24 Kentucky MAAV judgment, above n 6.

25 The statement of claim also pleaded the tort of abuse of process of the Kentucky Circuit Court. That cause of action was ultimately not pursued. A third cause of action was subsequently added on 20 April 2023 seeking declarations that the Coal Agreement and a purported assignment and purported appointment of trustee and purported change of governing law of the WFT were of no legal effect.

26 *Wikeley Family Trustee Ltd v Kea Investments Ltd* Ky Cir Fayette 21-CI-02508, 21 December 2022.

responses were to be provided but with a protective order restricting sharing with Mr Watson, Mr Hussain and Mr Dickson.

[41] On 4 November 2022, Gault J issued an ex parte interim injunction preventing WFTL from bringing or pursuing any litigation or taking any steps to enforce or otherwise act on the Coal Agreement, the Kentucky Default Judgment or the statutory demand.[27] He did so on a basis initially expressed to expire on 11 November 2022 but subsequently extended by agreement pending determination of a jurisdictional challenge filed by Mr Wikeley.

[42] On 10 March 2023, Gault J set aside WFTL's and Mr Wikeley's protests to jurisdiction and dismissed their application to stay proceedings (the Jurisdiction Judgment).[28] The Jurisdiction Judgment was not appealed within the relevant time limit.[29] Nor was any statement of defence filed by the date the Court fixed for that purpose. As a result, Kea sought formal proof on its claims of lawful and unlawful means conspiracy, giving rise to the First Judgment, the subject of the present appeal.

[43] We will discuss in greater detail later in this judgment developments in the period March to April 2023, as they bear directly on Mr Wikeley's application to adduce further evidence on appeal. Suffice to say that having failed on his jurisdictional challenge, Mr Wikeley embarked upon a scheme to insulate WFTL from any New Zealand judgment by assigning the benefit of the Kentucky Default Judgment to a new United States entity, Wikeley Inc, and replacing the trustee of WFT with USA Asset

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27 Interim injunction judgment, above n 8.

28 *Kea Investments Ltd v Wikeley Family Trustee Ltd* [2023] NZHC 466 [Jurisdiction Judgment].

29 Mr Wikeley sought to appeal the Jurisdiction Judgment out of time. He applied unsuccessfully to the High Court for an extension of time, leave to appeal and interim relief: *Kea Investments Ltd v Wikeley Family Trustee Ltd (in interim liq)* [2023] NZHC 2407 [HC Jurisdiction Judgment leave decision]. He then applied unsuccessfully to this Court for leave to appeal: *Wikeley v Kea Investments Ltd* [2024] NZCA 58 [CA Jurisdiction Judgment leave decision].

Holdings Inc, all in breach of Gault J's interim orders. This in turn resulted in an application by Kea to appoint interim liquidators to WFTL which was successful.[30]

[44] From mid-April 2023 there were the following developments:

(a) On 17 April 2023, the interim liquidators filed a proceeding in the United States District Court for the Eastern District of Kentucky (the Federal Court proceeding) seeking, among other things, a declaration that the purported assignment of the Kentucky Default Judgment was void. They also applied for temporary restraining orders preventing Wikeley Inc and USA Asset Holdings Inc from continuing litigation in the Kentucky Circuit Court, enforcing the Kentucky Default Judgment and acting on the purported assignment.

(b) On 20 April 2023, the application for a temporary restraining order and preliminary injunction was denied. United States District Judge Van Tatenhove noted in that context:[31]

> The Plaintiffs cite cases to support the proposition that American courts may recognize orders issued in foreign insolvency proceedings … Courts likely may. … But no case cited by the Plaintiffs involves restricting or modifying state-court proceedings. This is precisely what the New Zealand court orders do here. In the American system, state and federal governments are separate sovereigns, and state power derives from a source independent of the federal government. To protect this separation, the law disfavors federal courts from enjoining state court proceedings or altering final state-court judgments. … Therefore, while the Court gives due regard to the decisions of the New Zealand courts,

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30 During the relevant period, Mr Wikekely was (and still is) living in Australia. On 12 April 2023, Kea applied in Australia ex parte for — and was granted — interim orders requiring Mr Wikeley to refrain from taking, or causing entities he controlled to take, steps to enforce the default judgment, to cause Wikeley Inc to withdraw or seek to adjourn the Kentucky proceeding and orders that he not leave Australia and deliver up his passports: *Kea Investments Ltd v Wikeley (No 1)* [2023] QSC 79, (2023) 14 QR 75 [Queensland SC first interim orders judgment]. Mr Wikeley applied, for the most part unsuccessfully, to set aside those orders: *Kea Investments Ltd v Wikeley (No 2)* [2023] QSC 215, (2023) 381 FLR 372 [Queensland SC second interim orders judgment]. Mr Wikeley's appeal against this decision was dismissed: *Wikeley v Kea Investments Ltd* [2024] QSC 201 [Queensland CA interim orders judgment]. This decision, delivered shortly before the completion of the current decision, was brought to our attention by Kea. Kea did not, however, seek to make submissions on it. Mr Wikeley filed a memorandum in reply. We address the Queensland judgments below at [192] and [193].

31 *Gibson v Wikeley Inc* 670 F Supp 3d 423 (ED Ky 2023) at 5 (citations omitted).

> granting such extraordinary relief would risk frustration of our federalism principles and place an undue burden on the Court.

(c) The Federal Court proceedings were ultimately the subject of voluntary dismissal on 16 May 2023.

(d) By joint memorandum dated 10 May 2023, Kea and the interim liquidators applied to the Kentucky Court of Appeals to stay Kea's appeal from the Kentucky Default Judgment. Kea noted in its application that its appellant brief had been filed on 16 March 2023 and that the "Appellee Brief" of WFTL was due 15 May 2023. It sought a stay of the deadline for WFTL to file its brief, of any decision of the merits of the appeal and any decision on the application filed by Wikeley Inc on 21 April 2023 for "substitution". The duration of the stay sought was "until the Bankruptcy Court enters an order on recognition in the Bankruptcy Action". This was a reference to a petition filed by the interim liquidators under the United States Bankruptcy Code for recognition of the New Zealand proceeding placing WFTL in interim liquidation.[32] That application was filed with the United States Bankruptcy Court.

(e) On 25 May 2023, following a hearing in which Wikeley Inc appeared, the Bankruptcy Court granted an order recognising the interim liquidation of WFTL as a "foreign main" proceeding under § 1517 and § 1520 of the Bankruptcy Code. This had the effect of imposing on WFTL the "automatic stay" that applies in (United States) domestic insolvencies.

(f) On 26 May 2023, the Kentucky Court of Appeals granted a 90-day stay and directed the parties to file a copy of any order of the Bankruptcy Court resolving the bankruptcy proceeding or that had the effect of lifting the automatic stay and, if no such order had been made within 90 days, to file a motion to continue the abatement period.

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[32] 11 USC § 1517.

(g) Further applications for stay of the Kentucky Court of Appeals proceeding were made on 22 August 2023, 21 November 2023 and 27 February 2024. In each case the request was granted with imposition of a further 90-day stay.

(h) On 5 March 2024, the interim liquidators filed an application with the Bankruptcy Court seeking a determination that the Kentucky Default Judgment was the property of WFTL by granting full force and effect to those parts of the First Judgment granting declarations that first, the purported assignment of the Coal Agreement and the Kentucky Default Judgment were void and secondly, the purported appointment of USA Asset Holdings Inc as trustee of the WFT and purported change in the governing law of the WFT were "invalid and of no effect".

(i) On 15 May 2024 that application was granted. In so doing the Bankruptcy Court noted:[33]

> Accepting the Assignments and related actions are void because they violate the New Zealand High Court Injunction is a reasonable and limited exercise of comity under Chapter 15 and United States law. Recognition that the Assignments are void unwinds Kenneth Wikeley's efforts to avoid the New Zealand High Court orders and puts the parties back in the position they were in before the Assignments were executed. This result does not cause harm to any party because the Foreign Representatives and the Foreign Debtor remain subject to the oversight of the New Zealand High Court and have the same obligations to the beneficiaries of the Wikeley Family Trust as Kenneth Wikeley had in his capacity as Director of the Foreign Debtor when the Default Judgment was obtained.

(j) On 30 May 2024 the Kentucky Court of Appeals held over, on its own motion, the appeal from the Kentucky Default Judgment for a further 90 days.

[45] The upshot therefore is that in the United States there is a Kentucky Default Judgment against Kea for in excess of USD 130 million which the New Zealand

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[33] *Re Wikeley Family Trustee Ltd (in liq) (foreign debtor)* Bankr ED Ky Lexington 23-50420, 15 May 2024 at 22–23.

High Court says cannot be enforced anywhere in the world because it is based on a forged document — the Coal Agreement, itself part of a wider fraudulent scheme. But the only finding of forgery is that itself made in the First Judgment, heard by formal proof, in which there was no primary evidence about the signing of the document by Kea.[34] This has set the stage for a forum battle in which issues of "international comity" loom large.

The First Judgment

The Judge's findings as to fraud

[46] The Judge found that the Coal Agreement was "not a valid agreement" and that it was a "forgery".[35]

[47] He referred to evidence filed by Mr Wikeley in the context of the jurisdiction argument, to the effect that the Coal Agreement was drafted by him personally in Kentucky, signed by him in New York, given to Mr Watson to arrange execution by Kea and returned to him signed.[36] He also referred to various emails between Mr Wikeley and Mr Watson about five potential coal projects.[37] But he said these fell well short of the feasibility studies referred to in the recitals to the Coal Agreement and that the defendants had not disclosed "a single document showing or evidencing any requests for drawdowns under the agreement, or any documents evidencing that it was entered into or performed (other than the [Coal Agreement] itself)".[38]

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34 Mr Wikeley says that he was reluctant to call such evidence for fear of submission to jurisdiction (which he unsuccessfully challenged). He also says that hearing of the formal proof application occurred with undue haste giving him inadequate time to "mount a proper defence" in circumstances where his previous lawyers had withdrawn for non-payment of accounts, and he was under pressure because of ancillary interim relief proceedings for contempt brought by Kea in Queensland where he was a resident (ultimately resulting in confiscation of his passport). We consider that the real reason is that he had, by the time a statement of defence was due (14 April 2023), decided to assign the Kentucky Default Judgment to Wikeley Inc and take the various associated actions previously referred to — all with the intention of rendering the ex parte anti-suit and anti-enforcement injunction nugatory. We will discuss this issue more fully in the context of his application to adduce further evidence.

35 First Judgment, above n 2, at [88] and [143].

36 At [91].

37 At [98(b)].

38 At [99(f)(iii)].

[48] He noted a number of features of the Coal Agreement which he described as "irregular on its face", including:[39]

(a) the date of 23 October 2012 beneath Mr Dickson's signature is typed whereas the dates beneath other signatures are handwritten;

(b) the first two pages of the three page document show a paper clip at the top of the page, whereas the third page did not; and

(c) the third page is numbered "2", whereas the first two pages are not numbered at all.[40]

[49] He described the document as "grossly imprudent to Kea and commercially non-sensical".[41] He relied on expert evidence of Kentucky lawyer Mr Donald Kelly that the agreement "bears no resemblance to the contract one would expect to see between sophisticated business parties relating to investments in coal projects" and that this "is particularly true for a contract obligating a party to invest many millions of dollars and to potentially pay hundreds of millions of dollars".[42]

[50] In addition to the irregularities on the face of the document, the Judge postulated six strong circumstantial reasons why he considered "the document is fake":[43]

(a) the absence of any demand, despite the fact that Kea had allegedly failed to provide funding on request and had never paid the annual royalty of USD 1.5 million ostensibly due to Mr Wikeley;

(b) the fact that Kea had no records of, or in any way related to the Coal Agreement, or any similar agreement, also noting that, in 2013, Mr Dickson was ordered to provide all of Kea's records to the Nevis Court and provided multiple agreements but nothing in relation to contracts relating to United States coal interests;

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39 At [93].
40 The Judge did not have before him the copies of the document which have surfaced in this appeal.
41 First Judgment, above n 2, at [95(a)].
42 At [96].
43 At [99].

(c) there was no mention of Kea's rights or liabilities under the Coal Agreement in any of its financial records;

(d) there was no reason for Mr Dickson to withhold a legitimate commercial agreement in the context of orders made against him and every reason to disclose it;

(e) although the agreement referred to extensive "due diligence" and a "feasibility study" there was no such reference in any of Kea's documents — the Judge holding that it was "beyond belief that not one document was handed over";[44] and

(f) neither Sir Owen nor any of Kea's current directors had any knowledge of the Coal Agreement or any demand made under it before receipt of the statutory demand based on WFTL's Kentucky Default Judgment.

[51] He concluded therefore that "Mr Wikeley's affidavit in relation to the Coal Agreement is unreliable".[45]

[52] The Judge then went on to note that a separate forged document ostensibly signed by Mr Dickson, had emerged in the context of litigation by and against Kea in London in 2022, and highlighted attempts, after entry of the Kentucky Default Judgment, to "hijack Kea and substitute the Kentucky Default Judgment with a settlement".[46] He attributed these attempts to a joint conspiracy of Mr Wikeley, Mr Watson and Mr Hussain, who he said Mr Watson "likely met in prison".[47]

[53] He considered his conclusion that the claimed loss under the Coal Agreement was never genuinely incurred to be fortified by Mr Wikeley's conduct after the Court dismissed his protest to jurisdiction. He noted Mr Wikeley's failure to file a statement of defence, his breach of the Court's interim orders, WFTL's assignment of the

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44 At [99(e)].
45 At [101].
46 At [104] and [105].
47 At [105]. The Judge acknowledged that the evidence of their respective prison records was hearsay. However, he regarded the evidence as "nevertheless admissible under s 18(1) of the Evidence Act 2006", although he gave it "limited weight": at [105], n 54.

Coal Agreement and Kentucky Default Judgment and the incorporation of Wikeley Inc and USA Asset Holdings Inc as vehicles to facilitate his objectives.[48]

[54] He concluded that:

> [110] Taking all these facts together, I consider the Coal Agreement was not validly executed in 2012. The document was more likely created by or for Mr Wikeley much later — before the Kentucky proceedings were commenced in August 2021. If Mr Watson signed it, he would also have known it was not a valid agreement.

[55] However, he went on to find that, even if the Coal Agreement had been signed by Mr Dickson in 2012, he would have accepted Kea's alternative submission that it was liable to be set aside for fraud or breach of fiduciary duty:

> [111] … on the basis that Mr Dickson, Mr Wikeley and Mr Watson all knew that Mr Dickson signed without authority and in breach of his duties to Kea. Given its nature and terms as discussed above, Mr Dickson would have known that signing it was not in Kea's best interests and was inconsistent with his duties as a director under BVI's Business Companies Act 2004. Mr Wikeley and Mr Watson, as experienced businessmen, would have been aware that Mr Dickson could not have executed it without breaching his duties to Kea.

[56] The Judge said that he was satisfied Mr Wikeley, "combined with WFTL and Mr Watson to procure the Kentucky Default Judgment, and they also combined with Mr Hussain, and more recently with Wikeley Inc and USA Asset Holdings Inc, to defend the Kentucky Default Judgment or otherwise harm Kea".[49] He concluded that:

> [116] The use of the fraudulent Coal Agreement, the fraudulent claim under it, the subsequent fraudulent steps taken through Mr Hussain, and Mr Wikeley's breach of the Court's interim orders all amount to unlawful means and must have been intended to injure Kea by obtaining financial advantages at Kea's expense.

The relief granted

[57] The Judge then turned to relief. He considered the legal costs incurred by Kea to be recoverable damages in the context of the unlawful means conspiracy and that declarations were appropriate in the following terms:[50]

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48 At [107].
49 At [114].
50 At [122], [151] and [156(b) and (c)].

(a) the Kentucky Default Judgment was obtained by fraud;

(b) the Kentucky Default Judgment was not entitled to recognition or enforcement in New Zealand;

(c) WFTL, Mr Wikeley, Wikeley Inc and USA Assets Holdings Ltd were privies of each other in respect of the impugned transactions that were the subject of the proceeding;

(d) the Coal Agreement and the purported assignments of it and the Kentucky Default Judgment were void, could not lawfully be performed and conferred no rights on Wikeley Inc; and

(e) the purported appointment of USA Asset Holdings Inc as trustee of WFTL and purported change in the governing law of WFTL were invalid and of no effect.

[58] He also granted Kea permanent anti-suit and anti-enforcement injunctions, awarded Kea costs and interest under the Interest on Money Claims Act 2016 and made two ancillary orders.[51]

The Second Judgment

[59] On 5 December 2023 Gault J issued the Second Judgment.[52] He did so based on the reservation of leave contained in [156(a)(v)] of the First Judgment, which Kea had invoked on a without notice basis to seek orders that:

> (a) until 28 days after the date on which the [Kentucky Default Judgment] … is discharged the defendants shall not take any steps, and shall not cause or permit any other person, to:
>
> (i) appoint an additional or replacement trustee of the Wikeley Family Trust or otherwise exercise a power of appointment in respect of that Trust;
>
> (ii) change the proper law of that Trust.

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51 At [156(a), (d), (e) and (f)]. The ancillary orders were to grant leave under r 15.11 of the High Court Rules to seal judgment by default and to make a sealing order in relation to certain confidential evidence.

52 Second Judgment, above n 3.

(b) the orders made in (a) above are in addition and without prejudice to the sealed orders dated 17 November which remain in effect; …

[60] His Honour considered the orders appropriately granted and they were sealed the same day.

Set aside application

[61] Mr Wikeley applied on 8 December 2023 under r 15.10 of the High Court Rules 2016 to set aside the First and Second Judgments. He filed the notice of appeal which led to this appeal on the same day. Gault J declined the application to set aside on 20 May 2024, in part because the grounds raised were points to be advanced on appeal.[53] Mr Wikeley attempted to appeal against Gault J's decision to this Court, but the appeal was struck out for want of jurisdiction.[54]

Applications to amend notice of appeal and admit further evidence

Introduction

[62] Mr Wikeley makes an application to amend the notice of appeal. The original notice of appeal, filed when Mr Wikeley was still represented, focused on the forum conveniens, comity and evidence admissibility issues. Mr Wikeley now wishes to challenge the High Court's findings that the Coal Agreement and the claims under it are fraudulent as well.

[63] Both Mr Wikeley and Kea also make applications for leave to adduce additional evidence. Mr Wikeley seeks to adduce six affidavits which he says "prove the Coal Agreement was always real". Kea's application is essentially in two parts, seeking to adduce evidence:

(a) relevant to whether Mr Wikeley's applications should be granted; and

(b) in response to Mr Wikeley's evidence, should his applications be successful.

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53 *Kea Investments Ltd v Wikeley Family Trustee Ltd (in interim liq)* [2024] NZHC 1251 [HC set aside judgment] at [35].

54 *Wikeley v Kea Investments Ltd* [2024] NZCA 574.

[64] The former comprises evidence already admitted by Gault J in relation to the application by Mr Wikeley to set aside the First and Second Judgments,[55] in particular, WhatsApp communications between Mr Wikeley, Mr Andre Regard (a lawyer acting for WFTL in the Kentucky proceedings) and a Mr Michael Coleman, all within a date range of 22 March 2023 to 2 April 2023.

[65] In a judgment dated 13 February 2024, Gault J disallowed a privilege claim in respect of the WhatsApp messages, noting however that if Kea sought to adduce them in opposition to the application to set aside it would require leave on the usual grounds.[56] That leave was granted in the judgment declining Mr Wikeley's set aside application.[57]

[66] The same evidence was admitted by this Court in the context of Mr Wikeley's unsuccessful application for leave to appeal the Jurisdiction Judgment.[58] We will come back to this evidence shortly.

Key dates

[67] We start however by identifying the key dates and developments relevant to our assessment of Mr Wikeley's application.

(a) 10 March 2023 — the High Court issues the Jurisdiction Judgment, holding that it has jurisdiction over the substantive proceedings on the grounds that it was the appropriate forum for determination of Kea's claims.[59]

(b) 17 March 2023 — Wilson Harle (Mr Wikeley's solicitors to that point), advise the High Court of Mr Wikeley's intention to seek leave to appeal the Jurisdiction Judgment and that new solicitors and counsel would be appointed for that purpose.

(c) 28/29 March 2023 — Wikeley Inc is incorporated in the United States.

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55 HC set aside judgment, above n 53, at [24]–[30].
56 *Kea Investments Ltd v Wikeley Family Trustee Ltd (in interim liq)* [2024] NZHC 163 at [45] and [46].
57 HC set aside judgment, above n 53, at [26]–[27].
58 CA Jurisdiction Judgment leave decision, above n 29.
59 Jurisdiction Judgment, above n 28, at [88].

(d) 30/31 March 2023 — WFTL purportedly assigns the Coal Agreement and benefit of its Kentucky Default Judgment to Wikeley Inc.

(e) 3 April 2023 — Wilson Harle file an application with the New Zealand High Court declaring that Mr Browne, a partner of that firm, has ceased to act.

(f) 4/5 April 2023 — Wikeley Inc applies to the Kentucky Circuit Court for orders that it be substituted as the judgment creditor based on the purported assignment dated 30 March 2023.

(g) 6 April 2023 — Kea applies ex parte to the High Court for appointment of interim liquidators to WFTL based on the purported assignment. Interim liquidators are appointed the same day.

(h) 11 April 2023 — no appeal is filed by the due date for the filing of any appeal from the Jurisdiction Judgment dated 10 March 2023.

(i) 11/12 April 2023 — Mr Wikeley appoints USA Asset Holdings Inc (a company incorporated the same day) as trustee of the WFT and changes the governing law of the trust from that of New Zealand to that of Kentucky.

(j) 14 April 2023 — no statement of defence is filed by the due date for filing of any statement of defence in the New Zealand substantive proceeding.

(k) 17 April 2023 — Kea advises that it wishes to proceed by way of formal proof and Wilson Harle is granted leave to withdraw.

(l) 20 April 2023 — Kea files second amended statement of claim naming as defendants Wikeley Inc and USA Asset Holdings Inc.

(m) 21 April 2023 — the High Court allocates a formal proof hearing date of 17 May 2023.

(n) 17 May 2023 — the formal proof hearing occurs.

(o) 1 June 2023 — Mr Dowd of Dowd Wilson, Solicitors, Brisbane files a memorandum recording Mr Wikeley's intention to bring an application to file a defence and evidence in the proceedings and to defend them generally.

Kea's application to adduce the WhatsApp messages

[68] The WhatsApp messages clearly demonstrate Mr Wikeley's strategy in the latter part of March and early-April 2023. They belie his subsequent suggestion that failure to bring a timely appeal from the Jurisdiction Judgment (which would have had the inevitable effect of staying the substantive proceedings pending determination) or failing to file a timely statement of defence was related to an absence of legal representation over the relevant period. Rather, Mr Wikeley made a calculated decision effectively to render the decisions of the High Court otiose by transferring the benefit of the Kentucky Default Judgment to a new United States entity.

[69] As he said in his message of 23 March 2023:

> Our initial gut feeling was correct. Go contempt of court. Shift the Judgement [sic] and NZ goes to Hell …
>
> Anyway like the Ukranians [sic] we are about to Counter Attack these Bullies and watch them squirm!

[70] To similar effect Mr Wikeley asked on 28 March 2023:

> Should WFTL as [sic] change the jurisdiction of the WFT to KY USA?
>
> Then when we inform USA courts and Kea we can clearly say WFT has NO assets and NO New Zealand Jurisdiction?
>
> Basically goodbye!!
>
> …
>
> Lets move guys i done my part we need final Docs please

[71] Then on 2 April 2023 he messaged:

> Whatever happens above surely WFTL needs to be removed as the Trustee completely urgently this week? Then it's got nothing just a shell?
>
> I can make the NEW trustee of WFT my son Oliver Wikeley using his company in Vanuatu ?
>
> Or a NEWCO in USA if helps ?

[72] Later the same day he said:

> Yes its against a Court Order ,but nothing they can do about it legally ? Michael [Coleman] you say its Legal 100% just naughty. I assume KY judge might need understand this? I assume its like having a court injunction against a GOLD BAR . If WFTL allows gold bar to leave NZ to Wikeley Inc the reality is its gone ? …

[73] As this Court likewise did in its decision declining leave to appeal the Jurisdiction Judgment,[60] we consider this evidence to be:

(a) Fresh — Kea was not aware of the WhatsApp messages until they were published in the United States Federal Courts Public Access to Court Electronic Records system. Kea acted expeditiously to address possible privilege issues and made a timely application to adduce the evidence in the context of this appeal and Mr Wikeley's associated application for leave to adduce further evidence.

(b) Credible — Mr Wikeley has not challenged the authenticity of the messages.

(c) Cogent — they are plainly relevant to the question of why Mr Wikeley failed to bring a timely appeal against the Jurisdiction Judgment, failed to file a timely statement of defence, failed to seek leave to adduce evidence in the context of the formal proof application and failed to oppose that application. They are also relevant generally to the question of whether this Court should now grant leave to adduce additional

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[60] CA Jurisdiction Judgment leave decision, above n 29, at [29]; Court of Appeal (Civil) Rules 2005, r 45; *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA); *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA); and *Lawyers for Climate Change Action NZ Inc v Climate Change Commission* [2023] NZCA 443.

evidence from Mr Wikeley, which as Mr Wikeley acknowledges, is not fresh in the accepted sense.

[74] We therefore grant leave to Kea to adduce the affidavit of Mr Toby Graham dated 10 January 2024 to which the WhatsApp messages are annexed.

Mr Wikeley's applications

[75] We return then to Mr Wikeley's applications to amend the notice appeal and to adduce further evidence. We summarise briefly the evidence he seeks to adduce.

[76] In three affidavits signed by him,[61] Mr Wikeley deposes to drafting the Coal Agreement in the business centre of a Hilton Hotel in Lexington, Kentucky, where he lived between 2012 and 2015. He says he did so in approximately September 2012, that before doing so he had spoken with Mr Watson about "some coal deals that I was looking at putting together" and that Mr Watson informed him that he wanted to be part of the deals. He said Mr Watson told him he was going to Paris to meet with Peter Dickson of Kea around 23 October 2012.

[77] He says he signed the Coal Agreement in September 2012 but did not date it and that he typed the date 23 October 2012 under the signature line for Mr Dickson because that was the date he was told Mr Watson was going to be in Paris. He says that he met with Mr Watson at his New York Bendon Ltd office on 26 September 2012 but cannot recall whether he signed the agreement before giving it to Mr Watson or if Mr Watson witnessed him signing it. He says that a subsequent hard copy of the agreement was sent to him at the Hilton Hotel in Lexington by courier or post, which "may have been the original signed document, but [he] cannot recall". He says he put the Coal Agreement in a folder in his apartment in the hotel.

[78] In the course of returning to the United States from Switzerland in November 2015, he says that he was detained at the border, told that he was banned from using his ESTA visa for two years and instructed that he would need to obtain a business visa on his next entry into the country. He left the United States in

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[61] Affirmed on 17 April, 3 and 7 May 2024. The affidavit of 7 May essentially duplicates that of 17 April (which was originally filed in the context of the Queensland proceedings).

December 2015 expecting to obtain a business visa but was unsuccessful in doing so. He then contacted his cleaner to collect his belongings from the Hilton Hotel but was told that the landlord had thrown these out, including his filing cabinet containing the Coal Agreement.

[79] Six years later he says he "reached out to Mr Watson" to obtain a copy of the Coal Agreement. He says: "I recall that he had a falling out with Kea. I thought the Coal Agreement might have some teeth and I would be able to enforce the Coal Agreement against Kea." He says that Mr Watson arranged for Mr Mark Winters, who was based in the United Kingdom and was holding Mr Watson's New Zealand files, to search for and send him a copy of the Coal Agreement.

[80] He denies any conspiracy with Mr Watson or with Mr Hussain. He surmises that the Coal Agreement was not important to Mr Dickson "as it was like a Heads of Agreement". He says:

> I am just guessing, but I can imagine at a dinner with drinks in Paris, Eric Watson just told Peter Dickson to sign it, and he would report back when coal deals were ready.

[81] He says that it is:

> … absurd … that somehow [the claim under the Coal Agreement] was all dreamed up by Eric Watson as puppet master and I am just a puppet. This is mere speculation with no merit or evidence whatsoever. I believe this all stems back to Kea and Eric Watson and Owen Glenn despising one another and trying to drag me into it.

[82] Mr Winters deposes in his affidavit dated 7 May 2024, that he was retained by Mr Watson to assist with litigation in which Mr Watson was involved approximately four years ago. He says that he recalls Mr Watson telling him that one of his previous business contacts, "Mr Ken Wikeley wanted a copy of a historic agreement" and that his best recollection of the request is that it occurred in February 2021.

[83] He says that in the course of assistance earlier provided to Mr Watson, Mr Watson had approved delivery to him of three archived boxes from New Zealand. He says that with the assistance of Mr Paul Read, a former chief inspector of the National Crime Agency in the United Kingdom, he conducted a review of the documents

in the boxes and located an agreement matching the description of the agreement that Mr Wikeley was looking for. He deposes that he subsequently sent a copy of the agreement to Mr Wikeley via a messaging service.[62] He says that he recalled Mr Wikeley requesting a further copy some weeks later and "I sent him a phone scanned copy rather than [a] photograph of the document via email". He annexes a copy of the document sent. This copy shows paper clips on pages one and two, and on the third page (on which Mr Dickson's signature appears above a typed date of 23 October 2012), shading at the top left corner. The third page also has, beneath the witness signature line,[63] the page reference "2".

[84] He says that after he took a photo and scan of the agreement, the document was placed in an evidence bag which was sealed and dated 27 April 2021. He says that he understands that this evidence bag was subsequently sent to Mr Regard, Mr Wikeley's counsel in the United States, by the partner in Gunnercooke LLP who had assumed responsibility for Mr Watson's affairs. He says that before this occurred Mr Read took some photos of the agreement and the boxes and "sent the same to me". He annexes a copy of these photos and says that "the document in the photos is the document that was sent to Mr Regard as stated". That does not however appear to be the case, as this second copy of the document annexed by him does not have paper clips showing on pages one and two, does have a paper clip showing on page three, has no shading at the top left corner of page three and does not have the page "2" reference on page three (all as per the document which Mr Winters says he took a "phone scanned" copy of and then placed in the evidence bag).

[85] Mr Regard deposes that on 17 May 2021 a local Lexington attorney referred a potential instruction to him with a copy of a document headed "Coal Funding and JV Investment Agreement" and dated 23 October 2012.[64] He annexes that document as his first exhibit. That copy has paper clips visible on pages one and two, shading across the top left corner of page three, no paperclip on page three and carries the page reference "2" on page three.

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62 Which Mr Winters describes as "self-deleting so I do not have a copy".
63 Completed with the signature of Mr Watson, with a handwritten date of 23 October 2012.
64 In his affidavit of 6 May 2024.

[86] He further deposes that during due diligence, and prior to filing the Kentucky complaint, he was informed that Mr Winters was in possession of an original copy, which he describes as "a copy of a document, but not the original signed version". He says that on 9 February 2024 he received that document from an attorney at Gunnercooke LLP in London. He annexes a copy of the document received which has no paperclips showing on pages one, two or three and carries the page reference "2" on page three.

[87] He then deposes to his various due diligence inquiries prior to filing of the complaint, service of the complaint in BVI, subsequent efforts by Kea to set aside the judgment and what he describes as a "[s]trange attempt to settle [the] litigation" involving receipt of an email on 7 August 2022 from a person purporting to be Mr David Tabet. The email stated that Kea had "fired its lawyers and had been taken over by another set of directors and offered settlement to resolve this matter". He says that he advised Kea's United States attorney Mr Harnice that he had received the correspondence and asked for confirmation that Mr Harnice's retainer had been terminated. He says that Mr Harnice responded that he was unaware of the development. He says that he did not hear further from Mr Harnice so advised Mr Tabet that his client accepted the settlement offer. He then proceeded to draft a settlement agreement. He says that the settlement payment was never made but that on 14 August, he received an email from a "Godfrey Hicks" of "FVS" asserting a USD 483 million secured debt against Kea. He says he asked FVS for verification and that he forwarded a copy of the FVS correspondence to Mr Harnice on 24 August 2022. He says that on 20 August 2022 he was informed by FVS that Kea had sued him personally in England for USD 251 million.

[88] He says "[m]ysteriously, after the [sic] Kea's Motion to Alter, Amend or Vacate was denied", the proceeding against him was withdrawn. He says that he generally viewed the English proceedings as "bizarre" and against the interest of his client, postulating that there was no reason to file litigation elsewhere because the assets of Kea were not in the United Kingdom so litigation in London made no sense. He says that he has "always suspected that the litigation in England and the correspondence from Tabet and Hicks was created by Kea to muddle the issues and create some sort of great conspiracy".

[89] In his affidavit dated 8 May 2024, Mr Watson rejects Kea's allegations that he was part of an international conspiracy to defraud it. He says that he has been shown a copy of the Coal Agreement (annexing a copy obviously used in legal proceedings and with notarial stamps but which started life as the version with paper clips on pages one and two, no paper clip on page three, shading at the top of the left corner of page three and the page reference "2" on page three).

[90] He confirms his signature as witness to the signatures of Mr Wikeley and Mr Dickson. He says he first saw the agreement about a month before Mr Dickson signed it in October 2012, that his best recollection is it was handed to him at the offices of Bendon Ltd in New York — Bendon being owned by Cullen Investments Ltd (Cullen), a company of which he was the executive chairman, and which managed or owned a portfolio of a dozen different companies with total gross assets of over USD 200 million. He says that he does not now have a "positive recollection of whether I witnessed Mr Wikeley signing the agreement".

[91] By way of background to the agreement, he says that Mr Wikeley was promoting opportunities in the coal market and looking for capital commitments to do coal deals primarily in Kentucky and that Cullen and Kea were "interested in monitoring Mr Wikeley's deal pipeline and effectively having non-binding options on deals that might be attractive to us or other potential investors, and that would also trade well in public vehicles". Significantly, he says:

> 11. I was trying to keep Mr Wikeley motivated by having him continue to look for deals. Mr Wikeley wanted some assurance that if he put in the work to find a deal, then we would put in the funding. He also wanted a document that he could show to prospective acquisition targets and partners that showed he had sufficient capital backing to secure deals. In my mind the Coal Agreement was more of a non-binding heads of agreement that delivered optionality. I assured Mr Wikeley that via Cullen, Kea or other investors, capital could be provided if everything lined up. If a compelling deal was presented, then we would reverse the deal into a publicly-listed company.
>
> 12. For over 20 years I and my companies have completed many similar deals with Mr Wikeley and his associates. I estimate that those deals have totalled in excess of US$20m in value and generated market capitalisations of over US$100m. The deals included Advantage Group, Strathmore Ltd, Aquaria 21 Ltd, Canbet Ltd, Plus SMS and others.

> 13. The business model between my companies and Mr Wikeley was similar for each of the deals. Generally, in the first instance, a basic non-binding agreement was reached, either verbally or in an informal contract that was effectively an agreement to work towards packaging a deal that was suitable for an IPO or a reverse merger. Long-form legally binding agreements were not entered into until the acquisition was locked in (primarily driven by Mr Wikeley) and the funding and listing structure was arranged (primarily driven by Cullen).
>
> 14. I recall that Mr Dickson and I discussed the Coal Agreement several times by telephone before I came to Paris. Mr Dickson understood that this was a way of locking in a potential deal flow. By Kea and later Spartan, (the ultimate funding vehicle for investments by Kea and entities associated with me) having "show money", Mr Wikeley would be motivated to continue to work to find potentially lucrative opportunities.

[92] He then deposes to traveling to Paris in late October 2012 to meet with Kea's representative Mr Dickson. He says the primary purpose of the meeting was to finalise funding of approximately £130 million for Spartan — a deal that was ultimately finalised at the Paris meeting and closed shortly after. He says that based on passport entries, he took the Eurostar on 22 and 24 October 2012 and that he recalls himself and Mr Dickson staying at a hotel in Paris for "a couple of nights". He says that Mr Dickson was the director of Kea, that he had known him for approximately a year at that point and that he was looking for investments for Kea to make.

[93] He says he cannot recall the precise time or date that Mr Dickson signed the Coal Agreement but that he did so "over the two-night period that [they] were in Paris together". He says that he is confident that he was there when Mr Dickson signed it. He says that he understands the legal effect of the document is a matter for the courts but confirms that "Mr Dickson willingly signed the agreement on behalf of Kea".

The test for admission of Mr Wikeley's proposed additional evidence on appeal

[94] The conventional test for the admission of evidence on appeal is that it must be fresh, credible and cogent.[65] Evidence is not regarded as fresh if it could with reasonable

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[65] *Rae v International Insurance Brokers (Nelson Marlborough) Ltd*, above n 60; *Paper Reclaim Ltd v Aotearoa International Ltd*, above n 60; and *Lawyers for Climate Change Action NZ Inc v Climate Change Commission*, above n 60.

diligence have been produced at the trial. None of the evidence referred to above is in this category.[66]

[95] While the absence of freshness is not an absolute disqualification, this Court has previously held that:[67]

> … the criteria for admission in such circumstances must be very strict. In our view, when the evidence is not fresh it should not be admitted unless the circumstances are exceptional and the grounds compelling. In addition, it will need to pass the tests of credibility and cogency.

Discussion

[96] We do not regard the circumstances of Mr Wikeley's application as sufficiently exceptional or the grounds sufficiently compelling to admit the evidence. Nor is it appropriate to grant the application to amend the notice of appeal. To the contrary, Mr Wikeley made a calculated decision not to bring a timely appeal against the Jurisdiction Judgment, not to serve a defence and to withdraw entirely from the New Zealand proceedings having breached the High Court's interim orders. The breach was calculated to circumvent any order the New Zealand Court may make in the substantive proceedings. There was a deliberate decision not to defend on the merits nor advance the evidence on which reliance is now placed. We regard that as an inappropriate basis on which to now suggest the evidence should be admitted and the scope of the appeal widened.

[97] Moreover, even assuming for present purposes that the evidence is credible, it is, in our view, far from cogent in establishing that the Coal Agreement gave rise to binding obligations on the part of Kea. Although in the decision under appeal the Judge found that the Coal Agreement was a "forgery" he also accepted Kea's alternative submission that even if the Coal Agreement had been signed by Mr Dickson in 2012, it was nevertheless liable to be set aside for fraud or breach of fiduciary duty.[68] Mr Wikeley's and Mr Watson's proposed evidence fortifies the conclusion that, whether signed by Mr Dickson or not, the pursuit of claims under the agreement is appropriately

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66 Mr Wikeley does make brief reference in his affidavits to some events after the formal proof hearing, but they are not germane to any issue we are required to decide.

67 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd*, above n 60, at 193.

68 First Judgment, above n 2, at [111] and [143].

described as fraudulent. New Zealand courts have long followed *Abouloff v Oppenheimer* when considering the enforcement of foreign judgments alleged to have been obtained by fraud.[69] Under *Abouloff*, the party resisting enforcement must show that the judgment was obtained by intentional dishonesty.

[98] The proposed evidence demonstrates that, after nine years during which no demand of any sort had been made by Mr Wikeley under the Coal Agreement, he thought it "might have some teeth" while otherwise recognising that it would not have been important to Mr Dickson "as it was like a Heads of Agreement".[70] Likewise, Mr Watson's proposed evidence is that it was "more of a non-binding heads of agreement that delivered optionality" and something which Mr Wikeley would be able to use as "show money" as he worked "to find potentially lucrative opportunities" which, if sufficiently compelling, could then be reversed into publicly listed companies.

[99] A non-binding heads of agreement cannot give rise to legally enforceable obligations, and it is, in a legal sense, fraudulent to obtain a judgment based on an "agreement" that the plaintiff knows to have that character. The proposed evidence cannot therefore advance Mr Wikeley's defence against Kea's claims and accordingly fails the cogency test.[71]

[100] We therefore decline Mr Wikeley's applications to amend the notice of appeal and adduce further evidence.

Kea's applications to admit further evidence

[101] We have already indicated that the affidavit of Mr Graham dated 10 January 2024 exhibiting the WhatsApp messages is appropriately admitted.

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69 *Johnson v Johnson* [2017] NZCA 147, [2017] 3 NZLR 435 at [44], citing *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295 (CA).

70 In oral argument Mr Wikeley likewise described the Coal Agreement: "It's a heads of agreement. I have probably done 20 or more of these exactly the same type of heads of agreement, probably made the same types of spelling mistakes."

71 The corollary is, of course, that if, contrary to our view, the evidence was appropriately admitted on appeal, it would simply have reinforced the Judge's findings of fraud.

[102] Mr Graham's second affidavit dated 1 May 2024 is in response to the affidavit of Mr Winters which we have not admitted. In turn, we do not admit the response which is cogent only in the context of Mr Winters' proposed evidence.

[103] In respect of the affidavit of Queensland solicitor Mr Matthew Deighton dated 2 May 2024, admission is sought on a basis irrespective of the result on Mr Wikeley's parallel applications. Mr Deighton's evidence provides a summary of the course of events in Queensland where enforcement action was taken against Mr Wikeley under the Trans-Tasman Proceedings Act 2010 consequent upon his breach of the interim injunction preventing appointment of a replacement trustee to WFTL. Kea says that the evidence is:

(a) fresh, in that it responds to the evidence for which Mr Wikeley seeks leave to adduce, postdates the judgments under appeal and concerns events subsequent to the judgments under appeal;

(b) credible, in that it is given by a solicitor; and

(c) cogent, in that it enables Kea to respond to Mr Wikeley's evidence and to explain why the outcome of the New Zealand proceedings is relevant to the proceedings in Australia.

[104] Having declined Mr Wikeley's applications, we do not consider there to be anything sufficiently cogent in Mr Deighton's affidavit to warrant admission. The affidavit is largely responsive to Mr Wikeley's evidence, and, in any event, we consider developments in Australia essentially peripheral to the issues we are required to decide.

Affidavits of interim liquidators

[105] The interim liquidators abide the decision of this Court and did not appear at the hearing. They did however file a memorandum and an affidavit dated 3 May 2024 from Ms Natalie Burrett, who is one of the two interim liquidators. A second affidavit from Ms Burrett dated 17 May 2024 was filed in response to this Court's minute inviting further submissions on events in the Kentucky and US Federal Courts. The affidavits

update this Court in respect of applications by the interim liquidators to obtain recognition in the Bankruptcy Court and for orders from the United States Federal District Court declaring the alleged transfer of the Kentucky Default Judgment to Wikeley Inc to be void and of no effect. The application in the Bankruptcy Court was successful and the District Court proceeding was as a result made otiose and accordingly the interim liquidators applied for voluntary dismissal, as indicated above at [44(c)].[72]

[106] We admit the affidavits on standard updating principles. To the extent the affidavit dated 3 May 2024 responds (at [16]) to a written submission by Mr Wikeley that the interim liquidators have acted "dishonestly" and have been "conspiring together to try and fool a Bankruptcy Judge in Kentucky" (denied by the interim liquidators), we allow admission but note that neither the allegation nor the denial feature in our analysis of the issues.[73]

Mr Wikeley's admissibility challenges

[107] Mr Wikeley brings 44 challenges to the admissibility of evidence before Gault J. The challenges relate to evidence on four topics: the litigation on Project Spartan (Spartan litigation); the relationship between Mr Wikeley and Mr Watson; Mr Hussain and his connection to Mr Watson; and Mr Wikeley's credibility. We see merit in 16 of the challenges but do not consider any of them materially alter the conclusion to which the Judge could properly come.[74]

[108] The challenges are variously based on s 50 of the Evidence Act 2006 and claims that evidence was hearsay, opinion or irrelevant. We begin by setting out the approach to s 50, starting with the relevant statutory provision:

> **50 Civil judgment as evidence in civil or criminal proceedings**
>
> (1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove

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72 *Re Wikeley Family Trustee Ltd (in liq) (foreign debtor)*, above n 33.

73 The interim liquidators and Mr Wikeley subsequently filed various memoranda regarding allegations made by Mr Wikeley that the liquidators were in breach of their fiduciary obligations and colluding with Kea. We do not address these allegations except to note we see no merit in them.

74 The challenges were dealt with only briefly in the submissions, but set out in full detail in a table. The figures of 44 total and 16 successful challenges were taken from that table. For convenience, we deal with the challenges in groups, but outline the relevant evidence when we consider a particular challenge has merit.

> the existence of a fact that was in issue in the proceeding in which the judgment was given.
>
> (1A) Evidence of a decision or a finding of fact by a tribunal is not admissible in any proceeding to prove the existence of a fact that was in issue in the matter before the tribunal.
>
> (2) This section does not affect the operation of—
>
> (a) a judgment *in rem*; or
>
> (b) the law relating to *res judicata* or issue estoppel; or
>
> (c) the law relating to an action on, or the enforcement of, a judgment.

[109] Section 50 codifies the common law in respect of the admissibility of a judgment or finding of fact in a civil proceeding.[75] An issue of fact in one civil action is seldom the same as an issue of fact in a separate civil action involving different parties.[76] Where issues of fact in separate civil actions *do* overlap, the accuracy of the fact proved in the earlier proceedings must be independently established in the later proceeding.[77]

[110] In *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal*, Brewer J stated:[78]

> Put simply, if a court or tribunal has an independent obligation to determine whether alleged facts are proved or not, it cannot discharge that obligation by accepting without inquiry the findings of another court or tribunal as to the existence of those facts. To do that would be to abdicate its responsibility to determine the facts for itself.

[111] However, as Associate Judge Sussock noted in *Pacific Auto Carrier (NZ) Ltd v Jacanna Holdings Ltd*:[79]

> [13] … s 50 does not prevent reliance on judgments where they are not offered to prove the existence of a fact that was in issue in the earlier judgment, assuming the judgment is relevant under s 7 of the Evidence Act and not

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75 *Attorney-General v Siemer* [2024] NZCA 435, referring to *Hollington v F Hewthorn and Co Ltd* [1943] KB 587 (CA), the case from which the common law rule (the rule in *Hollington v Hewthorn*) developed.

76 *Attorney-General v Siemer*, above n 75, at [30], citing Torts and General Law Reform Committee of New Zealand *The Rule in Hollington v Hewthorn* (July 1972) and Law Reform Committee *Fifteenth Report: The rule of Hollington v Hewthorn* (Her Majesty's Stationery Office, Cmnd 3391, September 1967) at [6].

77 *Attorney-General v Siemer*, above n 75, at [41], citing *APN New Zealand v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315.

78 *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal* HC Auckland CIV-2009-404-7381, 11 May 2011 at [21] (footnote omitted).

79 *Pacific Auto Carrier (NZ) Ltd v Jacanna Holdings Ltd* [2023] NZHC 3058, citing *Kidd v Worldwide Leisure Ltd* [2014] NZHC 1351 at [20].

> excluded under s 8. For example in *Kidd v Worldwide Leisure Ltd*, the High Court held that a previous Court's findings of fact in an overseas proceeding were admissible for the limited purpose of assisting the High Court to find a reasonably arguable case in a proceeding to sustain a caveat. The Court reasoned that the fact something had been proved in the defended hearing overseas gave grounds for believing that the same findings of fact may be made in the similar New Zealand proceeding.

[112] Her Honour emphasised that the key question is whether reliance on a particular aspect of a previous judgment *offends* s 50 of the Evidence Act, noting a distinction between seeking to use a finding of fact to prove the existence of facts in a proceeding and seeking to use a finding of fact to show the way that issues have been subject to previous litigation.[80]

[113] Notably, the section does not affect the operation of the law relating to res judicata or issue estoppel,[81] with the result that findings in foreign litigation involving the same parties may be admissible to prove the existence of a fact that was in issue in the proceeding in which the former judgment was given.

Spartan litigation

[114] Mr Wikeley's first challenge is that evidence of the Spartan litigation, discussed above at [15]–[21], is inadmissible against him under s 50 because he was not party to that litigation, unlike Mr Watson. Specifically, he challenges the admissibility of the Spartan Judgment and references to it and other parts of the Spartan litigation in the affidavits of Mr Graham dated 30 October 2022 and Sir Owen dated 12 May 2023. Gault J noted that Kea may prove relevant elements of its claims against Mr Watson by reference to findings made in judgments in the Spartan litigation.[82] Mr Wikeley submits that Gault J nevertheless erred by using findings about Mr Watson from judgments in the Spartan litigation against both him and Mr Watson rather than just Mr Watson.

[115] As discussed above, there is a distinction between using findings of fact from an earlier judgment to prove facts in another proceeding and using an earlier judgment to

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80 *Pacific Auto Carrier (NZ) Ltd v Jacanna Holdings Ltd*, above n 79, at [14], citing *Puka v Attorney-General* [2023] NZHC 2686 at [129].

81 Evidence Act, s 50(2)(b).

82 First Judgment, above n 2, at [76], n 43, citing Evidence Act, s 50(2).

show the background to the proceeding.[83] The Spartan Judgment and the references to it in the affidavits were adduced to show the context to the current dispute, not to prove facts that were in issue in the Spartan litigation. Gault J was clear that the Spartan litigation related to Mr Watson's relationship with Kea, Sir Owen and Mr Dickson, not Mr Wikeley.[84] The evidence therefore did not offend s50.

Relationship between Mr Wikeley and Mr Watson

[116] Mr Wikeley challenges references in the affidavits of Mr Graham dated 30 October 2022, 2 December 2022 and 12 May 2023 to the nature of his relationship with Mr Watson.

[117] First, Mr Wikeley submits such references are irrelevant. The evidence is relevant because whether Mr Wikeley and Mr Watson had a business relationship is key to establishing the conspiracy and as such evidence of their relationship has a tendency to prove something of consequence to determination of the proceeding.[85]

[118] Secondly, Mr Wikeley submits parts of Mr Graham's evidence are inadmissible opinion evidence. Specifically, the statements that (1) "it is very likely Mr Watson would have told [Mr Wikeley] of his dispute with Sir Owen" and (2) that various records relating to the incorporation by Mr Watson's son of a company indirectly owned by Mr Wikeley "[demonstrate] an ongoing connection between the Watson family and Mr Wikeley". Both are statements of opinion, not otherwise admissible under ss 24 or 25 of the Evidence Act and therefore inadmissible. However, we consider it was nevertheless open to Gault J to draw the same inferences.

[119] Thirdly, Mr Wikeley submits parts of Mr Graham's evidence are inadmissible hearsay. Specifically, (1) the witness statement of William Gibson, a former associate of Mr Watson, given in the Spartan litigation, which describes Mr Watson and Mr Wikeley as members of a "relatively close-knit group" and (2) the transcript of a hearing before the Kentucky Circuit Court in which WFTL's Kentucky representation

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83 *Puka v Attorney-General*, above n 80, at [129].
84 At [84(a)].
85 Evidence Act, s 7(3).

indicated that WFTL had engaged the firm Grant Thornton.[86] These are both hearsay statements. The circumstances of both are such that they would be considered reliable.[87] However, there was no consideration of whether the makers of the statements were unavailable as witnesses or requiring them to be witnesses would cause undue expense or delay. The evidence was therefore not admissible under the general exception in s 18 of the Evidence Act

[120] Finally, Mr Wikeley submits parts of Mr Graham's evidence are inadmissible under s 50. Specifically:

(a) The statement in the Spartan Judgment that Grant Thornton provided Mr Watson and his interests tax advice, supposedly significant because of the later reference by WFTL's Kentucky representation to the same firm (see above at [119]).

(b) The finding in an English High Court judgment of Nugee J that a company ostensibly controlled by Richard Watson, Mr Watson's brother, was actually controlled by Mr Watson and that Mr Watson expected to obtain at least the majority of the equity in the company.[88] That judgment was raised because Mr Regard's affidavit mentioned a proceeding commenced by that company against Kea as an example of a proceeding Kea had not sought to defend despite being served. The judgment was referenced by Gault J in connection with Sam Watson's involvement in business structures associated with Mr Watson and Mr Wikeley.[89]

[121] On the former, the fact Grant Thornton provided Mr Watson tax advice was not at issue in the proceeding leading to the Spartan Judgment. Section 50 is therefore not engaged. On the latter, the findings of Nugee J were not used to prove the existence of any fact that was at issue before Nugee J, but rather to show the background to the

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86 The engagement of Grant Thornton was supposedly significant because the Spartan Judgment refers to Grant Thorton as having advised Mr Watson and his interests. That finding in the Spartan Judgment is the subject of a separate admissibility challenge under s 50: see below at [120].

87 Evidence Act, s 18(1)(a). See *Grant v Pandey* [2013] NZHC 3330 at [11].

88 Contempt committal judgment, above n 18, at [216].

89 First Judgment, above n 2, at [21].

current litigation. Gault J did not make any findings based on it. These two parts of Mr Graham's evidence are therefore both admissible.

Mr Hussain and his connection to Mr Watson

[122] As discussed earlier, Kea alleges that Mr Hussain was involved in the conspiracy and met Mr Watson while both men were in prison. Mr Wikeley submits that the only evidence Mr Watson and Mr Hussain were in the same prison at the same time is inadmissible hearsay evidence or inadmissible under s 50. The relevant evidence is from the affidavits of Mr Graham dated 30 October 2022 and Thomas Williams, an employee of Kea's English solicitors, dated 12 May 2023, both of which reference the English High Court judgment of Miles J.[90] That judgment details the prisons in which Mr Hussain was held over the relevant dates.[91]

[123] Where Mr Hussain was imprisoned was not a fact in issue in the proceeding before Miles J. Section 50 is therefore not engaged in respect of that evidence. The evidence of where Mr Hussain was imprisoned is therefore admissible.

[124] Mr Williams says that an official at HMP Pentonville told him that Mr Watson had been transferred to HMP Hollesley Bay. Mr Graham's affidavit refers to Mr Williams telling him that. Mr Williams' statements on where Mr Watson was imprisoned were hearsay. Gault J acknowledged that the evidence of both men's prison records was hearsay but considered it was admissible under s 18(1) and gave the fact they were imprisoned together "limited weight".[92] We agree the statements were hearsay but note there was no specific evidence that the official was unavailable as a witness or that requiring him to be a witness would cause undue expense or delay, as required under s 18(1)(b). The evidence of where Mr Watson was imprisoned was therefore inadmissible. Evidence to the effect that Mr Watson and Mr Hussain were in the same prison at the same time is therefore also inadmissible.

[125] Mr Wikeley also challenges several pieces of evidence suggesting Mr Hussain has been involved in previous dishonest conduct, variously on the basis they are

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90 *Business Mortgage Finance 4 plc v Hussain* [2021] EWHC 171 (Ch).
91 At [93].
92 First Judgment, above n 2, at [105] n 54.

inadmissible opinion evidence or inadmissible under s 50. The evidence in question comes from the affidavits of Mr Graham dated 30 October 2022, 2 December 2022 and 12 May 2023, which include exhibits to several judgments of English courts.

[126] Two statements by Mr Graham complained of are inadmissible opinion evidence: first, that Mr Hussain has been involved in bringing "spurious and abusive legal proceedings"; and secondly, that a proceeding brought against Mr Regard in England by someone purporting to act for Kea is "likely to be a Hussain-related sham, like the others". The other statements Mr Wikeley challenges on the basis they are inadmissible opinion evidence, are not statements of opinion and are therefore admissible.

[127] Mr Wikeley's s 50 challenges on this topic cover a wide range of material.[93] That material does not offend s 50 because it is used as background to the litigation only and not to prove facts that were in issue in the proceedings in which the relevant findings were made, with one exception. In striking out a proceeding connected with Mr Hussain's alleged attempt to take over Kea, Pelling J in the English High Court found that the proceedings at hand were "fair and square linked to a modus operandi of Mr Rizwan Hussain, operating as he does, through annulled Marshall Island companies".[94] That finding was relied on by Kea and Gault J for the following finding:[95]

> It is inconceivable that a genuine agreement was executed in 2012 with a Marshall Islands company, and that in 2022 the same entity, by now annulled, purported to take a step in litigation which the English Courts have found to be connected with Mr Hussain and signed in a name which has also been used in other proceedings connected with Mr Hussain.

[128] We consider that reliance was contrary to s 50 and the evidence of Mr Hussain's "modus operandi" is inadmissible.

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93 That material includes: findings of the English Courts that "Paul Anthony" is an alias of Mr Hussain; findings of the English Courts in various matters stemming from allegations of attempts by Mr Hussain to take over legitimate companies by fraudulent means, in particular proceedings relating to the Long Harbour group of companies and Blue Side Services SA; and Mr Watson's connection to proceedings involving Mr Hussain.

94 *Kea Investments Ltd v Farrer & Co LLP*, above n 21, at [18].

95 First Judgment, above n 2, at [104].

Mr Wikeley's credibility

[129] The remaining challenges are on matters somewhat periphery to the issues in this case, but which are relevant to Mr Wikeley's credibility generally.

[130] First, Mr Wikeley complains that several statements from Mr Graham's affidavit dated 30 October 2022 are inadmissible statements of opinion impugning his credibility. All but one of the statements that Mr Wikeley complains of are indeed inadmissible opinion evidence,[96] the exception being Mr Graham's statement that Kea was concerned about disclosure of documents in circumstances which Kea considered involved a fraudulent scheme. That statement of opinion was self-evidently Kea's assessment of the case, rather than anything meant to prove or disprove a fact,[97] and is therefore admissible.

[131] Secondly, Mr Wikeley submits that the various New Zealand judgments and news articles annexed as exhibits to the affidavit of Megan Wilson dated 31 October 2022 are inadmissible. Taking the news articles first, Mr Wikeley correctly submits they are inadmissible hearsay statements. In respect of the judgments, Mr Wikeley submits they are generally inadmissible under s 50 and invited highly prejudicial inferences. The judgments relate to various business deals of Mr Wikeley. They do not generally offend s 50 because they are not adduced to prove a fact at issue in any of the relevant proceedings. The only specific criticism Mr Wikeley makes is in relation to *Jacomb v Wikeley*, a High Court decision given by Kós J, in which the Judge records that Mr Wikeley was "resident in Melbourne".[98] Citing that judgment, Gault J noted:[99]

> [20] Mr Wikeley told this Court that he has not lived in New Zealand since 2002, that he lived in Kentucky between 2012 and 2015, that his permanent home is in Mykolaiv, Ukraine, but that he currently lives with his sister in Ningi, north of Brisbane. However, following a hearing before Kós J in November 2012, Mr Wikeley was said to be resident in Melbourne.

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96 The inadmissible statements are: at [111], "Kea is concerned that FVS's claim to be a secured creditor of Kea is intended to give WFTL a pretext for paying some or all of any amounts it may obtain from Kea to Mr Watson"; at [126], "Mr Watson and Mr Hussain are likely to seek to divert assets to themselves or entities controlled by them by illicit means such as the fraudulent letters and 'settlement agreement'"; at [127], "[u]nless orders are made restraining WFTL, Mr Wikeley and Mr Watson, it is very likely that WFTL will continue to take steps in reliance on the Coal Agreement, the Default Judgment, and the Statutory Demand."; and at [128], "Kea rejected those offers because they are obviously part of the fraud being practiced by WFTL".

97 Evidence Act, s 4(1) definition of "opinion".

98 *Jacomb v Wikeley* [2013] NZHC 707 at [5].

99 Footnote omitted.

[132] None of this engages s 50. Whether Mr Wikeley was indeed resident in Melbourne was not a fact in issue before Kós J, nor did Kea adduce *Jacomb v Wikeley* to prove any fact at issue in this proceeding.

[133] Finally, Mr Wikeley complains that the parts of Sir Owen's affidavit dated 12 May 2023 referring to the Spartan Judgment are inadmissible under s 50. The evidence once again is merely outlining the background to the litigation and therefore does not offend s 50. Mr Wikeley also submits that the statement by Sir Owen that "[i]t has been an enormous worry for the board of Kea what to do in the face of what I believe to be a serious fraud aimed at Kea" is inadmissible opinion evidence. The statement offers an opinion only in respect of Sir Owen's belief in the fraud, which is self-evident from Kea's claim.

Where does that leave the Judge's findings?

[134] We do not consider the various evidential challenges we have allowed materially alter the conclusion to which the Judge could properly come on the finding of fraud.

[135] In coming to that conclusion we reference first the nature of Kea's principal claim — a conspiracy by unlawful or lawful means — the essential pleaded elements of which were that:

(a) WFTL, Mr Wikeley, Wikeley Inc and USA Asset Holdings Inc were acting in combination by:

> … making claims against Kea under the Coal Agreement when they know … that none of them has any legitimate claim under such Agreement.

(b) Mr Watson was acting with the intention of injuring Kea in numerous ways, including by supplying documents and information to WFTL to support its claims.

[136] We share the Judge's concerns about the authenticity of the version of the Coal Agreement which was before him. No original, or verified copy of an original, was ever produced. The third page of the copy that was produced consisted of

three signature lines only: the first being that of Mr Watson ostensibly as witness to Mr Wikeley's signature at the foot of page two and hand dated "23.10.12"; the second ostensibly being that of Mr Dickson on behalf of Kea with a typed date "23/10/12"; and the third being that of Mr Watson, ostensibly as witness to Mr Dickson's signature, and hand dated "23.10.12". We agree with Kea's submission that it seems unlikely Mr Wikeley would have typed the date "23.10.12" beneath Mr Dickson's name, left the date for himself and Mr Watson's signatures to be handwritten and correctly predicted the exact day when Mr Watson would have Mr Dickson sign the agreement in Paris, knowing as he must, that Mr Watson was unlikely to be there for one day only.

[137] More significantly, the page with the three signatures (ostensibly page three of the Coal Agreement) is numbered "2", whereas none of the other pages are numbered. This suggests that what is ostensibly the page bearing Mr Dickson's signature could well have been appropriated from another document.

[138] But, even if Mr Dickson did sign the Coal Agreement in Paris, it was in our view still open to the Judge to conclude that the claims made under it in the Kentucky proceedings were not claims WFTL knew to be legitimate.

[139] For a start, the recitals to the Coal Agreement included statements that:

(a) Mr Wikeley had provided Kea and its advisors with access to financial models and analysis and that Kea and its advisors had "assisted with … financial models and analysis … over the past several months";

(b) Kea's advisors had "done a feasibility study" of a "Greenfields deal and the overall pipeline of investment deals"; and

(c) Kea would have "exclusive access to all [Mr Wikeley's] deals in the coal and energy sector".

[140] There was no documentary evidence in Kea's possession, nor produced by the Wikeley defendants in the High Court demonstrating that due diligence had ever occurred or the alleged feasibility study had ever been done. The Judge accepted that if

the Coal Agreement and WFTL's claims under it were genuine, some such evidence must have existed.[100] We agree and note that the proposed new evidence likewise does not establish that due diligence or modelling was undertaken by Kea or facilitated by WFTL as described in the recitals.

[141] Secondly, the absence of any demand for payment under the Coal Agreement or of any pre-action correspondence belies any legitimate belief on WFTL's part that it gave rise to legally binding obligations. On Mr Wikeley's case, Kea had not only failed to provide funding for coal deals, it had never paid him an annual USD 1.5 million royalty. It is not credible that anyone asserting legitimate claims to an annual royalty in this sum, would, for nine years, never raise the issue with Kea. Not so much as an invoice was ever generated.

[142] In the affidavit evidence we have declined to admit, Mr Wikeley says he raised the issue verbally with Mr Watson over the years. But that likewise lacks credibility as an explanation for inaction. By virtue of his ongoing relationship with Mr Watson, Mr Wikeley must have been aware of the enmity that had developed between Sir Owen and Mr Watson. We agree with Kea's submission that if Mr Wikeley believed he had a genuine claim about the lack of funding and non-payment of the annual "royalty", it is inconceivable that he would not have contacted Kea about it before 2021.

[143] We also consider it well open to the Judge to conclude that even if the Coal Agreement was actually signed by Mr Dickson in 2012, Mr Wikeley must have known, that, if intended to be any more than a non-binding heads of agreement, Mr Dickson would have signed in breach of his duties and without authority.

[144] If a counterpart knows that a director is acting contrary to the commercial interests of the company "it is likely to be very difficult for the person to assert with any credibility that he believed the [director] did have actual authority".[101] Kea's expert Kentucky legal evidence was compelling in this regard. As indicated, Mr Kelly said

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100 First Judgment, above n 2, at [98(b)] and [99(e)]. The Judge noted that none of the reports, presentations, or spreadsheets Mr Wikeley produced relating to the coal ventures referred to Kea, Mr Dickson or any funding to be provided by Kea.

101 *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846 at [31].

that the Coal Agreement "bears no resemblance to the type of contract one would expect to see", particularly so for a contract "obligating a party to invest many millions of dollars and to potentially pay hundreds of millions of dollars". He explained that the "Greenfields" opportunity described in the Coal Agreement is "even more speculative than an ordinary coal mining project" and that therefore "one would not expect for an agreement to require the funding party to undertake the extremely broad and absolute indemnity objections attributed to [Kea]". Mr Wikeley was a sophisticated businessman. He must have known this to be the case and, if it was intended to be any more than a non-binding heads of agreement, he must have known the Coal Agreement was so demonstrably against Kea's commercial interests that Mr Dickson had no actual authority to sign it.

[145] This comes back to the point that if the Coal Agreement was signed by Mr Dickson, we are satisfied that no party intended it to be more than a non-binding heads of agreement. We reach that point without reference to Mr Wikeley's proposed additional evidence but taking into account Mr Kelly's evidence, the informality of the Coal Agreement, the substantial imbalance in terms of mutual "obligations" and Mr Wikeley's own acknowledgements in oral argument. As we have indicated before, it is a fraud to obtain a judgment based on an "agreement" that a plaintiff knows not to give rise to legally enforceable obligations.[102] We are also satisfied that the evidence Mr Wikeley has sought unsuccessfully to adduce would not have assisted him in this respect. Indeed, it would have taken him backwards.

[146] Likewise we are satisfied that, on the basis of the admissible evidence, it was open to the Judge to find that Mr Wikeley had acted in consort with Mr Watson and possibly others to prosecute the fraudulent claim and in relation to subsequent fraudulent steps. We note that there has been no appeal by Mr Watson from that finding. We accordingly uphold the Judge's conclusion that:

> [116] The use of the fraudulent Coal Agreement, the fraudulent claim under it, the subsequent fraudulent steps taken through Mr Hussain, and Mr Wikeley's breach of the Court's interim orders all amount to unlawful means and must have been intended to injure Kea by obtaining financial advantages at Kea's expense.

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[102] See above at [97]; *Johnson v Johnson*, above n 69, at [44]; and *Abouloff v Oppenheimer & Co*, above n 69.

Jurisdiction

[147] In the Jurisdiction Judgment Gault J dismissed WFTL's and Mr Wikeley's application to dismiss or stay the proceedings and set aside their protest to jurisdiction.[103] On jurisdiction and, relatedly, forum conveniens grounds, Mr Wikeley subsequently sought the leave of the High Court to bring an appeal from that decision out of time. That application was declined on 31 August 2023.[104] In turn, Mr Wikeley applied to this Court for leave to appeal the Jurisdiction Judgment. On 14 March 2024 that application was also declined.[105]

[148] Mr Wikeley was served in Australia, which "has the same effect … as if the initiating document had been served in New Zealand".[106] As a result, his protest to jurisdiction was unsuccessful.[107] He had also sought a stay on the basis that New Zealand was not the appropriate forum, however, Gault J held that New Zealand was the appropriate forum for the following reasons:

(a) It was too narrow to characterise the New Zealand proceeding as a dispute about whether the Coal Agreement was a forgery.[108]

(b) In any event, the jurisdiction clause in the Coal Agreement related to the agreement only, and not Kea's wider claims that the defendants were conspiring to injure Kea by fraudulent means.[109]

(c) The Kentucky Court did not have jurisdiction over Mr Wikeley and Mr Watson who were not parties to WFTL's proceedings or the Kentucky Default Judgment.[110]

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103 Jurisdiction Judgment, above n 28, at [99].
104 HC Jurisdiction Judgment leave decision, above n 29.
105 CA Jurisdiction Judgment leave decision, above n 29.
106 Trans-Tasman Proceedings Act 2010, ss 13 and 14.
107 Similarly, there was in personam jurisdiction over WFTL on account of its New Zealand incorporation: Jurisdiction Judgment, above n 28, at [30]–[32]. See High Court Rules, rr 5.49(7A) and 6.36.
108 Jurisdiction Judgment, above n 28, at [82].
109 At [74].
110 At [83].

(d) Despite the Kentucky Default Judgment indicating submission to the Kentucky Court's jurisdiction for some purposes, there was disputed evidence as to whether Kentucky had jurisdiction over WFTL in respect of Kea's claim of conspiracy to injure it by fraudulent means.[111]

(e) Kea had not, in so far as it was relevant, submitted to the jurisdiction of the Kentucky Court.[112]

(f) The Kentucky Court was, in any event, not an available forum for Kea's second cause of action (relating to recognition of the Kentucky Default Judgment in New Zealand) since only a New Zealand court could determine that issue.[113]

(g) Even if Kentucky was an available forum, it was not the most appropriate forum because:[114]

(i) The New Zealand Court had a greater interest in regulating the conduct of WFTL, a New Zealand company acting as trustee of a New Zealand trust.

(ii) New Zealand has jurisdiction over WFTL as of right, and therefore the BVI Court will look to it to make conclusive findings on the conspiracy and fraud claims.

(iii) The location of the parties and witnesses did not favour Kentucky or the BVI. Even if Mr Wikeley resided in Kentucky when the contract was purportedly entered into, he no longer did and, although the only party currently based in New Zealand was WFTL, the natural person protagonists — Mr Wikeley,

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111 At [83]. The evidence of WFTL's United States counsel, Mr Regard was that Kea could counterclaim in conspiracy if the Kentucky Default Judgment was set aside. Kea challenges that on the basis that Mr Regard was not an impartial expert on Kentucky law. Nor do we purport to be, although the prospect of there being jurisdiction for a counterclaim would accord with usual principles.

112 At [86].

113 At [84].

114 At [84]–[86].

Mr Watson and Sir Owen — all had long associations with New Zealand. Nor were any of the likely principal witnesses based in Kentucky or the BVI.

(iv) Given Kea's second cause of action would need to be pursued in New Zealand in any event, New Zealand courts would have to determine whether the defendants were perpetuating a fraud in that context.

(h) The BVI was not an appropriate forum because it did not have jurisdiction over the defendants in respect of the conspiracy claim.[115]

[149] Kea submits that although it was only an interlocutory decision, the Jurisdiction Judgment should "in practice" be regarded as final because the trial has now occurred and the whole purpose of the interlocutory application was to determine where that should take place. It says this Court has typically adopted a benign approach to applications for leave to appeal such decisions for that reason,[116] but with both the High Court and this Court having declined leave in this case, it would be an abuse of process to now relitigate the question of forum in the context of this appeal.

[150] We have some sympathy with aspects of this submission (in particular, the apparent illogicality of revisiting forum after trial). However, s 56(6) of the Senior Courts Act 2016 provides that:

> (6) If leave to appeal under subsection (3) or (5) is refused in respect of an order or a decision of the High Court made on an interlocutory application, nothing in this section prevents any point raised in the application for leave to appeal from being raised in an appeal against the substantive High Court decision.

[151] In *Trotter v Telfer Electrical Nelson Ltd* this Court held:[117]

> Section 56(6) provides that even if leave is refused in respect of an order or decision the High Court made on an interlocutory application, nothing in the section prevents any point raised in the application from being raised in an appeal against a substantive High Court decision. In other words, the

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115 At [87].
116 Citing *Johnston v Johnston* [2021] NZCA 181 at [11] and [12].
117 *Trotter v Telfer Electrical Nelson Ltd* [2018] NZCA 231, [2019] NZAR 476 at [24].

> jurisdictional issue could still be raised on the appeal of any substantive judgment on the claim.

[152] Moreover, this Court's decision declining the application for leave to appeal the Jurisdiction Judgment noted Mr Wikeley's argument that the jurisdiction issue was available to him on his substantive appeal and that his submissions on the appeal addressed that issue.[118] The Court later concluded:[119]

> Further, given Mr Wikeley has appealed as of right against the substantive judgment and he has not pointed to any prejudice or injustice if leave to appeal against the interlocutory judgment is declined, we are not persuaded that the interests of justice require that we grant his application.

[153] We consider that in those circumstances it is appropriate that we address the jurisdiction (forum) appeal. We are not persuaded, however, that it should be granted.

[154] We note at the outset the unarguable point that Kentucky is not an available forum for Kea's second cause of action. But we do not give it particular emphasis. There is no suggestion of enforcement or recognition of the Kentucky Default Judgment in the New Zealand jurisdiction, where Kea is neither registered nor holds assets. We do not consider that a forum analysis should turn on a cause of action where an available inference is that it was introduced for the primary purpose of bolstering the jurisdiction claim. That has the ring of "bootstraps" about it.

[155] However, no party apart from Mr Wikeley sought leave to appeal the Jurisdiction Judgment and he is the sole appellant before this Court. We agree with Kea that it borders on "inconceivable" that proceedings could be stayed against Mr Wikeley alone on forum conveniens grounds so that the question whether he alone was party to a conspiracy could be determined in another forum.

[156] We also agree with the Judge's substantive analysis. The New Zealand proceedings alleged a worldwide conspiracy involving at least two parties, Mr Wikeley and Mr Watson, who are not parties to the Kentucky proceedings and over whom jurisdiction could not, on the evidence, be asserted. The claim under the purported contract in Kentucky, although undoubtedly a part of the conspiracy which was alleged,

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118 CA Jurisdiction Judgment leave decision, above n 29, at [38].
119 At [41].

did not define its limits. The alleged conspiracy included the attempts of Mr Watson and alleged associates to take control of Kea and to then purportedly abandon its challenge to the Kentucky Default Judgment. As the Judge found, it is too narrow a characterisation of Kea's claims to say that the "only (or even central, in the relevant sense) issue in dispute is whether the Coal Agreement is a forgery".[120]

[157] We accept that the jurisdiction clause in the Coal Agreement is not determinative of (or that it even significantly influences) the overall calculus because it does not, in its terms, capture Kea's tortious claims.[121]

[158] In respect of the applicable law, again the contractual provisions are not relevant to the conspiracy claim. Moreover, we consider the Judge correct to find that New Zealand law governed Kea's New Zealand claims, applying the Private International Law (Choice of Law in Tort) Act 2017.[122] The acts in Kentucky forming part of the conspiracy were significant. However, either the most significant elements occurred in New Zealand,[123] or the general rule in s 8 of the Private International Law (Choice of Law in Tort) Act was appropriately displaced under s 9 because none of Kea, WFTL, Mr Wikeley or Mr Watson were Kentucky-based and active parts of the conspiracy were orchestrated by a New Zealand national living in Australia.

[159] In any event, the expert evidence was that the elements of a conspiracy claim are no different under Kentucky or applicable Federal United States law than under New Zealand law. So even if United States law applied, the forum conveniens implications of a trial in New Zealand were limited.

[160] We also agree with the Judge's assessment that the location of parties and witnesses did not favour either Kentucky or the BVI for determination of the conspiracy claims.[124] None of the principal witnesses were Kentucky- or BVI-based. Mr Wikeley

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120 Jurisdiction Judgment, above n 28, at [82].

121 We accept, as the Judge did, that the doctrine of the putative proper law of the contract would require application of Kentucky and/or United States Federal Law "at least where the dispute is as to whether the parties' negotiations resulted in a concluded contract": see Jurisdiction Judgment, above n 28, at [81], n 58.

122 At [81], n 58.

123 Namely., the incorporation of WFTL as the vehicle to bring the claim and Mr Wikeley's appointment of WFTL as trustee of the WFT.

124 Jurisdiction Judgment, above n 28, at [85].

no longer resides there. Moreover, the New Zealand plaintiff in the Kentucky Default Judgment, WFTL, did not even exist at the time the Coal Agreement was entered into.

[161] We are therefore not persuaded that the Judge erred in finding that New Zealand was the appropriate forum for disposition of the conspiracy claims.

Comity

Introduction

[162] As indicated above, on 18 October 2022 the Kentucky Circuit Court denied Kea's application to set aside the Kentucky Default Judgment.[125] It did so in two brief paragraphs:

> 1. Defendant's Motion to Set Aside Default Judgment is DENIED. The Court finds the plaintiff properly served Defendant by personal service to its registered agent in the British Virgin Islands, Icaza, Gonzáles-Ruiz & Alemán Trust Limited ("Icaza"). The Default Judgment shall remain in place.
>
> 2. Because Plaintiff properly served Defendant the Court need not determine if there is meritorious defence raised by the Defendant or if Defendant can make a showing of no prejudice to Plaintiff.

[163] Kea's subsequent motion to amend, vary or alter the denial of its application was, in turn, denied on 28 October 2022.[126] It commenced its New Zealand proceeding three days later. It is clear that Kea came to the New Zealand High Court because of its dissatisfaction with the decision of the Kentucky Circuit Court and concern that the Kentucky Court of Appeals may apply a deferential standard of appellate review. With WFTL now in interim liquidation, that liquidation now recognised by the United States Federal Bankruptcy Court and the company no longer under Mr Wikeley's control, there has been no attempt to resolve the appeal lodged with the Kentucky Court of Appeals.[127] Kea is evidently content to rely on the permanent anti-suit, anti-enforcement orders issued by the New Zealand High Court.

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125 Kentucky set aside judgment, above n 5.
126 Kentucky MAAV judgment, above n 6.
127 Which has been adjourned for sequential three-month periods.

[164] In unusually stark terms, the case therefore engages with an area of law recently described as being "in a most unsatisfactory state".[128] Namely, when is a domestic court justified in granting a remedy (variously described as "a remarkable thing" and as a remedy of "extraordinary character") which has the effect of interfering with the interests of a foreign legal system in administering justice within its own territory.[129] We use the phrase "international comity" to mean respect for those interests. We reject the criticism of some that the phrase is an "unfortunate [one] best dismissed from the discourse",[130] or that it "can mean practically anything or nothing".[131] Like Professor Andrew Dickinson of the University of Oxford, we do not regard it simply as a matter of judicial collegiality or "amour propre".[132] Rather, in the words of Judge Wilkey in *Laker Airways v Sabena Belgian World Airlines*, we see the concept as:[133]

> … serv[ing] our international system like the mortar which cements together a brick house. No one would willingly permit the mortar to crumble or be chipped away for fear of compromising the entire structure.

[165] That is because, as Professor Dickinson points out, without collaboration between legal systems litigation would in many cases prove fruitless and, by managing proceedings to reduce the risk of conflicting decisions, legal systems contribute to the common venture of a fair and just resolution of disputes.[134] To that end:[135]

> … the normal assumption is that [a domestic] court has no superiority over a foreign court in deciding what justice between the parties requires …

[166] Nominally at least, we live in an era where "judicial comity has replaced judicial chauvinism", but anti-suit and anti-enforcement injunctions push at the boundaries of

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128 Andrew Dickinson "Taming Anti-suit Injunctions" in Andrew Dickinson and Edwin Peel (eds) *A Conflict of Laws Companion: Essays in Honour of Adrian Briggs* (Oxford University Press, Oxford, 2021) 77 at 109.

129 Adrian Briggs *Private International Law in English Courts* (Oxford University Press, Oxford, 2014) at [5.89]; and Dickinson, above n 128, at 109.

130 Michael D Ramsey "Escaping 'International Comity'" (1998) 83 Iowa L Rev 893 at 893.

131 Pamela K Bookman "Litigation Isolationism" (2015) 67 Stan L Rev 1081 at 1096.

132 Dickinson, above n 128, at 84, citing *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231 at [132], *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599 at [101], [105] and [125], *British Airways Board v Laker Airways Ltd* [1984] QB 142 (CA) at 185–186 ("Judicial comity is shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjourning judicial vineyards."), and *West Tankers Inc v Ras Riunione Adriatica Di Sicutra SpA* [2005] EWHC 454 (Comm), [2005] 2 All ER (Comm) 240 at [51].

133 *Laker Airways Ltd v Sabena Belgian World Airlines* 731 F 2d 909 (DC Cir 1984) at 937.

134 Dickinson, above n 128, at 77.

135 *Re Maxwell Communications Corporation (No 2)* [1992] BCC 757 (Ch) at 762.

this paradigm and with it the global system of justice.[136] The issue is whether, in this particular case, the grant of anti-suit and anti-enforcement injunctions was a push too far.

[167] We reject at the outset what we regard as the pretence sometimes used to justify incursions on international comity by way of anti-suit or anti-enforcement injunction — that the order is only directed to the parties and not to the foreign court. We accept the position in *Dicey, Morris and Collins: The Conflict of Laws* that this is not now "a realistic view".[137] As such, we need to confront, head on, the appropriateness, in comity terms, of an order which not only prevents WFTL from seeking what it says is just compensation for breach of a contract subject to the jurisdiction of the United States and choice of law clauses,[138] but which also, in substance, is addressed to United States courts and which could, at least in theory, provoke countermeasures, with the result that no legal system will be able to administer justice.[139]

The Judge's approach

[168] The First Judgment does not address comity issues. Mr Wikeley submits that this was remarkable given their importance to the case. He says that, although the Judge may have had in mind his analysis at the without notice interim injunction stage,[140] there was no explanation of how that analysis applied to, or justified, a final permanent anti-enforcement injunction. He also emphasises the ability of a Judge at an interlocutory stage to rely on evidence which would be inadmissible at trial. To that end, he says that a fresh analysis was required.

[169] We have some sympathy with these criticisms, particularly because, in its terms, the judgment on the without notice application for an interim injunction identifies that

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136 Dickinson, above n 128, at 79.

137 Lord Collins and Jonathan Harris (eds) *Dicey, Morris and Collins: The Conflict of Laws* (16th ed, Sweet & Maxwell, London, 2022) at [7-013].

138 The latter specifying the law of "Lexington, Kentucky and any applicable Federal law".

139 On the anti-anti-suit injunction, see *Peck v Jenness* 48 US 612 (1849) at 625; and *SAS Institute Inc v World Programming Ltd*, above n 132, at [133]–[136].

140 Interim injunction judgment, above n 8, at [66]–[70].

Kea had not yet exhausted its recourse in the Kentucky courts[141] and that the relief sought at that stage was:[142]

> … limited to restraining the defendant's opposition to any application from Kea for an adjournment pending the return date — that is, for a short period of time to enable (interim) consideration of the alleged fraud. Kea is not seeking to restrain enforcement indefinitely or against assets in Kentucky.

[170] We note however that the Judge touched briefly on comity considerations again in the Jurisdiction Judgment, where he said extension of the without notice interim injunction was:[143]

> … consistent with comity considerations, as Professor Silberman and Mr Jones KC, a barrister practicing in England and Wales and in [the] BVI who has also provided expert evidence in this proceeding, have now also indicated.

[171] The reference is to the opinions of Professor Linda Silberman and Mr Philip Jones KC, dated respectively 30 November 2022 and 1 December 2022, which were filed in support of the without notice application for injunction.[144]

[172] The judgment granting the interim injunction contained the following analysis:[145]

> [68] This is a very unusual case. Without commenting in any way on the proceedings of the Kentucky Court, absent the allegedly fraudulent Coal Agreement Kea would not have been subject to proceedings in Kentucky at all. Kea has no presence or business in Kentucky. It is there only because the

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141 A fact that the Judge did not consider to be a reason to decline interim relief: at [70].

142 At [69].

143 Jurisdiction Judgment, above n 28, at [92].

144 Professor Silberman's opinion on comity vis-à-vis the United States courts is confined to one paragraph in which she acknowledges anti-suit injunctions are generally disfavoured but suggests that, if necessary to restrain continued perpetuation of fraud, they are not offensive. For reasons we discuss later we consider this assumes an inability on the part of United States courts to restrain fraud which is inappropriate in comity terms. Mr Jones briefly discusses the position in the BVI. He says that because, for reasons he earlier sets out, New Zealand is the more appropriate forum for adjudication of Kea's conspiracy claims "the BVI Court will not consider the New Zealand Court's injunction to be exorbitant or inappropriately infringing on the jurisdiction of the BVI Court". We consider this conflates issues of jurisdiction (including forum conveniens) and comity, noting also that it is a United States judgment and not a BVI judgment which is the ultimate foundation for WFTL's attempted enforcement proceedings.

145 Jurisdiction Judgment, above n 28. The Judge having earlier noted at [66] that New Zealand courts have "great respect for the work of foreign courts, particularly those in countries such as the United States with which we share common traditions and fundamental principles, and which have a high regard for the rule of law" and having cited the English Court of Appeal's caution that "it is not for [an English] court to arrogate to itself the decision how a foreign court should determine the matter": *SAS Institute Inc v World Programming Ltd*, above n 132, at [102], quoting *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725, [2010] 1 WLR 1023 at [50].

> allegedly fabricated Coal Agreement states the parties have agreed the jurisdiction shall be the [United States] and the contract will be governed by the laws in Lexington, Kentucky and any applicable Federal law. If the Coal Agreement is a fraud, WFTL is abusing the process of the Kentucky Court. If a New Zealand company, as trustee of a New Zealand trust, is abusing the process of the Kentucky Court to perpetuate a fraud, the New Zealand Court's intervention to restrain that New Zealand company may even be seen as consistent with the requirements of comity.

[173] This discussion is in a section of the judgment headed "[o]ppressive or vexatious", in which the Judge accepted Kea's submission that, because there was an arguable if not strong case of tortious conspiracy, seeking to enforce the Kentucky Default Judgment "would be unconscionable, meeting the oppressive and vexatious requirement".[146] The Judge then recorded counsel's submission that "this is one of the rare cases where an anti-enforcement injunction is justified, because of the circumstances in which the judgment was obtained and the inability or unwillingness of the Kentucky court to intervene".[147] The Judge did not however directly engage with this submission. In so doing, he may have had in mind the sensitivities of his proposed orders in a comity sense. Rather, he appears to have justified his interim anti-enforcement order on the basis that "[i]f the Coal Agreement is a fraud, WFTL is abusing the process of the Kentucky Court."[148]

Discussion

[174] No anti-suit or anti-enforcement injunction can of course be issued without the court having first identified personal jurisdiction over the defendant. The principle of forum conveniens will (as in this case) often be relevant to that question. However, considerations of comity stand superimposed over this analysis. Even when jurisdiction and forum are established "it does not automatically follow that an anti-suit injunction should be granted".[149] The local court must consider whether, having established jurisdiction, that jurisdiction should be *exercised*. At that point the focus should be on the matters relied on to support and oppose the injunction,[150] not on the suitability of

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146 Interim injunction judgment, above n 8, at [64].
147 At [65].
148 At [68].
149 *Deutsche Bank AG v Highland Crusader Offshore Partners LP*, above n 145, at [50]. See *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14, [2012] 2 All ER (Comm) 225 at [25]–[30].
150 Dickinson, above n 128, at 87.

New Zealand as a forum for the injunction defendant's substantive claims. Indeed, as Professor Dickinson observes:[151]

> … one questions whether there is any value in borrowing the concept of the "natural forum" or the principle of *forum conveniens* more generally from the set of rules governing questions of personal jurisdiction in order to answer a question concerning the legitimacy of judicial interference with the affairs of a foreign sovereign State. Comity requires that the administration of justice in a foreign legal system should ordinarily be left to the courts of that system.

[175] In England the question of whether the jurisdiction *should* be exercised will, at its most general level, be analysed via the "just" and "convenient" preconditions for the issue of an injunction under s 37(1) of the Senior Courts Act 1981 (UK). However, as in New Zealand, that is not an invitation to the exercise of unfettered discretion. There must be a sufficient legal reason for the injunction, according with settled legal principles.[152] It is in that context that comity comes to be considered.

[176] We accept as a basic starting point the proposition that comity requires that a New Zealand court should be "extremely cautious" before deciding that there is a sufficiently real risk justice will not be done by the foreign court to warrant imposition of an anti-suit or anti-enforcement injunction.[153] As a result, before such an injunction is issued, cogent evidence will be required that the foreign court has acted or is likely to act in excess of its jurisdiction under international law,[154] in violation of the

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151 At 87 (footnotes omitted). We acknowledge the emphasis in some of the cases (see for example: *Airbus Industrie GIE v Patel* [1999] 1 AC 119 at 138–139 (HL); and *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 395–398) on whether the injuncting forum has a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which such an injunction entails. But we do not consider that involves defaulting to a standard forum conveniens type analysis. As Estreicher and Lee observe in Samuel Estreicher and Thomas Lee "In Defense of International Comity" (2020) 93 S Cal L Rev 169 at 205, a forum conveniens analysis looks primarily at issues of litigation convenience:

> Abstention on international comity grounds, by contrast, focuses on weighing the strength of the US government's interests as opposed to the foreign governmental interests in providing a forum for the litigation. For this reason, long-settled federal judicial doctrines of abstention may be natural and more instructive reference points than [forum non conveniens] doctrine.
> (footnote omitted)

152 *Beddow v Beddow* (1878) 9 Ch D 89 (Ch) at 93.

153 *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [97].

154 *Re Maxwell Communications Corporation (No 2)*, above n 135, at 762; *Deutsche Bank AG v Highland Crusader Offshore Partners LP*, above n 145, at [56]; and *SAS Institute Inc v World Programming Ltd*, above n 132, at [104], [111]–[112] and [125].

requirements of natural justice,[155] otherwise in a manner manifestly incompatible with New Zealand's fundamental policies,[156] or that its proceedings are likely significantly and irreversibly to interfere with the administration of justice in New Zealand.[157]

[177] The reason for this extreme caution is that, generally,[158] comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice. In such circumstances it is not for a New Zealand court to arrogate to itself the decision how a foreign court should determine the matter.[159] As the High Court of Australia observed in *Voth v Manildra Flour Mills Pty Ltd*:[160]

> Moreover, there are powerful policy considerations which militate against Australian courts sitting in judgment upon the ability or willingness of the courts of another country to accord justice to the plaintiff in the particular case. Those policy considerations are not dissimilar to those which lie behind the principle of "judicial restraint or abstention", which ordinarily precludes the courts of this country from passing upon "the provisions for the public order of another State" …

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155 *Pemberton v Hughes* [1899] 1 Ch 781 (CA) at 790; *Adams v Cape Industries plc* [1990] Ch 433 at 498; and *Jet Holdings Inc v Patel* [1990] 1 QB 335 (CA) at 345.

156 *Re Maxwell Communications Corporation (No 2)*, above n 135, at 762; *Deutsche Bank AG v Highland Crusader Offshore Partners LP*, above n 145, at [56]; and *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41, [2015] AC 616 at [42].

157 *Armstrong v Armstrong* [1892] P 98 (PDA) at 98; *Stichting Shell Pensioenfonds v Krys*, above n 156, at [18]–[24]. We acknowledge Professor Dickinson's convenient collection of these four categories: see Dickinson, above n 128, at 84.

158 Where the injunction is founded on violation of a contractual right, for example cases involving enforcement of a jurisdiction clause or an arbitration agreement, English courts tend to require "strong reasons" for refusal of an anti-suit injunction: see *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749 at [24] and [53]. A similar approach has been adopted in New Zealand: see *Maritime Mutual Insurance Association (NZ) Ltd v Silica Sandport Inc* [2023] NZHC 793 at [38], where Gault J observed "[c]omity has a smaller role in cases involving an agreement to arbitrate given the Court's role in upholding and enforcing the parties' contractual bargain" (citing English authority and New Zealand cases emphasising arbitral autonomy). Professor Dickinson criticises the proposition that the "true role" of comity in these cases is to ensure the parties' agreement is respected, saying that this gives insufficient weight to the fact that "the adjudicatory authority asserted by the foreign court does not depend on the parties' agreement and will, one may assume, withstand a challenge based on that agreement": Dickinson, above n 128, at 85. Nevertheless, he acknowledges that the defendant's agreement to litigate or arbitrate in the country where the injunction is sought "diminishes the force of any argument it may make of prejudice", but says that is distinct from the comity argument based on the interests of a foreign court administering justice in its own jurisdiction. We do not take the issue further because there is no jurisdiction or arbitration clause in favour of New Zealand in this case. To the contrary, the Coal Agreement features a United States jurisdiction (and choice of law) clause.

159 Adopting the language of Toulson LJ in *Deutsche Bank AG v Highland Crusader Offshore Partners LP*, above n 145, at [50].

160 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 559 (footnote omitted).

[178] Some of the earliest cases in which the courts identified a real risk that justice would not be done in the foreign country involved proceedings in England brought by German Jewish plaintiffs against German companies in the lead up to the Second World War.[161] More recently, English courts have recognised that the "possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained", but have emphasised that if the plaintiff's case is that even-handed justice may not be done, that must be asserted candidly and supported by "positive and cogent evidence".[162] In *Altimo Holdings and Investment Ltd v Kyrgz Mobil Tel Ltd* it was said that what must be established is:[163]

> … a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption. Of course, if it can be shown that justice "will not" be obtained that will weigh more heavily in the exercise of the discretion in the light of all other circumstances.

[179] Given the exacting nature of the test and the underlying comity considerations, it is unsurprising that there have (at least where jurisdiction or arbitration clauses in favour of the injuncting forum are not in issue) been relatively few cases where anti-suit injunctions have survived appellate review and some notable volte-faces. For example, in the *Laker Airways* litigation, the House of Lords discharged such injunctions, acknowledging that, however disguised and indirect, the anti-suit injunction was an interference with the process of justice in the United States courts.[164]

[180] Anti-enforcement orders, as in this case, are rarer still and are characterised by particularly careful assessments of whether the relief sought is truly necessary and consistent with comity. An example is *ED & F Man (Sugar) Ltd v Haryanto* which concerned an application by Man for (inter alia) injunctive relief preventing

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161 See for example: *Oppenheimer v Louis Rosenthal & Co AG* [1937] 1 All ER 23 (CA); and *Ellinger v Guinness, Mahon & Co* [1939] 4 All ER 16 at 24 (Ch). In both cases evidence was accepted that if the plaintiffs were compelled to bring proceedings in Germany, they would be unable to obtain legal representation and would be denied justice there because of discriminatory measures against Jewish people.

162 *The Abidin Daver* [1984] AC 398 (HL) at 411 per Lord Diplock. In *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd*, above n 153, at [102] this was stated to be "simply a reflection of the fact that comity considerations require the court not to pass judgment on the foreign court system without adequate evidence".

163 *Altimo Holdings and Investments Ltd v Kyrgyz Mobil Tel Ltd*, above n 153, at [95].

164 *British Airways Board v Laker Airways Ltd* [1985] AC 58 (HL). See also *Philip Alexander Securities and Futures Ltd v Bamberger* [1997] I L Pr 73 (EWCA) at 117, which concerned an appeal against refusal to grant injunction that was dismissed.

Mr Haryanto from enforcing an Indonesian judgment.[165] The English Court of Appeal concluded that, even if Mr Haryanto's act in bringing the Indonesian proceedings was "unconscionable", an English court should not, as a matter of comity and discretion, grant an injunction which prevented him from relying on the Indonesian judgment.[166] The Court found that:

(a) Injunctive relief was not necessary to protect Man in England in light of the other relief granted in Man's favour.[167]

(b) It would be wrong to grant an injunction designed to take effect in Indonesia — that "would interfere or purport to interfere with the judgment of a court of competent jurisdiction inside that country".[168]

(c) It would be inappropriate to grant an injunction preventing reliance on the Indonesian judgment in other countries, in light of the "special features" of the case (including that the Indonesian judgment already existed; it was issued in proceedings started by Man and was unsuccessfully appealed by Man; and that the Indonesian court was a court of competent jurisdiction).[169]

[181] A similar analysis was undertaken in *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* where the High Court of England and Wales declined to grant an anti-enforcement injunction because such relief was unnecessary in England and inappropriate as it would "interfere, albeit indirectly, with the process of the [courts

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165 *ED & F Man (Sugar) Ltd v Haryanto (No 2)* [1991] 1 Lloyd's Rep 429 (CA). Man and Mr Haryanto had entered into contracts for the sale of sugar in 1982 which were disputed by 1984. A settlement agreement was reached by 1986, which Man sought to enforce in Indonesia. The Indonesian Court, finding that the contract and subsequent settlement agreement was illegal, dismissed Man's proceeding. Man then sought a declaration in the English courts that the settlement agreement was valid and binding. This declaration was granted by the English Commercial Court in 1990. A further application by Man for an injunction with extraterritorial effect, restraining Mr Haryanto from repeating the assertions made in the Indonesian proceedings anywhere in the world, was declined. On appeal, the English Court of Appeal again declined to grant injunctive relief and dismissed the appeal.

166 At 440.

167 At 436.

168 At 437.

169 At 437, quoting *ED & F Man (Sugar) Ltd v Haryanto (No 2)* [1991] 1 Lloyd's Rep 161 (QB) at 168.

of other countries] to decide, in accordance with their own laws and procedure, whether to recognise and enforce a judgment of a foreign court".[170]

[182] In the present case the injunction was applied for because of the perceived inability or unwillingness of the Kentucky Circuit Court to intervene in the face of the Kentucky Default Judgment, which on the evidence was clearly entered without the proceeding having been drawn to Kea's attention as a result of negligence on the part of its BVI agents. On an equivalent application in New Zealand, we consider it almost inevitable that the Kentucky Default Judgment would have been set aside on the basis that the omission to file the statement of defence was explained and that sufficiently substantial grounds of defence were made out (by reference either to the fact that the agreement was fraudulent[171] or that it was never intended to be binding on the parties).[172] The fact that the Kentucky Default Judgment, including interest and costs, was for a sum in excess of USD 130 million and that there had never been any demand (or even suggestion of liability) under the agreement, would have undoubtedly been considered relevant factors.

[183] At least if the judgment were final, with all appeal rights exhausted and against a New Zealand entity (whether having assets in this jurisdiction or not) a New Zealand court might well consider that, despite its respect for the United States courts, a sufficiently fundamental policy issue was engaged — one ultimately based in principles of natural justice and fair hearing rights — that an anti-suit or anti-enforcement order should issue.

[184] But that is not the case here. There is an extant appeal from the decision of the Kentucky Circuit Court. Nowhere in the evidence of Kea's United States legal expert Mr Kelly does he suggest that the Circuit Court decision declining to set aside the Kentucky Default Judgment was correct — simply that there is a "real danger" it will not be corrected because of appellate deference. Indeed, the submissions filed by Kea in the Kentucky Court of Appeals make the argument (in our view compellingly) that in

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170 *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2002] EWHC 2210 (Comm), [2003] 1 Lloyd's Rep 1 at [204].

171 In the sense either that it was fabricated, or the agreement was so demonstrably in breach of Mr Dickinson's fiduciary duties to Kea (and known by all parties to be so) that it was properly set aside.

172 See High Court Rules, r 15.10.

terms of the relevant test for setting aside default judgments in Kentucky, the Circuit Court inexplicably changed the first prong of the test from "valid excuse" for the default to "effective service of process". Kea says that this was "manifestly improper" and constitutes an abuse of discretion, warranting reversal. It references case law from "numerous jurisdictions including from [the Kentucky Court of Appeals], which [distinguish] service from notice in the default judgment context". It points out that the Kentucky Court of Appeals has on previous occasions "specifically overturn[ed] *this Circuit Court's* denial of multiple motions to set aside".[173]

[185] This brings us to a further observation by Professor Dickinson with which we agree, namely that the anti-suit or anti-enforcement injunction has such capacity to interfere with the interests of a foreign legal system in administering justice within its own territory, that it should be a "measure of last resort".[174] For example, in *Société Nationale Industrielle Aérospatiale v Lee Kui Jak*, an anti-suit injunction was only applied for in Brunei after all avenues of appeal against the Texas Court's assumption of jurisdiction had been exhausted.[175]

[186] We consider that, in this case, comity required that a New Zealand court at least await the outcome of the appeal process before considering whether to issue an anti-suit or anti-enforcement judgment.[176]

[187] We have particular concerns about the anti-enforcement aspect of the orders given that, unlike in *Ellerman Lines Ltd v Read* and *Bank St Petersburg OJSC v*

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173 Emphasis in original.

174 Dickinson, above n 128, at 104.

175 *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871 (PC). This proceeding arose out of the death in a helicopter crash in Brunei of an international businessman resident in that country. The defendants were the French helicopter manufacturer SNI, Malaysian operator Bristow and (in the parallel Texas proceedings) two of Bristow's United States associates. The application for injunction was declined by the Brunei High Court and an appeal to the Brunei Court of Appeal failed. A further appeal to the Privy Council was successful. Dickinson refers to the case as "troubling on several fronts": Dickinson, above n 128, at 106.

176 To the extent Kea raised issues before the High Court about inability to bond the judgment pending appeal without potentially compromising its ability to challenge enforcement in the BVI, we note that, with interim liquidators now appointed to WFTL and recognition of the liquidators by the United States Federal Bankruptcy Court, no enforcement action is anticipated pending resolution of the appeal in Kentucky. We note also the expert evidence that the BVI courts will look to the New Zealand court's finding on the conspiracy claim and will recognise such judgment because the New Zealand court has jurisdiction over WFTL as of right: see Jurisdiction Judgment, above n 28, at [84] and [87].

Arkhangelsky,[177] there is no contractual jurisdiction clause that the New Zealand Court was seeking to enforce, and, unlike *SAS*,[178] the anti-enforcement injunction has global effect. As Mr Wikeley submits, it may have been permissible to seek an injunction against enforcement in New Zealand (a mirror image of the declaratory relief issued under the second cause of action) but it was always moot because there was never any suggestion of enforcing the Kentucky Default Judgment in this jurisdiction. We agree that it was, in the technical sense which applies, an "exorbitant" exercise of jurisdiction of the New Zealand High Court to injunct enforcement anywhere else in the world and that comity suggested it was a matter for those courts to make orders for stay, in accordance with the applicable policy choices and laws in the particular jurisdictions involved.

[188] However, our conclusions are again influenced by the fact that there is currently an unresolved appeal in Kentucky challenging the validity of the Kentucky Default Judgment. We do not suggest it would *never* be appropriate for a New Zealand court to issue a worldwide anti-enforcement order.

[189] We also have reservations about the Judge's assessment that if the Coal Agreement was a fraud then it "may even be seen as consistent with the requirements of comity" for the New Zealand High Court to restrain perpetuation of the fraud (being that of a New Zealand company acting as trustee of a New Zealand trust) on the Kentucky courts.[179] We consider that United States courts are unlikely to look for or need the protection of New Zealand courts and are well capable of identifying fraud and ensuring no reward flows from it. We emphasise again however, that these comments were made in the context of the ex parte interim injunction application and may not have influenced the Judge's permanent injunction assessment.

[190] Finally, we express caution about the related proposition that pursuit of the Kentucky proceedings was oppressive and/or vexatious on the basis that "perpetuating a fraud is inherently unconscionable".[180] Professor Dickinson argues that "it is time to

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177 *Ellerman Lines Ltd v Read* [1928] 2 KB 144 (CA); and *Bank St Petersburg OJSC v Arkhangelsky* [2014] EWCA Civ 593, [2014] 1 WLR 4360.

178 *SAS Institute Inc v World Programming Ltd*, above n 132.

179 Interim injunction judgment, above n 8, at [68]. At that point in the judgment using "fraud" as a synonym for "fabricated".

180 That was a submission by Kea recorded in the interim injunction judgment, above n 8, at [63].

discard the language of unconscionability here and elsewhere … [it is] a vestige of an earlier monotheistic society [which] no longer performs any useful role and obscures the real reasons for granting injunctions".[181] We likewise consider that more precision should be possible in explaining the basis for anti-suit and anti-enforcement injunctions.

[191] We also feel compelled to ask, if the relevant issues are assumed to be:

(a) is the Coal Agreement an authentic or a fabricated document;

(b) if authentic, was it entered into in breach of fiduciary duty by Mr Dickinson;

(c) if so, is knowledge of that attributable to Mr Wikeley; and

(d) was it, in any event, intended to be a binding agreement;

why it should be considered vexatious or oppressive for these issues to be addressed in a United States court with all of the advanced legislative and common law apparatus available to it to do justice between the parties? We again think that a conclusion of vexatiousness or oppression has the capacity to look patronising from the perspective of the United States — something which in comity terms should be avoided.[182]

[192] For completeness, we note that, in granting the interim order restraining Mr Wikeley from taking steps to enforce the Kentucky Default Judgment, the Queensland Supreme Court considered it arguable that Kea's claim of tortious conspiracy could support a permanent anti-enforcement injunction and not offend considerations of comity.[183] In doing so the Judge relied on the decisions in *Ellerman Lines* and *Bank St Petersburg*.[184] In dismissing Mr Wikeley's appeal against

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181 Dickinson, above n 128, at 98.

182 Noting that Maria Hook and Jack Wass *The Conflict of Laws in New Zealand: Supplement 2024* (LexisNexis, Wellington, 2024) at 2.439A likewise seems to cast doubt on whether the granting of an anti-suit/anti-enforcement injunction could itself be described as an act of comity.

183 Queensland SC second interim orders judgment, above n 30, at [159]–[203].

184 At [178]–[188], citing *Ellerman Lines Ltd v Read*, above n 177, and *Bank St Petersburg OJSC v Arkhangelsky*, above n 177.

the interim order, the Queensland Court of Appeal saw no error in the Judge's reasoning.[185]

[193] Although these decisions, on their face, take a different approach to our own on the issue of comity, they do not cause us to alter our view. This Court is concerned with the permanent injunctions. In comparison, the Queensland Supreme Court was considering whether an arguable case had been established in the context of an ex parte application for interim relief and the Queensland Court of Appeal's focus was whether there had been error in the lower court's assessment of that question. This was essentially the same issue that Gault J faced in determining the application for interim relief. It was not in issue before us but, given the short-lived nature of the relief, we do not see any basis for criticism of that decision. Because the appeal in this Court was one from a final decision, we have had the benefit of more extensive consideration of the comity issue. For the reasons we have explained, we see *Ellerman Lines* and *Bank St Petersburg* as distinguishable and, unlike the Queensland Court of Appeal, we do not see the likelihood of the Kentucky Default Judgment being overturned in that jurisdiction as a factor that supports the making of a permanent anti-suit injunction.

[194] We come back to what we consider to be the underlying rationale for the injunctions, and certainly the basis on which they were applied for so soon after Kea was rebuffed by the Kentucky Circuit Court. Kea considered the Kentucky judicial system unable or unwilling to act. WFTL's New Zealand registration and its status as a trustee of a New Zealand trust provided a jurisdictional leg up with which to challenge enforcement of a USD 130 million plus judgment based on a claim of which Kea had no actual notice. Recourse to the New Zealand courts may, in that context, have been understandable — a case of desperate times calling for desperate measures. But ultimately, absent exhaustion by Kea of its remedies in Kentucky, we consider that comity requires the New Zealand courts to keep their powder dry.[186]

[195] We therefore discharge the permanent anti-suit and anti-enforcement injunctions and associated orders (at [156(a)(i)(ii)(iii) and (iv)] of the First Judgment) on the basis

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185 Queensland CA interim orders judgment, above n 30.

186 In a manner akin to the doctrine of "prudential exhaustion" recognised in cases such as *Sarei v Rio Tinto plc* 550 F 3d 822 (9th Cir 2008) at 831. See also *Fischer v Magyar Államvasutak Zrt* 777 F 3d 847 (7th Cir 2015); and the discussion in Estreicher and Lee, above n 151, at [206].

that the Kentucky Court of Appeals is seized of the appeal relating to the Kentucky Default Judgment and comity considerations require this Court to defer to the jurisdiction of Kentucky Court of Appeals. We do so without prejudice to Kea's right to reapply at a later time.

Position of interim liquidators and consequences of Kentucky Default Judgment not being set aside

[196] Although we discharge the permanent anti-suit and anti-enforcement injunctions, we emphasise that we are not discharging the appointment of interim liquidators to WFTL on 6 April 2023. That appointment occurred in consequence of breaches by WFTL and Mr Wikeley of interim orders preventing appointment of additional or replacement trustees. It served valid domestic interests by ensuring assets available to satisfy any New Zealand judgment remained under the control of New Zealand parties. No equivalent comity issues were engaged.

[197] WFTL is bound by the First Judgment which we have otherwise upheld. As our next section identifies, it has a substantial damages liability to Kea. Its New Zealand interim liquidators remain under the control of the New Zealand High Court.

[198] We note with concern the contents of Kea's updating memorandum dated 3 September 2024 and affidavit of Mr Andrew Hagerman dated 30 August 2024, which we admit on standard updating principles. That affidavit annexes correspondence addressed to the interim liquidators and signed by Mr Wikeley and his sons Oliver and William Wikeley, all ostensibly as beneficiaries of the WFT. The correspondence is dated 21 May 2024, the day after we heard this appeal. The correspondence purports to suggest that unless the interim liquidators take action to recover the United States debt "with urgency" they will not only be in breach of their fiduciary duties, but may invite findings of contempt by the United States courts.

[199] We consider such correspondence in further breach of the interim injunctions which were in place at the time. In addition, the correspondence seeks to place pressure on the interim liquidators to act in a way which would not only have offended extant injunctions, but which may well be otherwise inconsistent with the obligations of the interim liquidators to the New Zealand High Court. We come to that conclusion despite

the contents of Mr Wikeley's memorandum dated 12 September 2024, which we have also taken into account.[187]

[200] The interim liquidators may, if they consider that our discharge of the permanent injunctions warrants it, apply to the High Court under ss 246(2) and 284(1)(a) of the Companies Act 1993 for directions in relation to any matter arising in connection with the interim liquidation. In our view, such directions could, in the circumstances of this case, include directions that the interim liquidators not take steps by way of enforcement of the Kentucky Default Judgment, pending resolution of the Kentucky appeal. The alternative is potentially to expose WFTL to substantial costs, including to Kea, on enforcement proceedings based on an underlying judgment which may ultimately be set aside on appeal.

[201] However we note further, that if the Kentucky Default Judgment were not set aside, the interim liquidators could face renewed pressure to enforce the Kentucky Default Judgment in order to meet the New Zealand judgment debt and costs awards against WFTL — this despite the judgments of the High Court and this Court finding claims under the Coal Agreement to be fraudulent and made pursuant to a conspiracy. We do not at this stage express any view about how the principles of international comity might respond to that particular scenario.

Legal costs as damages

[202] Mr Wikeley argues that, in awarding damages for 75 per cent of the legal costs incurred by Kea in England, the United States and Australia[188] "while the Kentucky Judgment has not been set aside", the High Court "supplant[ed] the position of those courts further". He says that costs as damages should not be considered or awarded in respect of costs in proceedings still pending.

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[187] We note Mr Wikeley's original memorandum in response dated 10 September 2024 which Mr Wikeley withdrew after the apparent use of generative artificial intelligence in its drafting was drawn to our attention by respondent counsel. The use of generative artificial intelligence was not initially disclosed by Mr Wikeley, but was evident from the references to apparently non-existent cases. No further comment is necessary except to note the relevant guidance recently issued by the judiciary: *Guidelines for use of generative artificial intelligence in Courts and Tribunals: Non-lawyers* (Artificial Intelligence Advisory Group, 7 December 2023).

[188] The award against Mr Watson was further reduced on account of a costs order made in the English proceedings against him.

[203] We are unpersuaded by this argument. We have upheld the High Court's substantive findings. The overseas legal expenses were all incurred in defence of a tortious conspiracy. We agree with Gault J that the costs claimed are a direct and foreseeable consequence of the conspiracy — a finding which holds irrespective of whether Kea's appeal to the Kentucky Court of Appeals is successful or not.[189] We note Kea's undertaking not to seek double recovery.

Mr Wikeley's challenge to the Second Judgment

[204] Mr Wikeley challenges the Second Judgment on the basis that the First Judgment had already been sealed and "the Court is not a permanent well from which a plaintiff may continually draw further orders pursuant to leave reserved, let alone on an *ex parte* basis". Kea responds that the orders were made "in continuation of the formal proof procedure" of which Mr Wikeley was not entitled to have notice. It says that a court can grant supplemental orders and grant or modify protective measures such as freezing orders, after judgment.[190]

[205] Having set aside the permanent injunctions in [156(a)(i) to (iv)] of the First Judgment on the terms indicated, we do not think it appropriate to uphold the further orders made pursuant to a reservation of leave in [156(a)(v)] of the First Judgment which was itself expressed to be "in relation to further relief necessary to give effect to these orders".

[206] There is also the additional point, recognised in Kea's submissions, that the Second Judgment granted relief to prevent any further attempt to affect changes of trustee and/or the proper law of the WFT. As such, it was conceptually related to the relief granted in [156(b)(iii), (iv) and (v)] of the judgment (the declarations) and not [156(a)(i) to (iv)] (the anti-suit and anti-enforcement injunctions). It seems doubtful to us therefore, that the reservation was ever able to be accessed for the purposes specified. Nor was it a case where we consider recall would, as Kea suggests, have been justified. The additional relief was not sought in the amended statement of claim. Its omission from the First Judgment was not the result of judicial oversight, but rather apparent later

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189 First Judgment, above n 2, at [125].

190 Citing *Universal Homes Ltd v Kloet* [1976] 1 NZLR 246 (SC) at 248; and *Glover Trust Ltd v Glover Trust Corp* [2013] NZHC 2056.

recognition by Kea that it had not sought the full range of remedies it ultimately considered necessary.

[207] We therefore set aside the injunctions contained in the Second Judgment on the basis that there was no jurisdictional basis to apply for them under the specific reservation which Kea invoked.

[208] We nevertheless understand why the Judge was sympathetic to Kea's attempts to restrain further meddling by Mr Wikeley with the constitutional arrangements of the WFT. His history shows that he considers himself uninhibited in his endeavours to defeat the orders of New Zealand courts.

[209] We therefore reserve the right of Kea to apply further to the High Court if it considers that additional relief of a kind not raised before us is necessary despite our confirmation that the interim liquidators of WFTL remain in place and continue to be seized of the trust assets.

[210] Further, to preserve Kea's ability to be heard on interim relief pending a possible application for leave to appeal to the Supreme Court,[191] the orders setting aside the injunctions will lie in Court and not become operative for 20 working days from delivery of this judgment.

Summary of our judgment

[211] We summarise our response to the appeal as follows:

(a) We are satisfied on comity grounds that the permanent injunctions identified in [156(a)] of the First Judgment are appropriately discharged. Broadly these are the injunctions which:

(i) compel discharge of the Kentucky Default Judgment and preclude any steps relying on the Coal Agreement (the anti-suit injunctions);

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[191] Supreme Court Rules 2004, r 30(2).

(ii) restrain the defendants from enforcing the Kentucky Default Judgment anywhere in the world (the anti-enforcement injunction); and

(iii) apply the injunctions to the defendants' privies and assignees.

(b) We discharge the injunctions in the Second Judgment.

(c) The orders setting aside the injunctions will lie in Court and not become operative for a period of 20 working days from delivery of this judgment. As a result, absent a stay pending appeal, there will be no injunction against enforcement of the Kentucky Default Judgment in New Zealand. However, Kea has no assets within the New Zealand jurisdiction and, in any event, we uphold the High Court's declaration that the Kentucky Default Judgment is not entitled to recognition or enforcement in this country.

(d) We also uphold all the other orders made by the High Court, including:

(i) the declarations that the Kentucky Default Judgment was obtained by fraud and that Mr Wikeley's attempts in March and April 2023 to assign the benefit of that judgment and of the Coal Agreement (and related steps) were void;

(ii) the damages and costs awards; and

(iii) the ancillary orders at [156(f)] of the First Judgment.

We do so because we are satisfied that the Judge was correct in finding a fraudulent conspiracy between the defendants.

(e) For the avoidance of doubt, we do not discharge the appointment of interim liquidators to WFTL. Their appointment was for valid domestic reasons and is unaffected by discharge of the anti-suit and anti-enforcement injunctions. We recognise that the interim liquidators

may wish to seek further direction from the High Court. We specifically reserve their right to do so.

(f) We reserve generally, Kea's right to apply to the High Court for further injunctive relief, for example, relief consequent on our discharge of the injunctions in the Second Judgment.

Costs

[212] Having regard to Mr Wikeley's self-representation and the respective wins and losses, we consider that costs in this Court appropriately lie where they fall.

Result

[213] The appellant's application to amend the notice of appeal is declined.

[214] The appellant's application to admit further evidence is declined.

[215] The first respondent's application to admit further evidence is granted in respect of the affidavits of Toby Graham dated 10 January 2024 and Andrew Hagerman dated 30 August 2024. The first respondent's application to admit further evidence is otherwise declined.

[216] The second respondent's application to admit further evidence is granted in respect of the affidavits of interim liquidator Natalie Burrett dated 3 May 2024 and 17 May 2024.

[217] The appeal is allowed in part by discharge of:

(a) the permanent anti-suit and anti-enforcement injunctions in [156(a)(i) to (iv)] of the First Judgment ([2023] NZHC 3260); and

(b) the permanent injunctions in [7] of the Second Judgment ([2023] NZHC 3532).

[218] The orders in [217] above are to lie in Court and not become operative for a period of 20 working days from delivery of this judgment.

[219] We reserve to the first respondent the right to reapply to the High Court for further injunctive relief if required and reserve to the interim liquidators the right to apply to the High Court for any further order considered appropriate in the context of the interim liquidation.

[220] The appeal is otherwise dismissed.

[221] There is no order as to costs.

Solicitors:
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