The Conflict of Laws in New Zealand

Supplement 2024

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Preface to Supplement 2024

The first edition of *The Conflict of Laws in New Zealand* was published in 2020. We noted in the preface the irony of submitting a manuscript on private international law at a time when a pandemic had brought so much international movement and commerce to a halt. However, we expressed the hope that the text would assist lawyers, judges, scholars, and students to navigate the cross-border issues that would inevitably continue to arise.

We hope that the first edition has gone some way to achieve that goal. The purpose of this supplement is to update the principal text with the key developments that have occurred since publication. We have tried to capture all relevant New Zealand judgments decided before 31 December 2023, together with overseas appellate judgments of particular relevance to New Zealand law. We are pleased to see that the subject continues to be a vibrant and important part of New Zealand law, with significant decisions in the past three years on topics as diverse as parallel class action proceedings (*Whyte v a2 Milk Company Ltd*), sovereign immunity (*Sodexo Pass International SAS v Hungary*), anti-suit injunctions (*Kea Investments Ltd v Wikeley* and *Maritime Mutual Insurance Association (NZ) Ltd v Silica Sandport Inc*), the territorial scope of the Consumer Guarantees Act 1993 (*Body Corporate No DPS 91535 v 3A Composites GmbH*), choice of law in contract (*Salih v Almarzooqi*), questions of privilege (*Business Control (Schweiz) AG v Shibalova*), the Trans-Tasman Proceedings Act 2010 (*Lange v Lange*), and cross-border insolvency (the *Halifax* litigation).

We were grateful to be jointly awarded the Legal Research Foundation's JF Northey Prize for the first edition, and for the acknowledgements, encouragement and suggestions we have received from judges, practitioners and other users of the text since it was published. We are also grateful to LexisNexis for their continued support, and particularly their agreement that this supplement could be made freely available to ensure that readers can continue to obtain the most out of the principal work.

The supplement is current as at 31 December 2023. Up-to-date commentary on the New Zealand conflict of laws can be found at https://blogs.otago.ac.nz/conflicts. Readers are also referred to new editions of two important overseas texts: Lord Collins & Jonathan Harris *Dicey, Morris & Collins on the Conflict of Laws* (16 ed, Sweet & Maxwell, 2022) and Reid Mortensen, Richard Garnett & Mary Keyes *Private International Law in Australia* (5 ed, LexisNexis, 2023).

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2.137

In light of recent dicta by Lord Collins in *Employees Compensation Assistance Fund Board v Fong Chak Kwan* [2022] HKCFA 12 at [114]-[121], sitting as a non-permanent judge on the Hong Kong Court of Final Appeal, this paragraph requires redrafting. In Lord Collins' view, the "letter and spirit" principle is relevant to the availability – and not just the meaning – of the head of jurisdiction, to the extent that this question involves a discretionary exercise. In other words, it is not enough that the claim falls within the letter of the head of jurisdiction, it must also fall within its spirit, and it is this latter question that engages the court's discretion. In particular, Lord Collins concluded that the principle could be invoked where a claimant has manufactured a link with the forum. For example, where a claimant from Country A is the victim of a tort committed in Country B and travels to the forum (Country C) for medical treatment, the court may refuse to assume jurisdiction on the basis that the forum is a place of damage, because the plaintiff has "no real connection with the forum" (at [118]). According to Lord Collins, there was no need to interpret the letter of the rule as excluding such cases, because the court still had to be satisfied that the case fell within its spirit.

A number of observations are helpful at this point. First, as acknowledged by Lord Collins, the principle has (also) been used in a different sense, to construe the *meaning* of heads of jurisdiction. For example, in *Mercedes-Benz AG v Leiduck* [1996] AC 284 at 299, Lord Mustill said that regard must be had to "the intent" of the words – "their spirit" – when determining whether Mareva injunctions could be construed as injunctions under the rules for service out. It was "not enough simply to read the words of the rule and see whether, taken literally, they are wide enough to cover the case". In fact, *Metall & Rostoff v Donaldson* [1990] 1 QB 391 (CA), which was cited by Lord Collins in support of his "wider" approach to the principle, might simply be another example of the principle being used as an interpretive aid. When discussing the requirement that damage caused by a tort resulted "from an act committed within the jurisdiction", the Court of Appeal said that "it would certainly contravene the spirit, and also we think the letter, of the rule if jurisdiction were assumed on the strength of some relatively minor or insignificant act having been committed here, perhaps fortuitously" (at 437). The Court concluded, therefore, that damage had to result from "substantial and efficacious acts committed within the jurisdiction", and its allusion in this context to a distinction between "the spirit" and "the letter" of the rule, may have simply reflected the potential difference between a literal and purposive approach to interpretation.

This is not to say that there is no support for Lord Collins' "wider" principle. In *Johnson v Taylor Bros & Co Ltd* [1920] AC 144, two of the Lords expressly mentioned the spirit of the rule, and one of them clearly did so on the basis that it engaged the discretionary part of the court's jurisdiction (Viscount Haldane at 153, but see Lord Dunedin at 154). What is more, Lord Atkinson (at 158) and Lord Buckmaster (at 158) also seemed to rely on the court's discretion to refuse leave, albeit that they did not mention the spirit of the rule.

The second observation is that these two uses of the "letter and spirit" principle need not be mutually exclusive. Lord Collins seemed to acknowledge this (at [117]), although there is a potential tension with his point that "[t]he purpose of the gateways is to set out a list of the situations in which the legislator considers that there *may* be a sufficient link with [the forum]" (at [105], emphasis added). For example, a party may have received acceptance of an offer to contract while on a business trip in New Zealand, with the result that a claim to enforce the contract would fall within r 6.27(2)(b)(i), because the contract was made or entered into in New Zealand. A purposive construction of the heads of jurisdiction that is based on the spirit of the rule would strive to exclude cases with only fortuitous or tenuous connections to New Zealand (but see Lord Collins at [105], [110]). However, even on a purposive construction of r 6.27(2)(b)(i), the contract was clearly entered into in New Zealand. In such a case, the wider principle would provide an additional basis for refusing jurisdiction as envisaged by Lord Collins. The claim falls within the meaning – but outside of the spirit – of r 6.27(2)(b)(i), and the wider principle provides a kind of

correction to the overinclusive meaning of para (i). In this way, the wider principle may make up for the relative inflexibility of the gateways, which reflect a choice of certainty over the guarantee of a meaningful minimum connection.

The third observation is that this is not an unusual technique in the conflict of laws. That is because connecting factors – whether unilateral or multilateral, broad or narrow – involve a necessary trade-off between certainty and justice (see [**4.40**]). Either they are prescriptive and, therefore, predicable in outcome, or they are sufficiently open-ended to enable the right decision to be made on the facts of the case. A comparison with choice of law is instructive here. For example, the lex loci delicti rule is the default choice of law rule for international torts (Private International Law (Choice of Law in Tort) Act 2017, s 8), but because the lex loci delicti is not necessarily the law with the closest connection to the tort, the court may invoke a flexible exception to ensure that it applies the most appropriate law (s 9). In fact, the Canadian approach to jurisdiction is now explicitly based on such a model, which combines presumptive connecting factors with the ability to displace the presumption of a real and substantial connection (*Club Resorts Ltd v Van Breda* 2012 SCC 17, [2012] 1 SCR 572).

Fourth, the spirit of the rule seems to be that a defendant should not be served outside of the jurisdiction unless there is a meaningful connection to the forum. It forms part of the requirement that the forum must be shown to be "the proper place in which to bring the claim" (at [112]). Lord Collins also drew on the principle that the court should be careful before serving proceedings out of the jurisdiction, noting that the jurisdiction has to be exercised "with discrimination and with scrupulous fairness to the defendant" (at [112], citing *Ocean Steamship Co Ltd v Queensland State Wheat Board* [1941] 1 KB 402 at 417 (CA)). Thus, Lord Collins considered that the spirit principle can mitigate the effect of broad heads of jurisdiction by requiring a real connection (at [106], [118], cf the reference in [120] to mitigating "the excesses" of the rule).

Fifth, there has been some uncertainty about the locus of this particular discretion. While Lord Collins was very clear that the spirit principle is distinct from the question of forum conveniens, its particular connection to the heads of jurisdiction is more confusing (see Ivan Sin "Service out and tort gateway in the Hong Kong Court of Final Appeal" (2023) 139 LQR 210; Alex CY Chan and Kelvin KC Tse "The Tort Gateway: The Missing Jigsaw Piece?" [2023] LMCLQ 211). Ultimately, the question for Lord Collins seemed to be whether the particular head of jurisdiction *should* be available (see also r 6.28(5)(d), discussed at [**2.143**] and [**2.144**]).

Sixth, is there anything to be gained from reviving the wider spirit principle? Lord Collins clearly thought so, emphasising that the inquiry is functionally distinct from the question of forum conveniens (at [118], [119]; cf the majority in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995 *(Brownlie II)* which

relied on forum conveniens to moderate the reach of the heads of jurisdiction). It is possible, though difficult, to think of scenarios where New Zealand would be the appropriate forum despite lacking a meaningful connection to the claim. It is also possible that the spirit principle could provide a more efficient route to declining jurisdiction than the question of forum conveniens (see Andrew Dickinson "Faulty Powers: One-Star Service in the English Courts" [2018] LMCLQ 189), although parties may still end up fighting their jurisdictional dispute on all fronts, in which case the principle would simply be another potential source of contention.

iii. Degree of connection

2.138, Note 261

See *Employees Compensation Assistance Fund Board v Fong Chak Kwan* [2022] HKCFA 12 at [113].

iv. Strength of the claim

2.141, Note 266

See *Wang v Wang* [2020] NZHC 309 at [93].

2.142A

In *Body Corporate Number DPS 91535 v 3A Composites GmbH* [2023] NZCA 647, the Court of Appeal considered that it was important to have regard to the rationale for the "serious issue to be tried on the merits" requirement, in circumstances where a defendant was already required to defend related claims in New Zealand and the "incremental litigation burden" that would arise from defending a further claim was "negligible" (at [120]).

v. Any other relevant circumstances

2.144, Note 271

Sodexo Pass International SAS v Hungary [2021] NZHC 371.

f. Heads of jurisdiction in r 6.27

i. Introduction

ii. Nature and extent of the connection

2.149

See generally, in the English context, D Foxton "The Jurisdictional Gateways – Some (Very) Modest Proposals" [2002] LMCLQ 71.

2.149, Note 279

Cf *Employees Compensation Assistance Fund Board v Fong Chak Kwan* [2022] HKCFA 12 at [105], [110], discussed at [**2.137**] of this supplement.

2.149, Note 280

Cf *Employees Compensation Assistance Fund Board v Fong Chak Kwan* [2022] HKCFA 12 per Lord Collins, that "[t]he purpose of the gateways is to set out a list of the situations in which the legislator considers that there *may* be a sufficient link with [the forum]" (at [105]). The heads of jurisdiction do not provide "a necessary connection" with the forum (at [110]). Like the majority in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995 (*Brownlie II)*, Lord Collins used the "ordinary" meaning of the term "damage" in the tort gateway to conclude that the gateway included indirect damage suffered in the forum as a result of foreign acts. In other words, an injured tourist who returns home to the forum after an accident abroad is able to rely on the gateway, and there is no room for a purposive interpretation of the gateway to restrict its scope in line with a requirement of a real or substantial connection.

In our view, the drafting of the heads of jurisdiction is (almost necessarily) over-inclusive, but this does not mean that they lack the purpose of establishing a meaningful connection. A connecting factor can have the purpose of requiring a meaningful connection without guaranteeing such a connection in every case. In fact, Lord Collins seemed to accept that indirect damage could provide a meaningful connection, or even that it would do so in most cases. This was not the case for Lord Sumption in *Brownlie I* (*Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192) or Lord Leggatt in *Brownlie II*, which explains why, in their view, there was room for a purposive interpretation based on a real or substantial connection. See the discussion at [**2.137**] of this supplement.

iii. A good arguable case

2.154A

In *Zhang v Yu* [2020] NZCA 592, for example, the issue was whether the defendant had made certain misrepresentations while in New Zealand with the result that the plaintiff could rely on r 6.27(2)(a). The High Court had found that, if the relevant representations were made, it was "more likely that they were made in China" (*Zhang v Yu* [2019] NZHC 29 at [54]). The Court of Appeal allowed the appeal. It noted that, to find that the good arguable case standard was met, it was "only necessary to find that there was a sufficiently plausible basis for the relevant representations having been made in New Zealand" (at [51]). It was not necessary to establish "a prima facie case" (at [12], referring to *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754

at [41]) or "to find the representations were 'more likely' to have occurred in New Zealand" (at [51]). Disputed questions of fact could not be resolved on affidavit evidence (at [12]). Here, there was "a sufficiently plausible basis on the evidence for the claim that [the defendant] made the relevant representations while in New Zealand" (at [51]).

The purpose of the good arguable case standard in this context should be to provide the court with sufficient confidence that the claim has the requisite connection to New Zealand to assume jurisdiction. English courts have recognised that this means that the inquiry must be approached with a certain degree of flexibility and a willingness, *where possible*, to evaluate the relative merits of the parties' competing positions, although it is clear that this cannot be done on the balance of probabilities (*Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192 per Lord Sumption (at [7], later confirmed in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, [2018] WLR 3683, and usefully analysed in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, [2019] WLR 3514). Thus, in our view – consistent with *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 (HL) and the more recent English authorities just cited – a prima facie case (or less) should be sufficient only where the court cannot take a reliable view on the material because of the interlocutory stage of the proceedings.

This may, in fact, have been the situation that the New Zealand Court of Appeal had in mind when it said that the plaintiff need not establish a prima facie case, so what it really meant to say was that the plaintiff need not establish a prima facie case where the court cannot come to a concluded view on the conflicting material before it. In *Zhang,* there seemed to be a genuine dispute whether the alleged representations were made while in New Zealand. The parties made competing claims to that effect and there was no further (eg documentary) evidence to resolve the issue. The differences, therefore, between the New Zealand and English authorities may be more apparent than real, especially when one considers the possibility that the New Zealand court and the English court may not have a shared understanding of the term "prima facie case". In some ways, this expression may simply be another "gloss", "explication" or "reformulation" that does more harm than good in elucidating the meaning of the good arguable case (see *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, [2019] WLR 3514 at [59]).

2.155, Note 292

Although this was not the approach followed in *Johnston v Johnston* [2020] NZHC 2887, [2020] NZFLR 594 at [39]-[40], which led to the Court of Appeal granting leave to appeal ([2021] NZCA 181 at [10]).

iv. Tort

Any act or omission in respect of which damage was sustained was done or occurred in New Zealand (r 6.27(2)(a)(i))

The damage was sustained in New Zealand (r 6.27(2)(a)(ii))

2.162, Note 323

A majority of the Supreme Court has now held that "damage" under the equivalent English gateway must be construed extensively as referring to "actionable harm", whether that harm is "direct or indirect": *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995 (*Brownlie II)* at [81]. See also *Employees Compensation Assistance Fund Board v Fong Chak Kwan* [2022] HKCFA 12.

2.162, Note 327

According to the majority in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995 (*Brownlie II)*, forum conveniens is a sufficient tool to ensure that the English court does not assume jurisdiction in cases with a merely "casual or adventitious link" to England (at [79]). It did not seem to think that cases of indirect damage would necessarily – or usually – involve a merely casual or tenuous connection (see also *Employees Compensation Assistance Fund Board v Fong Chak Kwan* [2022] HKCFA 12, but compare Lord Leggatt's judgment in *Brownlie II* and Lord Sumption's judgment in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192 (*Brownlie I*).

2.163, Note 331

A majority of the Supreme Court in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995 (*Brownlie II)* noted that "the mere fact of any economic loss, however remote, felt by a claimant where he or she lives or, if a corporation, where it has its business seat would be an unsatisfactory basis for the exercise of jurisdiction" (at [76]). In such cases, "the more remote economic repercussions of the causative event will not found jurisdiction" (at [75]).

v. Contract

Was made or entered into in New Zealand (r 6.27(2)(b)(i))

2.170, Note 353

See the recently amended Gateway 6(a) of the English PD6B for service out to the jurisdiction.

2.170, Note 354

Brownlie v FS Cairo (Nile Plaza) LLC [2021] UKSC 45, [2022] AC 995 per Lord Leggatt, who thought that the gateway should apply only when

both parties were within the jurisdiction when they made the contract (at [211]-[213]).

Was made by or through an agent trading or residing within New Zealand (r 6.27(2)(b)(ii))

Was to be wholly or in part performed in New Zealand (r 6.27(2)(b)(iii))

Was by its terms or by implication to be governed by New Zealand law (r 6.27(2)(b)(iv))

vi. Breach of contract in New Zealand

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2.184

A relationship property claim involving land or other property in New Zealand clearly falls within the purview of r 6.27(2)(e): *Johnston v Johnston* [2020] NZHC 2887, [2020] NZFLR 594 at [22], confirmed in a decision granting leave to appeal ([2021] NZCA 181 at [10]).

ix. Trusts to be carried out or discharged according to New Zealand law

x. Defendant is domiciled or ordinarily resident in New Zealand

2.191

It has been said that the most obvious point in time for assessing the requirement of residence or domicile may be the filing of the claim: *Johnston v Johnston* [2020] NZHC 2887, [2020] NZFLR 594 at [30].

xi. The defendant is a necessary or proper party to a New Zealand proceeding, or the claim is for contribution or indemnity in respect of a liability enforceable in New Zealand

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Act, omission or damage in New Zealand (r 6.27(2)(j)(i)–(ii))

2.205, Note 449

In *Fruit Shippers Ltd v Petrie* [2020] NZHC 749 at [134], the High Court considered that communications to New Zealand were relevant conduct under para (i) in the

context of a claim under s 131 of the Companies Act 1993 for breach of directors' duties, where the purpose of the communications was to arrange for payments to be made from New Zealand to the defendant.

Enactment applies to an act, omission or persons outside New Zealand (r 6.27(2)(j)(iii)–(iv))

2.209

The High Court disagreed with the conclusion in this paragraph that this head of jurisdiction would not extend to a Property (Relationships) Act 1976 claim relating to foreign movables against a defendant who is domiciled and resident abroad, even where such a claim satisfies s 7 of the Act (see also [**9.119**]): *Johnston v Johnston* [2020] NZHC 2887, [2020] NZFLR 594 at [32]-[40]). The Court considered that s 7 conferred both personal and subject-matter jurisdiction, with the result that the Act expressly conferred jurisdiction on the court over persons outside New Zealand for the purpose of para (j)(iv) (at [39]). The Court of Appeal granted leave to appeal on the basis that there was a serious argument that the Judge erred in finding that para (iv) applied to the proceeding by virtue of s 7 ([2021] NZCA 181 at [10]).

xiv. Submission

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2.213, Note 467

In *Fruit Shippers Ltd v Petrie* [2020] NZHC 749, the High Court seemed to consider that it was sufficient that some of the defendant's acts took place in New Zealand (in particular, "instructions sent to New Zealand requesting payment"): at [135].

xvi. Enforcement of foreign judgment or arbitral award

2.215, Note 473

See *Hebei Huaneng Industrial Development Co Ltd v Shi* [2020] NZHC 2992.

2.215, Note 474

New Zealand's international obligation to recognise an award is a good reason for assuming jurisdiction: *Sodexo Pass International SAS v Hungary* [2021] NZHC 371 at [55].

g. Real and substantial connection under r 6.28

2.217, Note 482

Cf *Hebei Huaneng Industrial Development Co Ltd v Shi* [2020] NZHC 2992 at [78], where the High Court concluded that the fact that the case concerned enforcement of a foreign judgment against assets in New Zealand was a sufficient connection even if r 6.27(2)(m) was not satisfied.

2.219, Note 485

Michael Wilson & Partners Ltd v Emmott [2019] NSWSC 218 was reversed on appeal: [2021] NSWCA 315, (2021) 396 ALR 497.

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e. Submission by the plaintiff

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2.254, Note 574

See *Unwired Planet International Ltd v Huawei Technologies (UK) Ltd* [2020] UKSC 37, [2021] 1 All ER 1141 at [94] on the importance of avoiding an unduly formalistic characterisation of "the case" to be tried so as not to prejudge the outcome of the forum conveniens analysis.

c. Determining the appropriate forum

d. Stage 1: Identification of the natural forum

2.266

A majority of the Supreme Court has since confirmed that the forum (non) conveniens enquiry is not limited by practical issues but involves a "structured discretion" that "is an appropriate and effective mechanism which can be trusted to prevent the acceptance of jurisdictions in situations where there is merely a casual or adventitious link between the claim and [the forum]": *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995 at [78]-[79]; but cf *Employees Compensation Assistance Fund Board v Fong Chak Kwan* [2022] HKCFA 12 per Lord Collins.

2.267, Note 604

But see the High Court's reasoning in *Sequitur Hotels Pty Ltd v Satori Holdings Ltd* [2020] NZHC 2032 at [77].

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ii. Location of witnesses/parties

2.272, Note 615

Remote participation may not be an option where, for example, the relevant party is in prison, and it may in any event not be desirable where a court will have to assess the party's credibility: *A & B v C* [2021] NZHC 2090 at [41].

iii. Applicable law

2.277, Note 632

Cf *Sequitur Hotels Pty Ltd v Satori Holdings Ltd* [2020] NZHC 2032, where the Court considered that the absence of an equivalent statutory scheme to the Financial Markets Conduct Act 2013 in Fiji left a "juridical gap" favouring New Zealand as the appropriate forum (at [71], [83]).

2.277A

A good illustration of these points are the proceedings in *Thomas v A2 Milk Company Ltd No 2* [2022] VSC 725, 68 VR 283 and *Whyte v A2 Milk Company Ltd* [2023] NZHC 22, [2023] 2 NZLR 486, where the Supreme Court of Victoria concluded that it had jurisdiction to determine claims under the (New Zealand) Fair Trading Act 1986 and the Financial Markets Conduct Act 2013, and the New Zealand High Court held that it was not the appropriate forum for the claims.

2.277B

Where a court has concluded, in the context of r 6.28(5)(b), that it is seriously arguable that the law of a particular country is applicable, this is no barrier to considering whether it is more likely that another law is applicable in the context of its determination of the appropriate forum: *Huang v Huang* [2024] NZCA 5 at [54].

iv. Enforceability

v. Related/parallel proceedings

2.280, Note 643

Cf *Johnston v Johnston* [2020] NZHC 2887, [2020] NZFLR 594, where the High Court concluded that it was the appropriate forum to determine a relationship property matter (at [52]-[66]), despite the fact that the parties' entire dispute could have otherwise been resolved in ongoing proceedings in Texas, due to the close connection to New Zealand, and because "[i]t would be no little thing for a Texan court to make binding determinations about who is entitled to realty in Auckland, Collingwood and Broomfield" (at [55]).

2.283

In some circumstances, it may be appropriate to have certain matters determined by the foreign court on a preliminary basis. This could be the case, for example, where difficult questions of foreign law are concerned, or there is a foreign jurisdiction agreement that is not, however, a complete bar to the New Zealand proceeding (see **[2.398]** of this supplement**)**, or where the foreign court has exclusive subject-matter jurisdiction over a particular issue. Here, the court is effectively ordering a split trial, although the particular issue may ultimately be dispositive of the New Zealand proceeding: see *Perpetual Trustee Co Ltd v Downey* (2011) 21 PRNZ 38 (HC) at [50]; *Pacific Auto Carrier (NZ) Ltd v Jacanna Holdings Ltd* [2023] NZHC 2058 at [56]; *Inguran, LLC v CRV Ltd* [2023] NZHC 3692, where the Court rejected a general stay; *Kidd v Van Heeren* [1998] 1 NZLR 324 (HC) and *Kidd v Van Heeren* [2006] 1 NZLR 393 (HC). For relevant foreign authority, see *Westacre Investments Inc v The State-owned Company Yugoimport SDPR* [2008] SGCA 48, (2009) 2 SLR (R) 166 and *Westacre Investments Inc v Yugoimport SDPR* [2008] EWHC 801 (Comm).

2.283B

There has been considerable case law on the problem of multiplicity of class action proceedings. In *Whyte v A2 Milk Co Ltd* [2023] NZHC 22, [2023] 2 NZLR 486, the Court provided clear and helpful analysis on this issue, grouping the cases into

three different categories, depending on whether the proceedings involved the same or different plaintiff classes and whether they were commenced in the same jurisdiction or in different jurisdictions (at [78]). Where the proceedings involve different plaintiff classes and were commenced in different jurisdictions, they are not considered oppressive or an abuse of process *per se*, so a stay is not "a pre-determined response" (at [80]). For further analysis of the Trans-Tasman context of this decision, see below ([**2.326A**] of this supplement).

vi. Progress of the proceeding, or of preparatory work relating to the proceeding

vii. Other considerations

Parties' real interests

Strength of the case

2.288, Note 662

This approach was adopted in *Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 466 at [77].

Efficiency or quality of the foreign legal system

e. Stage 2: Circumstances by reason of which justice requires that the New Zealand court exercise jurisdiction

i. Concerns relating to the natural forum's laws or legal system

2.297, Note 685

The court requires specific information and will not make "blanket assumptions" about the foreign legal system: *A & B v C* [2021] NZHC 2090 at [57]. Compare the courts' approach to the argument that Chinese courts are not "courts" for the purposes of recognition and enforcement of Chinese judgments: *Hebei Huaneng Industrial Development Co Ltd v Shi* [2020] NZHC 2992 and [2021] NZHC 2687, discussed at [**5.80**] of this supplement.

ii. Overriding policies of the forum

iii. Legitimate advantages

f. Onus and standard of proof

g. Forum (non) conveniens in specific subject areas

i. Employment

2.311, Note 717

See *Radford v Chief of New Zealand Defence Force* [2021] NZEmpC 35, [2021] ERNZ 85 at [150]-[151].

2.312, Note 718

See [**6.83A**] of this supplement for an analysis of this question.

2.314, Note 720

However, in *Radford v Chief of New Zealand Defence Force* [2021] NZEmpC 35, [2021] ERNZ 85 at [163], the Employment Court considered that "as a matter of public policy, the Crown should be able to be sued in New Zealand by a New Zealand citizen living here".

2.314, Note 721

See [**6.83A**] of this supplement for an analysis of the question of subject-matter jurisdiction.

ii. Couples' property

iii. Dissolution of marriage

iv. Parenting orders

h. Trans-Tasman proceedings

2.324, Note 747

The applicant should specify the Australian court that is said to be the more appropriate forum: *Addleman v Lambie Trustee Ltd* [2021] NZHC 2504 at [23].

2.324A

As specified in s 24, the question is which is the more appropriate forum to determine "the matters in issue". It is the content of the matters in issue that is relevant: *Drink Tank Ltd v Morrows Pty Ltd* [2020] NZHC 1391, [2020] 3 NZLR 443 at [27]. In Australia, it has been held that the phrase "matters in issue" does not mean "only some or part or an aspect of the matters in issue": *Eastgate & Cardiff* [2020] FamCA 387 at [64]. However, the Court is able to stay a part of a proceeding (in particular, a part of a proceeding that applies only to one defendant): *Addleman v Lambie Trustee Ltd* [2021] NZHC 2504 at [26].

2.326

The High Court has held that the strength of the case was not a relevant factor when determining the appropriate forum under the Trans-Tasman Proceedings Act 2020 (*Drink Tank Ltd v Morrows Pty Ltd* [2020] NZHC 1391, [2020] 3 NZLR 443 at [25]).

2.326, Note 757

See also *Whyte v A2 Milk Co Ltd* [2023] NZHC 22, [2023] 2 NZLR 486 at [65]; Richard Garnett "Determining the Appropriate Forum by the Applicable Law" (2022) 71 ICLQ 589 at 595.

2.326A

In *Whyte v A2 Milk Co Ltd* [2023] NZHC 22, [2023] 2 NZLR 486, the High Court granted a stay of a New Zealand class action against a New Zealand company in relation to allegedly misleading or deceptive statements to the Australian Stock Exchange and the New Zealand Exchange Main Board and breaches of continuous disclosure obligations. The High Court decided that Australia was the more appropriate court to determine the claim, because of the existence of an Australian class action that was "a substantively similar proceeding" (see s 24(2)(f)). The proceedings involved different plaintiff classes and were commenced in different jurisdictions, but to allow the two proceedings to continue in parallel "would be at odds with" the aims of the TTPA, which includes "streamlining the process for resolving civil proceedings with a trans-Tasman element" (at [93]). A stay would promote "the twin goals of efficiency and cost saving embodied in the TTPA (at [119]). Case management techniques such as a joint trial could be a useful alternative to a stay in some cases. However, a stay of proceedings would lead to greater efficiencies, and case management techniques did not address the risk of inconsistent judgments, which was "a significant risk in this case" (at [97]). The Australian proceeding had been commenced first, and this, too, was relevant to the "streamlining and cost reduction purposes of the TTPA" (at [100]). The fact that the plaintiff's proceeding had been commenced in New Zealand was not a permissible consideration (at [36]).

2.326B

When determining the place where the subject-matter of the proceeding is situated, the court may have to identify the location of relevant acts and omissions: see *Drink Tank Ltd v Morrows Pty Ltd* [2020] NZHC 1391, [2020] 3 NZLR 443 at [62]-[69].

E. SUBJECT-MATTER JURISDICTION

E.1 What is subject-matter jurisdiction?

2.331

It is notable, however, that the concept has received increased attention in the New Zealand courts over the past few years (see, eg, *Almarzooqi v Salih* [2021] NZCA 330, [2021] NZFLR 501; *Mao v Buddle Findlay* [2022] NZHC 521 at [51]; *Johnston v Johnston* [2020] NZHC 2887, [2020] NZFLR 594 at [38]).

2.334, Note 787

A recent example of a case where the concept led to confusion was *Lun v Kong* [2023] NZHC 1317, where the Court seemed to assume that there is a *general* limitation on the court's subject-matter jurisdiction based on a requirement of closest connection, and the enquiry ended up detracting from the more relevant questions (in that case) of choice of law and appropriate forum.

E.2 Principles of subject-matter jurisdiction

a. Mandatory, optional and discretionary rules

b. Reasons for limiting subject-matter jurisdiction

c. Determining whether the court has subject-matter jurisdiction

2.342, Note 815:

See, eg, *Thomas v A2 Milk Company Ltd No 2* [2022] VSC 725, 68 VR 283.

E.3 Admiralty

E.4 Sovereign claims

2.350, Note 836

See *Skatteforvaltningen (the Danish Customs and Tax Administration) v Solo Capital Partners LLP (in special administration)* [2023] UKSC 40 at [22]; *Webb v Webb* [2020] UKPC 22 at [32], [55].

2.353, Note 851

Skatteforvaltningen (the Danish Customs and Tax Administration) v Solo Capital Partners LLP (in special administration) [2023] UKSC 40.

E.5 Foreign act of state

2.355

In *Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela* [2021] UKSC 57, [2022] 2 WLR 167, the Supreme Court cited *Buck* in support of its conclusion that it could not adjudicate on the lawfulness or validity of a foreign executive act performed within that state, or of a foreign state's legislation or other laws in relation to acts taking place within that state. The Court reasoned that constitutional questions of lawfulness or validity were questions to be adjudicated in the foreign state (at [176]). However, this did not seem to deprive the rest of the dispute of a foothold in the English courts. The result was that the foreign acts and laws were applicable

as a matter of choice of law, to the extent they properly formed part of that law (although the Court did not use the language of choice of law to come to this conclusion): see [**2.358**], ch 4.B.4.a.ii; see also [**7.172**] of this supplement.

2.357, Note 870

See *Mohamed v Guardians of New Zealand Superannuation* [2021] NZHC 512, [2021] 2 NZLR 612 at [79].

F. CHALLENGING JURISDICTION

F.1 Introduction

F.2 Protesting the court's personal jurisdiction under r 5.49

a. Introduction

2.364, Note 891

If a court would assume jurisdiction under r 6.29 but valid service has not been effected, the appropriate response is not to dismiss the proceeding, but to order that the proceeding be dismissed unless the plaintiff effects valid service within a stipulated time frame, or to adjourn the hearing of a protest to jurisdiction to enable valid service to be effected: *Huang v Huang* [2024] NZCA 5 at [26].

b. Service under r 6.27

c. Service under r 6.28

d. Multiple causes of action

F.3 Applying for a stay or dismissal of proceedings

F.4 Approach on appeal

F.5 Effect of failure to challenge jurisdiction

F.6 Challenging subject-matter jurisdiction

F.7 Trans-Tasman proceedings

G. JURISDICTION AGREEMENTS

G.1 Introduction

2.384, Note 950

Although it will usually be the same: *Enka Insaat VE Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 at [53], [254].

G.2 Nature and effect

G.3 Limits

2.398

However, courts may grant a stay, or use case management tools, to enforce foreign jurisdiction agreements in relation to specific issues that *can* be determined in the foreign court and that will be of relevance to the New Zealand proceeding: see *Inguran, LLC v CRV Ltd* [2023] NZHC 3692, where the Court rejected a general stay; *Kidd v Van Heeren* [1998] 1 NZLR 324 (HC) and *Kidd v Van Heeren* [2006] 1 NZLR 393 (HC). See also [**2.283**] of this supplement.

G.4 The court's discretion

G.5 Existence and validity

2.408

A recent example is *Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 466, where the High Court considered that the plaintiff's allegations of fraud impugned the existence of the contract as a whole (at [63]).

2.408A

In *Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 466, the Court clarified that the standard of proof to determine the existence or validity of the jurisdiction agreement is that of a good arguable case, including in cases where the defendant applies for a stay or dismissal of the New Zealand proceeding on the grounds of forum non conveniens (at [44], see [**2.154A**] of this supplement). This makes sense, to the extent that the broad issue is whether the court is able to give effect to a contested jurisdiction agreement, at a point in the proceeding where the court's ability to make factual findings is necessarily limited. The assessment of the jurisdiction agreement should not descend into a predetermination of the merits. In other words, the court should not have to resolve the parties' substantive dispute in order to determine whether it has, or should exercise, jurisdiction over the dispute.

There is one aspect of the Judge's reasoning, however, that raises further questions. The good arguable case test is especially difficult to apply in cases where the court is unable "to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument" (at *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, [2019] WLR 3514 at [79]). In such cases, the good arguable case inquiry is no longer a relative inquiry, and all that is needed is a plausible (albeit contested) evidential basis. This is probably fine where the plaintiff is seeking to establish a head of jurisdiction under r 6.27

(see [**2.154A**] of this supplement); but the approach may cause unfairness where a party wants to rely on a jurisdiction agreement more definitively, to argue that the New Zealand court should/should not assume or exercise jurisdiction. The reason this approach may cause unfairness is that it would require the court to decide on the effect of the jurisdiction agreement even though it is unable to say who has the better argument (see *Kaefer* at [80]).

Of particular relevance in these circumstances will be the question who is the party who is merely required to show a plausible evidential basis. Is it always the plaintiff, or is it the party seeking to enforce the jurisdiction agreement? The latter view seems to be the view adopted by *Dicey, Morris and Collins on the Conflict of Laws* at 12-083. Gault J, however, adopted the former view, and applied the evidential standard to the question whether the contract was a forgery (or the result of fraud), as opposed to the question whether there was a contract (executed by the plaintiff). Thus, Gault J considered that the plaintiff had to show "a plausible evidential basis" for its argument that there was no jurisdiction clause: "[t]he test is whether there is a plausible (albeit contested) evidential basis for the claimant's case in relation to the jurisdiction clause (by analogy with the application of the relevant gateway). It is not whether the defendants have a plausible (albeit contested) evidential basis for their position that the [substantive contract] was executed by [the plaintiff]" (at [60], see also [63]).

It is likely that Gault J's approach can at least to some extent be explained by reference to the peculiar facts of the case. However, if his approach were adopted more generally, the result would be that in cases of evidential uncertainty that cannot be resolved, the good arguable case inquiry necessarily favours plaintiffs over defendants, and New Zealand jurisdiction agreements over foreign jurisdiction agreements. This would not be a desirable outcome. Having said that, the concern might be more theoretical than real. In practice, a court is always likely to engage in some form of relative inquiry in practice, reaching the best conclusion it can, even though it is technically unable to form "a decided conclusion on the evidence".

G.6 Interpretation

2.412, Note 1023

On the other hand, a clause in a letter of indemnity that the liable person "shall at your request" submit to the jurisdiction of the English court has been construed as a non-exclusive jurisdiction agreement: *Berge Bulk Shipping Pte Ltd v TPT Shipping Ltd* [2020] NZHC 2627 at [19].

2.413A

What is the law that applies to the question whether a jurisdiction agreement is to be construed as exclusive or non-exclusive**?** There is now authority for the proposition that this is a question for the proper law of the contract (*Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 466 at [70], although both the proper law and New Zealand law would have led to the same outcome on the facts of the case). To the extent the question involves an interpretation of the agreement based on general principles of the law of contract, there is little doubt that this is the correct approach (see Mary Keyes "Jurisdiction clauses in New Zealand law" (2019) 50 VUWLR 631 at 636). Nevertheless, the question of exclusivity occupies an awkward spot as far as matters of choice of law are concerned. That is because rules of interpretation that are specific to the conflict of laws would only ordinarily apply if they form part of New Zealand law as the law of the forum (see [**2.410**]). An obvious example would be a rule that jurisdiction agreements are presumed to be exclusive (see Hague Choice of Court Convention, Art 3(b)). But at what point does an application of the general rules of interpretation to a jurisdiction agreement turn into a specific rule of the conflict of laws?

2.413B

In *Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 466, the Court applied the good arguable case test to determine whether a foreign jurisdiction agreement that was governed by Kentucky law was exclusive or non-exclusive (see also [**2.408A**] of this supplement). The Court was presented with conflicting evidence on US law, and the Court considered that there was "at least a plausible evidential basis for [the plaintiff's] case that the jurisdiction clause is permissive rather than exclusive" (at [70]). However, any evidential matters that are directed only at the jurisdiction agreement – and that are irrelevant to the merits of the claim – should be resolved at the time of the court's decision on jurisdiction. In other words, it is not clear that the good arguable case standard should have applied here at all (see [**2.409**], and [**2.155**] in the context of r 6.27).

This is for two reasons. First, the evidence in question here, concerning the exclusive or non-exclusive nature of the jurisdiction agreement, was solely relevant to the question of jurisdiction. Therefore, the Court would not have risked predetermining the substance of the dispute by forming a conclusive assessment of this evidence. Second, the source of the uncertainty was a question of (US) law. It is true, of course, that questions of foreign law are treated as matters of fact, but it is difficult to see how a conflict of expert evidence on US law could only be properly resolved at trial (at which point, in any case, the question would have necessarily been moot).

G.7 Trans-Tasman proceedings

H. ANTI-SUIT INJUNCTIONS

H.1 Introduction

2.420-2.421

There have now been further developments in New Zealand law relating to anti-suit injunctions. In *Maritime Mutual Insurance Association (NZ) Limited v Silica Sandport Inc* [2023] NZHC 793, the High Court granted an interim anti-suit injunction to stop Guyana proceedings commenced in breach of an agreement to arbitrate; and in *Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 3260, the High Court granted an anti-enforcement injunction in relation to a default judgment from Kentucky. As in *Jomer Inc* and *Lu*, the Courts in these cases were guided by English authorities. For an argument that the jurisdiction to grant anti-suit relief should be exercised in a cooperative spirit, see Maria Hook and Jack Wass "The cooperative spirit of the common law conflict of laws" (2024) Journal of Private International Law (forthcoming).

2.422, Note 1047

Or in breach of an arbitration agreement: *Maritime Mutual Insurance Association (NZ) Limited v Silica Sandport Inc* [2023] NZHC 793.

H.2 Effect

2.424

In *Kea Investments Ltd v Wikeley Family Trustee Limited* ([2022] NZHC 2881, [2023] NZHC 466 and [2023] NZHC 3260), for example, the claimant had to apply to the Supreme Court of Queensland to stop the defendant from evading the High Court's anti-enforcement injunction (see *Kea Investments Ltd v Wikeley* [2023] QSC 79 and *Kea Investments Ltd v Wikeley (No 2)* [2023] QSC 215). The defendant was located in Queensland, so the New Zealand Court had limited powers to make its restraining orders effective against him.

2.425

An exception would be where the court grants the injunction in aid of a foreign proceeding, in which case enforcement jurisdiction will typically be the crucial link: cf *Kea Investments Ltd v Wikeley* [2023] QSC 79 and *Kea Investments Ltd v Wikeley (No 2)* [2023] QSC 215.

2.425A

A particular form of anti-suit injunction is the anti-enforcement injunction, available to restrain a defendant from enforcing a judgment already obtained overseas: *Kea Investments Ltd v Wikeley Family Trustee Limited* [2022] NZHC 2881 at [36]; [2023] NZHC 3260. Anti-enforcement injunctions are rarely granted because "the New Zealand Court has great respect for the work of foreign courts" and "[t]o grant an injunction which will interfere, even indirectly, with the process of a foreign court is therefore a strong step for which a clear justification is required" (at [66]). The main exception are cases involving fraud. *Kea Investments Ltd v Wikeley Family Trustee Limited* was "one of the rare cases" where an anti-enforcement injunction was justified (at [65]).

H.3 Personal jurisdiction

H.4 New Zealand's connection to the proceeding (subject-matter jurisdiction)

2.431

A foreign fraudulent proceeding that is inherently abusive is an example of a single forum case: *Kea Investments Ltd v Wikeley Family Trustee Limited* [2022] NZHC 2881 at [41]. The defendants in that case were a New Zealand company, an Australian resident with a long business history in New Zealand and a New Zealand citizen, and New Zealand was the appropriate forum to determine the claims for tortious conspiracy and for a declaration that a Kentucky judgment was not capable of recognition or enforcement in New Zealand: see also [2023] NZHC 466 (protest to jurisdiction dismissed), [2023] NZHC 2407 (leave to appeal dismissed) and [2023] NZHC 3260 (final relief). The New Zealand Court had an interest in regulating the conduct of a New Zealand company acting as trustee of a New Zealand trust.

2.433A

As noted above, where the court is asked to grant the injunction in aid of a foreign proceeding, the fact that the court has enforcement jurisdiction over the defendant may well be a sufficient connection: *Kea Investments Ltd v Wikeley* [2023] QSC 79 and *Kea Investments Ltd v Wikeley (No 2)* [2023] QSC 215.

H.5 Grounds

2.435, Note 1075

Maritime Mutual Insurance Association (NZ) Limited v Silica Sandport Inc [2023] NZHC 793.

2.439A

Cases of fraud may provide a compelling basis for the exercise of the jurisdiction. In *Kea Investments Ltd v Wikeley Family Trustee Limited* [2022] NZHC 2881 and [2023] NZHC 3260), the High Court granted an anti-enforcement injunction in relation to a default judgment worth USD136,290,994 obtained in Kentucky. The case involved allegations of "a massive global fraud" perpetrated by the defendants. The plaintiff alleged that the US default judgment was based on fabricated claims intended to defraud the plaintiff. Applying for an interim injunction, the plaintiff argued that "the New Zealand Court should exercise its equitable jurisdiction now to prevent a New Zealand company … from continuing to perpetrate a serious and massive fraud on '[the plaintiff]" (at [27]) by restraining the defendants from enforcing the US judgment. Gault J considered that the case was "very unusual" (at [68]). The plaintiff had no connection to Kentucky, except for the defendants' allegedly fabricated claim involving an agreement with a US choice of court agreement and a selection of the law of Kentucky. The plaintiff also did not receive actual notice of the Kentucky proceedings until after the default judgement was obtained (at [73]). In these circumstances, the defendants were arguably "abusing the process of the Kentucky Court to perpetuate a fraud", with the result that "the New Zealand Court's intervention to restrain that New Zealand company may even be seen as consistent with the requirement of comity" (at [68]). Whether the injunction could properly be characterised as an act of comity, the case illustrates that there is a legitimate – and potentially important – role to play for injunctions in the context of cross-border fraud.

2.443A

A potential example of such a case was *Maritime Mutual Insurance Association (NZ) Limited v Silica Sandport Inc* [2023] NZHC 793, where Gault J granted an interim anti-suit injunction to stop Guyana proceedings commenced in breach of an agreement to arbitrate. The applicant was a New Zealand company that had provided marine insurance to Silica Sandport Inc, a company incorporated in Guyana. The insurance cover related to a barge that capsized in international waters north of Trinidad. Silica brought proceedings against the insurer in Guyana, claiming breach of the insurance policies and breach of the (Guyana) Insurance Act 2016. The defendant applied to the New Zealand court for an injunction restraining the proceeding on the basis that the parties had agreed to arbitrate any dispute in New Zealand or England. The High Court noted that comity played "a smaller role" in cases involving arbitration (or jurisdiction) agreements (at [38]). In such cases, the court would "ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of a forum clause unless the defendant can show strong reasons to refuse the relief". That was because the court was involved "in upholding and enforcing the parties' contractual bargain" (at [38]).

His Honour specifically noted that "the existence of a mandatory provision of foreign law applicable in the foreign court which overrides the contractual choice of jurisdiction is not a strong reason to refuse [an anti-suit injunction", quoting *QBE Europe SA/NV v Generali Espana de Seguros Y Reaseguros* [2022] EWHC 2062 (Comm) at [10]-[11]. However, New Zealand courts should think twice before following the English lead and granting injunctions in such circumstances as a matter of course. What may appear to the New Zealand court as a blatant attempt to evade a forum clause might be viewed differently by the foreign court, and legitimately so. The foreign court's perspective should at least be a relevant consideration in the decision whether to grant an injunction. It is conceivable that there are circumstances in which a New Zealand court, if it was in the position of the foreign court, would refuse to enforce the forum clause in order to protect a New Zealand insured under policy entered into with an overseas insurer. The fact that common law courts would still feel entitled to interfere with an insured's access to justice in the foreign court, in the name of upholding the parties' bargain as to jurisdiction, seems difficult to defend. For further commentary, see Andrew Dickinson "Taming Anti-suit Injunctions" in Andrew Dickinson and Edwin Peel (eds) *A Conflict of Laws Companion* (OUP, 2021) 77 at 85-6.

H.6 Anti-suit injunctions in relation to Australian civil proceedings

I. IMMUNITIES

I.1 Foreign states

2.447, Note 1104

See *Mohamed v Guardians of New Zealand Superannuation* [2021] NZHC 512, [2021] 2 NZLR 612.

2.451

The High Court has since confirmed that a state may waive its immunity by the express terms of an international convention: *Sodexo Pass International SAS v Hungary* [2021] NZHC 371 at [39].

I.2 Foreign representatives and international organisations

3

Procedure

A. INTRODUCTION

B. SERVICE OF DOCUMENTS

B.1 Introduction

B.2 General principles

3.20

In *Huang v Huang* [2021] NZHC 2902, personal service of proceedings was invalid as being effected contrary to the law of China. The appeal was dismissed: [2024] NZCA 5.

B.3 Service of documents on corporations

a. New Zealand companies

b. Overseas companies with a presence in New Zealand

c. Overseas companies without a presence in New Zealand

B.4 Service in Australia

B.5 Service of foreign process in New Zealand

C. PROOF OF FOREIGN LAW

C.1 Introduction

3.43

In *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239, Williams J cited this paragraph in observing that tikanga is not foreign law, and therefore it is "not appropriate to refer to it as having to be proved as a question of fact", but it may still need to be established and ascertained by evidence. Cf *Ngāti Whātua Orākei Trust v Attorney-General* [2022] NZHC 843, [2022] 3 NZLR 601 at [384]-[388], where Palmer J cited Professor Richard Boast's view that New Zealand courts had "adhered closely to the 'foreign law' analogy" for reception and proof of tikanga, and found that this "is consistent with tikanga being law, even if it is proved as fact."

C.2 Methods of proving foreign law

a. Introduction

3.53

Documentary evidence must meet the requirements of s 144 to be admissible: general advice to a non-legal audience will not: *Guangzhou Dongjiang Petroleum Science & Technology Development Co Ltd v Kang* [2020] NZHC 3068 at [39]. See also [**3.87**].

b. The role of expert evidence

3.55

In *Autoterminal International Ltd v LOFA Trustee Ltd* [2020] NZHC 1843 at [76], the High Court observed that expert evidence on foreign law must still meet the substantial helpfulness test in s 25(1) of the Evidence Act 2006. In that case, the court found that the evidence was not substantially helpful. The expert had been asked to opine on what were essentially questions of New Zealand law, rather than the key question of foreign law (whether the order obtained in the British Virgin Islands court authorising the bringing of proceedings should be interpreted as authorising the lodging of a caveat); the expert did not address the definition of a "proceeding" in British Virgin Islands law or refer to any applicable statutory or case law definitions so the exercise he engaged in was no more than ascertaining the plain meaning.

3.56

See also *B v C* [2023] NZCA 28 at [33].

3.59

See *Autoterminal International Ltd v LOFA Trustee Ltd* [2020] NZHC 1843 at [78]-[80] (discussed at [**3.55**] above) for an illustration of the importance of the expert explaining the basis of their opinion by reference to the applicable legal framework.

3.59

In *B v C* [2023] NZCA 28 at [34] the Court of Appeal held that the brevity of an affidavit, including the absence of any reference to commentary on the relevant provision of the legislation, counted against its admission on appeal.

c. Qualification as an expert

3.64

In *B v C* [2023] NZCA 28 at [32] the Court of Appeal emphasised the importance of an expert on foreign law qualifying themselves as such; merely describing themselves as a "practising lawyer" is not sufficient.

d. To what extent must the judge rely on expert evidence?

e. When is it unnecessary to prove foreign law? When can judicial notice be taken?

f. Are there better ways of proving foreign law?

g. Foreign law on appeal

C.3 The consequence of parties failing to plead or prove foreign law

a. Introduction

3.87

In *Schaeffer v Murren* [2020] NZSC 98 at [12], the Supreme Court endorsed the conventional approach, recorded in this paragraph, that where the parties had failed to plead or prove foreign law, the court would apply New Zealand in default.

In *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995, Lord Leggatt comprehensively reviewed and restated the approach to be followed where foreign law is not pleaded or proved, or there are gaps in evidence. The judge explained that English law recognised both a default rule and a presumption of similarity, which were distinct and operated in different circumstances:

(a) Where the parties elect not to plead foreign law, then according to the default rule the court will apply English law. But this rule is limited to cases where neither party has invoked foreign law: if either party makes out a case that the rules of private international law apply, the court has a duty to apply that law, and the person who bears the burden of making or defending the case must show that they have a good claim or defence under that applicable law: [113]-[118].

(b) Where foreign law has been put in issue, then the court may still rely on a flexible presumption that foreign law is the same as English law. This is justified on the basis that: while legal systems differ there are often similarities (especially within common law systems, but even between trading nations of different legal traditions); unless there is a real likelihood of difference on the relevant point, there is no good reason to put the parties to the trouble and expense of proving foreign law; and the presumption is not determinative—it only operates unless and until evidence of foreign law is adduced: [119]-[125].

Lord Leggatt emphasised that there is no warrant for applying the presumption unless it is fair and reasonable to expect that the applicable foreign law is likely to be materially similar (ie, not leading to a different result). At [143]-[149], the Judge provided general guidance as to the limits of the presumption: (1) the

presumption is more likely to be appropriate where the foreign law is based on the common law, although "great and broad" principles may span all developed legal systems; (2) the presumption is less likely to be applicable where the foreign law is contained in a statute, at least where it implements a local scheme of regulation rather than codifying general principles; (3) there will always be uncertainty about whether the judge will be prepared to rely on the presumption, and it is always open to the parties to adduce proof of foreign law on the point; (4) there is more scope for relying on the presumption at an early stage of the proceedings (eg, where the plaintiff needs only demonstrate a serious issue to be tried); (5) ultimately the presumption is only ever a basis for drawing inferences about the probable content of foreign law in the absence of better evidence.

When it comes to pleading claims in foreign law, Lord Leggatt observed that where it is reasonable to assume that the defendant will be content to rely on English law, the plaintiff can simply plead their case under English law even if private international law rules would point to foreign law. The defendant is then put to an election of whether to accept that. However, where the defendant pleads (or it is clear at the outset that it intends to plead) that foreign law is applicable, the claimant must decide whether to contend otherwise and whether to advance a claim for relief under foreign law, which requires it to be properly pleaded and proved: [161]-[165].

3.87

In *Kang v Guangzhou Dongjiang Petroleum Science & Technology Development Co Ltd* [2022] NZCA 281 at [51], the Court of Appeal explained why a general guide to businesspeople could not be relied upon as evidence of foreign law: "In order to establish how the law of another country applies to a particular dealing a party will normally need to provide evidence of the relevant primary legal materials: legislation and any authoritative rulings or interpretations, with reliable translations if they are not in English. The party will also need to provide reliable evidence about the way in which those materials apply to such dealings. It is difficult to envisage circumstances in which a New Zealand court could make findings about the content of foreign law, and how it applies to a particular dealing, by reference to a general guide for businesspeople. Such a guide could not be relied on as an authoritative source on a point of New Zealand law. We struggle to see why the position should be different on a point of foreign law."

3.87

For an illustration of the complex interactions between foreign law and New Zealand law, see *Huang v Chen* [2022] NZHC 1888 and the discussion at **[7.282]**.

b. The consequences of failing to prove foreign law

3.92

In *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995 at [150]-[153], Lord Leggatt confirmed that where expert evidence of foreign law has been called but does not address a particular issue, then the court may apply the presumption that foreign law is the same as English law where that would be fair and appropriate. There is no reason why a party should be stymied just because one particular point was not anticipated in an expert report, for example, but the procedural context may make that unfair and inappropriate (citing *Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd* [2007] EWHC 1713 (Comm), [2007] 2 All Er (Comm) 701 where the claimant had sought leave to raise a new point of Indian law and when that was denied sought to argue the same point on the basis of English law).

3.93

See for an illustration *Webster v Jagger* [2021] NZHC 1146 at [36] where both parties agreed that the contract was governed by California law but in the absence of proof of that law the Court applied New Zealand law.

c. Limits on the default rule

3.96

See discussion of *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995 [**3.87**] above.

3.100

In *Guangzhou Dongjiang Petroleum Science & Technology Development Co Ltd v Kang* [2020] NZHC 3068 at [41], Associate Judge Bell refused to apply New Zealand law in default of evidence on the Chinese law of bribery, holding that it was "not plausible to say that the Chinese court was tricked into coming to a wrong result because the result would be different under New Zealand law."

3.101

In *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995 at [138]-[141], Lord Leggatt explained *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452, [2003] Ch 350 not on the basis that the English Companies Act could not operate extraterritorially: the question is not whether the English Act applied, but whether there was a reasonable basis for assuming that Pennsylvanian law was the same. Because the relevant provisions were derived from a European directive, it was unrealistic to assume that Pennsylvanian law would impose similar requirements.

C.4 Foreign public documents

D. CROSS-BORDER EVIDENCE

D.1 Introduction

3.104

See also *R v R* [2020] NZCA 64, [2020] 2 NZLR 590 at [91], a criminal case, where a search warrant for Facebook Messenger posts was challenged on the basis that it operated extraterritorially where data was stored on servers overseas. The Court found that using a cellphone, located and forming part of a computer system in New Zealand, to access messages did not involve an extraterritorial act even if the messages were stored on overseas servers.

D.2 Taking evidence in New Zealand for use in an overseas proceeding

3.113, Note 148

See also *Martinez v F & H* [2021] NZHC 2517, where the High Court granted an application from the United States tax authorities to view documents filed in support of a claim that had been stayed on the grounds that California was the appropriate forum. Associate Judge Lester found that access for the purpose of assisting foreign tax authorities' investigations did not involve enforcement of a foreign tax law in terms of *Government of India v Taylor* [1955] AC 491 (HL), relying on the observation in *Controller and Auditor-General v Davison* [1996] 2 NZLR 279 (CA) that it would be contrary to comity and public policy to assist in breach of foreign tax laws.

3.113

See for example *Labrador Entertainment, Inc v Moore* [2022] NZHC 2674, where the Court made arrangements for evidence to be taken from two defendants in New Zealand pursuant to a letter of request issued by the United States District Court arising out of the *Eight Mile Style LLC v New Zealand National Party* litigation.

a. The procedure for making an application

b. What relief may be ordered

c. Particular considerations relating to documents

3.122

Documents produced in discovery in New Zealand proceedings cannot be used for any other purpose: r 8.30 codifies the common law implied undertaking.

A party may apply for leave to use the documents in foreign proceedings: *Kidd v van Heeren* [2020] NZHC 2792.

d. Exercise of the discretion

e. Privilege and the evidence of Crown servants

3.128

See also *Kidd v van Heeren* [2020] NZHC 231. Whether a document was privileged or whether privilege had been waived was governed by New Zealand law as the *lex fori;* the submission of documents to the Liechtenstein courts by a lawyer in the course of a criminal investigation, not authorised by the privilege holders, did not amount to a waiver of privilege. See also **4.D.6.**

D.3 Obtaining evidence overseas for use in a New Zealand proceeding

a. Introduction

b. Willing witnesses

c. Unwilling witnesses

d. Obtaining documents

3.145

In *Bank Mellat v Her Majesty's Treasury* [2019] EWCA Civ 449 at [63], the English Court of Appeal emphasised that potential prosecution in the discovering party's home jurisdiction was not an absolute defence to production, but the court would conduct a balancing exercise between, on the one hand, the actual (rather than merely theoretical) risk of criminal prosecution against the importance of the documents to the fair disposal of the proceedings in the forum, and will attempt to fashion an order for inspection to minimise as much as possible the concerns under foreign law. The Court also argued that when such an order is made "considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national …. Comity cuts both ways."

3.146

See also *Grant v Arena Alceon NZ Credit Partners LLC* [2023] NZHC 3048 holding that the Court did not have jurisdiction to make orders under s 266(1) of the Companies Act 1993 requiring foreign companies to comply with liquidators' requirements under ss 239AG and 261 to produce documents relating to the affairs of New Zealand companies in liquidation.

3.147

In *Zuru, Inc v Glassdoor, Inc* (N.D. Cal., 8 July 2022), the United States District Court upheld a subpoena requiring the respondent to disclose documents revealing the identity of former employees of the applicant that had posted unfavourable reviews of the company, pursuant to the procedure under USC § 1782(a).

D.4 Trans-Tasman arrangements

E. INTERIM RELIEF IN SUPPORT OF NEW ZEALAND AND FOREIGN PROCEEDINGS

E.1 Introduction

E.2 Freezing orders

a. Freezing orders generally

3.158

In *Gracewood International Ltd v Zhan* [2023] NZHC 307 at [54], the Court took into account the "paucity of information" the respondent had provided as to his assets and means of support, in circumstances where the applicant had pointed to information suggesting a risk that the judgment would be unsatisfied. Although the judge acknowledged the argument that it was not for a respondent to assist an applicant, she concluded that where the respondent was the only person who could have provided requisite information and did not do so, "the Court is required to make the orders it considers necessary."

For the approach to assessing a risk of dissipation, see *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203, [2020] 2 All ER (Comm) 359, holding that where there was a good arguable case that a respondent had engaged in wrongdoing (particularly dishonest conduct) against the applicant relevant to the issue of dissipation that would point strongly to a risk, and it may not be necessary to adduce significant further evidence in support of that risk.

b. Jurisdiction to grant freezing orders against non-resident respondents in support of New Zealand proceedings

c. Freezing orders in relation to overseas assets

d. Freezing orders in support of foreign proceedings

3.177

In *Gracewood International Ltd v Zhan* [2023] NZHC 307, the Court granted a freezing order in support of proceedings in Hong Kong. There was a dispute over whether

the claim in Hong Kong was arguable, in circumstances where the debtor had been discharged from bankruptcy but the creditor claimed that the parties had agreed by contract that the debtor's liability would survive discharge, and that the bankruptcy was subject to an application for annulment. The Court found that the claim was arguable, and was not prepared to go behind credible expert evidence from a Hong Kong Senior Counsel that the contracting out provision could be enforced.

3.183

In *Gracewood International Ltd v Zhan* [2023] NZHC 307, the applicant relied on the existence of assets in New Zealand (a car and bank account, alleged to be a subset of the respondent's assets but presumably only those which the applicant was able to identify in New Zealand by the time of the application) and the fact that the respondent had been resident here for 20 years. Ordinarily the former connection would only justify an order restraining assets in New Zealand, although not limited to those assets that the applicant was able to identify at the time of the application.

e. Position of third parties

3.191

Tian v Xu [2023] NZHC 2443 at [33] noted that it was unclear whether r 32.5(5)(b) required a risk of dissipation (as is required under r 32.5(4)(b) for freezing orders against defendants), citing *Official Assignee v 22 O'Shannessey Ltd* [2022] NZHC 2930 at [71]-[76].

3.192

In *Gracewood International Ltd v Zhan* [2023] NZHC 307, the applicant sought an order against the defendant's former wife (who was not a defendant) on the basis that she held assets in which the defendant was likely to have a beneficial interest. The Court declined an order on the basis that, however well founded the applicant's suspicions seemed to be, it had not established that the defendant had a beneficial interest in her assets (although the Court ordered that she be served with the orders presumably so that she would be bound not to assist in their contravention). That may be described as a conservative approach, in circumstances where there was evidence consistent with intermingling or at least intermingled use of assets, and a proprietary interest in assets is not required where the third party was somehow implicated in the defendant's attempts to defeat execution.

3.197

In *Mao v Buddle Findlay* [2022] NZHC 521, the High Court discussed the merits of a claim brought in New Zealand for damages caused by a freezing order in

China that was allegedly wrongfully obtained. Associate Judge Andrew noted at [47] that under New Zealand law, a party cannot sue in tort for damages caused by a court order, except potentially in circumstances where the order was obtained maliciously or by abusing the process of the Court. He noted the usual method of enforcing a wrongly obtained freezing order is through the undertaking to pay damages, but an undertaking to pay damages is given to the Court, not to a party to the proceedings and does not found any independent cause of action.

The Judge noted that the appropriateness or otherwise of steps taken in China was a matter for those courts and it would be inappropriate as a matter of comity for a New Zealand court to consider such a claim, citing *Digital Equipment Corporation v Darkcrest Ltd* [1984] Ch 512. Assuming that New Zealand law could apply to a claim arising out of the freezing order being obtained, the Judge held that the plaintiffs would need to show malice or an abuse of process for which there was no basis, and was *res judicata* arising out of earlier judgments (in particular *Lu v Industrial and Commercial Bank of China (New Zealand) Ltd* [2020] NZHC 402).

f. Ancillary (disclosure) orders

3.201

Even if there is some doubt about the effectiveness of a freezing order, an ancillary order for disclosure may have clear utility that justifies the Court's intervention: *Gracewood International Ltd v Zhan* [2023] NZHC 307 at [55].

g. Procedural matters and terms of the order

3.211

In *JSC VTB Bank v Skurikhin* [2020] EWCA 1337, [2021] 1 WLR 434 the English Court of Appeal held it was an abuse of process for a respondent foundation to apply to set aside an earlier interlocutory order appointing a receiver over its assets (on the basis that the defendant individual had a right to call for the assets in the foundation) on the basis of subsequent restructuring which purported to remove his interest in the assets but which was "redolent with illegitimate collateral purposes, subterfuge and manifest unfairness".

3.212

The Court will ordinarily expect an applicant who is based overseas to provide evidence of its ability to satisfy a freezing order, and to disclose candidly matters that might cast doubt on its ability to do so: see *Gracewood International Ltd v Zhan* [2023] NZHC 307 at [57].

h. Trans-Tasman arrangements

E.3 Other forms of interim relief

F. SECURITY FOR COSTS

F.1 Overview

F.2 Application

3.221, Note 343

Where the plaintiff is resident in Australia then the threshold for granting security under r 5.45(1)(a) is met, although this may be relevant to the exercise of the discretion: *Keezz Ltd (NZCN 6836013) v Waikato District Health Board* [2020] NZHC 2330 at [31].

3.222

In *Klimenko v Klimenko* [2022] NZHC 2684 the Court held that the difficulties of enforcement of a costs award in Russia given the political climate was a relevant consideration.

4

Choice of Law

A. INTRODUCTION

B. THE CHOICE OF LAW PROCESS

B.1 Nature of the inquiry

a. Rules-based

b. Values-based and internationalist

4.10, Note 18

See *The Soldiers, Sailors, Airmen and Families Association – Forces Help (SSAFA) v Allgemeines Krankenhaus Viersen GmbH* [2022] UKSC 29, [2023] AC 597 at [83].

c. Broad scope of application

d. Common law reasoning

B.2 Characterisation

a. The process of characterisation

b. What is to be characterised?

c. Characterisation of related issues

4.35, Note 71

Parveen v Hussain [2022] EWCA Civ 1434, [2023] 2 WLR 787

4.36

In *Parveen v Hussain* [2022] EWCA Civ 1434, [2023] 2 WLR 787 emphasised the need for flexibility: see [**9.38**] of this supplement.

B.3 Application of connecting factor

a. General or specific connecting factors

b. Legal or factual connecting factors

c. Multilateral or unilateral connecting factors

d. Law of a "country"

4.46, Note 96

See *Fa'agutu v Ali* [2020] NZHC 404, [2020] 2 NZLR 774 at [83].

B.4 Application of the lex causae

a. What is part of the foreign lex causae?

i. Conflict of laws rules (renvoi)

ii. Foreign acts of state

4.56, Note 121

In *Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela* [2021] UKSC 57, [2022] 2 WLR 167, the Supreme Court decided that the relevance (as a matter of foreign law) of allegedly invalid legislative and executive acts depended on whether a judgment from the relevant foreign state's courts declaring them invalid qualified for recognition or effect in accordance with domestic rules of private international law.

iii. Public laws

b. Where laws do not "harmonise"

4.62

In *Thomas v A2 Milk Company Ltd No 2* [2022] VSC 725, 68 VR 283, the Supreme Court of Victoria concluded that the Fair Trading Act 1986 and the Financial Markets Conduct Act 2013 should not be construed as conferring exclusive jurisdiction on New Zealand courts, based on *Rimini Ltd v Manning Management and Marketing Pty Ltd* [2003] 3 NZLR 22 (HC) (at [60], [73], [77]).

B.5 Limits to application of foreign lex causae

a. Overriding mandatory rules

i. Nature of the rules

ii. Identification

4.78

The question is "whether the public policy of the forum displaces the … presumption that statutes only apply if they form part of the applicable law": *The Soldiers, Sailors, Airmen and Families Association – Forces Help (SSAFA) v Allgemeines Krankenhaus Viersen GmbH* [2022] UKSC 29, [2023] AC 597 at [36].

4.85, Note 169

See *The Soldiers, Sailors, Airmen and Families Association – Forces Help (SSAFA) v Allgemeines Krankenhaus Viersen GmbH* [2022] UKSC 29, [2023] AC 597 at [38], [83].

b. Public policy

i. Meaning of public policy

ii. Relevant considerations

B.6 Statutes

a. Introduction

b. Statutory interpretation as an alternative methodology

4.123A

In *Body Corporate Number DPS 91535 v 3A Composites GmbH* [2023] NZCA 647, in relation to the Consumer Guarantees Act 1993 (CGA), the Court of Appeal applied both statutory interpretation and choice of law principles and found that the relevant connecting factor was the place of supply, regardless of which methodology applied. The implication seemed to be that there was a shared rationale for the place of supply as the most appropriate connecting factor and that, if the two methodologies had pointed in different directions, this *might* have been evidence that things had gone awry. In this way, the judgment lends support to the proposition that statutory interpretation and choice of law are not engaged in any kind of "competition". There is a reason why product liability is typically governed by the law of the place of injury (or the place of supply, where liability is for pure economic loss). Why should this reason not also be determinative for claims under the CGA specifically? The more difficult question would be whether a statute should be given a wider scope of application than it would receive under bilateral choice of law. But here, too, it would be unhelpful to think of the conflict of laws as a kind of jilted discipline. The goal should be to identify the cross-border considerations that bear upon the scope of the particular statute, when compared to the rationale underpinning the choice of law rule that would otherwise be applicable. How else can a court decide whether a statute is intended to fall outside of general rules of choice of law? Statutory interpretation, and characterisation, are necessarily intertwined. It remains to be seen whether future courts will build on the Court of Appeal's judgment to engage more explicitly with the interrelationship between statutory interpretation and choice of law.

c. Statutory interpretation in choice of law

d. Foreign statutes

4.127

In *Chief Executive of the Department of Corrections v Fujitsu New Zealand Limited* [2023] NZHC 3598, the Court disagreed with a submission that the applicability of a foreign statute depended on choice of law analysis, and instead proceeded to

determine whether the foreign statute applied on its own terms. This approach is submitted to be incorrect: Maria Hook "*Department of Corrections v Fujitsu*: is the Australian CCA (potentially) applicable in a New Zealand court?" [2024] NZLJ 22.

C. CONNECTING FACTORS

C.1 The forum

a. Local matters

b. Protection of domestic policies

c. Practicality

C.2 Parties' intention

a. Rationale

b. Scope

c. Nature of the choice

d. Applicable rules

4.153, Note 316

But see *Enka Insaat VE Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 at [33], where the Supreme Court considered it "both consistent with authority and sound in principle to apply English law as the law of the forum to ascertain whether the parties have agreed on the law which is to govern their contract" (however, cf at [53](v)).

e. Existence and validity

C.3 Domicile

a. Introduction

b. A child's domicile

c. Capacity to obtain independent domicile

d. New domicile

e. Domicile in countries and unions

C.4 Residence

D. SUBSTANCE AND PROCEDURE

D.1 The problem

D.2 Overall inquiry

D.3 Identification of the issue

D.4 Relief

a. Whether relief is available

4.210, Note 479

This observation (in *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (CA) at [28] that "[i]n remedial terms it may sometimes be necessary or desirable to apply the lex fori if there is a material difference between it and the proper law of contract") was cited in *Huang v Chen* [2022] NZHC 1888 at [287]. The Court "can apply remedies under New Zealand law to match the substantive rights determined by the foreign law" (at [288]).

b. Whether relief is excluded

4.218, Note 501

See *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326, [2022] 1 All ER (Comm) 940 at [100]-[109].

c. Extent and manner of relief

4.225A

In *Kidd v Van Heeren* [2021] NZHC 1414 at [39], the Court treated a partnership duty to account as a substantive issue.

d. Priorities

D.5 Parties

D.6 Evidence

4.233

In *Haines v Herd* [2020] NZCA 396 at [25], the Court of Appeal noted – without hearing argument on the substance/procedure distinction – that the High Court correctly excluded evidence of subsequent conduct on the basis that under the proper law of the contract such evidence was inadmissible to assist in interpretation. Foreign law was also applicable to determine the effect of a requirement that the

contract be "duly stamped", but only insofar as it related to the validity of the contract (at [31]-[33]).

4.234

In *Autoterminal International Ltd v LOFA Trustee Ltd* [2020] NZHC 1843 at [56], where the question was whether a party had a mandate to lodge a caveat in another party's name on the basis of an order granted by the courts of the British Virgin Islands, the Court characterised the issue of the standard of proof as procedural.

4.235

In *Haines v Herd* [2020] NZCA 396 at [27]-[29], the Court of Appeal seemed to assume that s 40(1) of the Law of Property Act 1925 (UK), which is the equivalent of s 24 of the Property Law Act, gave rise to a substantive matter.

4.235A

In *Business Control (Schweiz) AG v Shibalova* [2023] NZHC 3278, the Court held that questions of privilege, including a question of waiver, were to be characterised as procedural and hence governed by New Zealand law. The Court emphasised that the issue arose in the context of questions the plaintiff wished to ask for the purposes of obtaining evidence in the New Zealand proceeding. The same approach was taken in *Kidd v van Heeren* [2020] NZHC 231: see [**3.128**] of this supplement. The approach is also consistent with the Australian approach. It is worth noting that, in this context too, there is room for the application of "an enlightened lex fori": see [**4.25**]; Richard Garnett *Substance and Procedure in Private International Law* (OUP, Oxford, 2012) at 236.

5

Foreign Judgments

A. INTRODUCTION

A.1 Overview

A.2 The role of foreign judgments in the New Zealand legal system and the distinction between recognition and enforcement

5.10–5.13

These paragraphs were cited in *Smith v R* [2020] NZCA 420, [2021] 3 NZLR 324 at [71] for the proposition that "In the ordinary course, courts do not question the merits or the validity of the reasoning of a foreign judgment if satisfied that the foreign court acted within its jurisdiction, the judgment is final and there is evidence of its formal validity."

A.3 The circumstances in which a party may seek to rely on a foreign judgment

A.4 Why do we give effect to foreign judgments?

a. Introduction

b. The doctrine of obligation

c. Future developments

5.45

In *Almarzooqi v Salih* [2021] NZSC 161, [2021] NZFLR 606 the Supreme Court declined to grant leave to consider whether New Zealand's rules on recognition and enforcement of foreign judgments should be reformed, suggesting that accession to multilateral agreements such as the Hague Judgments Convention was the appropriate course for reform.

A.5 Which regime applies?

a. Introduction

b. Australian judgments

c. The Reciprocal Enforcement of Judgments Act 1934

d. Section 172 of the Senior Courts Act

e. The relationship between the statutory schemes and the common law

B. THE ENFORCEMENT OF AUSTRALIAN JUDGMENTS

B.1 Introduction

B.2 The scope of the Trans-Tasman Proceedings Act 2010

5.68

Re Australasian Hail Network Pty Ltd [2020] NSWSC 44 at [29] confirmed that a costs judgment is registrable under the TTPA regime, in the context of declining security for costs in Australian proceedings brought by a New Zealand plaintiff.

B.3 The process for registration

B.4 Grounds for setting aside

5.75

In *Lange v Lange* [2021] NZCA 447, [2021] NZFLR 719 at [29]-[33], the Court of Appeal found that where a Western Australian judgment dealt with property in Kaitaia as part of a relationship property proceeding, the "subject matter of the original proceeding" was not immovable property but the parties' rights in personam. The TTPA adopted the *Moçambique* rule but in a "strictly limited way", consistent with the modern view (expressed at [**7.85**] of the text) that it is limited to claims that directly impeach legal title. This interpretation is consistent with earlier authority under the 1934 Act in *McCormac v Gardner* [1937] NZLR 517 (SC) and *Gordon Pacific Developments Ltd v Conlon* [1993] 3 NZLR 760 (HC).

The Court in *Lange* at [39] also confirmed that hardship is not an independent ground for setting aside registration. The Court left open the question of whether it could be invoked in support of an argument based on breach of public policy. In principle this may be so, but the requirements of that defence are stringent and it cannot be used an excuse to attack the merits of the judgment, let alone its fairness assessed at large.

C. REQUIREMENTS FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

C.1 Overview

C.2 Recognition: general requirements

a. A judgment of a court

5.80

Where a judgment has been set aside in the original court then there is no judgment to enforce and enforcement proceedings are liable to be struck out: *Gowdey v Heseltine* [2021] NZHC 540; see also [**5.152**] below.

5.80

In *Hebei Huaneng Industrial Development Co Ltd v Shi* [2020] NZHC 2992, Associate Judge Bell rejected the proposition that a money judgment of the Higher People's Court of Hebei should not be enforced because the courts of China are not independent of the political arms of government and therefore do not qualify as "courts" for the purpose of New Zealand's rules on the enforcement of foreign judgments. That decision was made in the context of a protest to jurisdiction; in a subsequent decision, Associate Judge Sussock rejected an application for summary judgment on the basis it was arguable that the judgment was not a judgment of a court as that term is understood for the purposes of recognition or that the defence of natural justice applied: [2021] NZHC 2687. Leave to appeal was declined on the basis that although the point was arguable it was better determined at trial: [2022] NZCA 534.

5.82

In *Yoonwoo C & C Development Corporation v Huh* [2023] NZHC 1395 at [122]-[123] Duffy J found that an agreement recorded in a judgment pursuant to the Judicial Conciliation of Civil Disputes Act 1990 (Korea) was entitled to recognition as a final and conclusive judgment, noting that the "concept of a Court making orders or entering judgment by consent to reinforce the legal effect of a compromise reached between litigating parties is a familiar concept in this jurisdiction."

b. Same parties or privies

i. Parties

ii. Privies

5.90

The recognition of judgments against privies was considered in *Pacific Premier Bank v AsiaTrust New Zealand Ltd* [2020] NZHC 2086. The plaintiff had obtained

judgment in California against various defendants, finding among other matters that the disposition of various assets on to trust was a fraudulent conveyance and the assets were subject to a constructive trust. The trustee company that had originally held these assets did not disclose to the Californian court that it had been replaced as trustee by a Cook Islands trustee. Because the plaintiff was not aware of this, the Cook Islands company had not been joined as a defendant to the Californian proceedings. The High Court refused to grant a declaration that the Cook Islands company held the assets on constructive trust, because it was not party to the Californian judgment and it was not satisfied "that the rules of res judicata can be used to extend orders that were made with respect to a party to a proceeding to a person or company that was not party to the proceeding." The Judge noted in particular that the Californian court's decision to grant judgment against the former trustee was based on a prior determination by the Californian courts that the courts had jurisdiction over that company, which would not necessarily have been the same for the Cook Islands company: [69]-[78].

The very purpose of the privity rules is to extend the res judicata effect of foreign judgments to persons who were not parties but who have a sufficiently common interest that it is appropriate for them to be bound to the result. On the approach adopted by the Court of Appeal in *McGougan v DePuy International Ltd* [2018] NZCA 91, [2018] 2 NZLR 916 discussed at [**5.94**] of the main work, the Court should have found that if the former trustee and the Cook Islands company were privies and the Californian court had jurisdiction over the former, then the latter was bound to the result. (In fact, it may be doubted whether the Californian court did have jurisdiction for enforcement purposes: see [**5.96**]).

c. International jurisdiction

5.96

In this paragraph of the main work, we noted that the courts still sometimes overlook the requirement that the foreign court had jurisdiction according to New Zealand rules of private international law, regardless of whether it had jurisdiction under its own law, citing *Pacific Premier Bank v AsiaTrust New Zealand Ltd* [2018] NZHC 1762. That misconception appears to have continued in the second phase of the litigation: *Pacific Premier Bank v AsiaTrust New Zealand Ltd* [2020] NZHC 2086. It was irrelevant whether the Californian court was correct to assume jurisdiction under its own law; if as the defendants pleaded they had not participated in the proceedings after their protest to jurisdiction had been dismissed, then the judgment would not be entitled to recognition.

i. First case: presence

ii. Second case: plaintiff or counterclaimant

iii. Third case: voluntary appearance

Basic rule

Voluntary appearance

When will a stay application constitute submission?

Explicitly reserving the objection

5.131

This paragraph was cited in argument in *Greys Avenue Partners LLC v Theyers* [2023] NZHC 327 at [32]. The defendant had protested the Hawaiian court's jurisdiction and then participated in a number of steps, including by making a strike-out application on the merits and engaging in other interlocutory steps. The plaintiff argued that the only proper inference was that the defendant had elected to fight the case on the merits, albeit that objections to jurisdiction were still being referred to. Associate Judge Sussock found that the objection to jurisdiction did not need to be advanced as the defendant's "primary defence" in the sense of "main defence" provided that he maintained the objection to jurisdiction throughout, and on this basis she could not be satisfied that the defendant had submitted. Although every case is fact-specific this may be seen as generous to the defendant.

Parallel pleading

iv. Fourth case: agreement to submit

v. What is not *sufficient to create jurisdiction?*

Jurisdiction under the 1934 Act

5.147

This approach was followed in relation to s 61(2)(c) of the Trans-Tasman Proceedings Act 2010 in *Lange v Lange* [2021] NZCA 447, [2021] NZFLR 719.

d. Final and conclusive

5.150

See also *Hebei Huaneng Industrial Development Co Ltd v Shi* [2020] NZHC 2992 at [**5.166**] for the position where foreign law requires the judgment creditor to exhaust other remedies before enforcing the judgment.

5.152

By contrast, where a judgment has been set aside in the original court then there is no judgment to enforce and enforcement proceedings are liable to be

struck out. In *Gowdey v Heseltine* [2021] NZHC 540, the High Court refused to allow summary judgment proceedings to remain on foot in anticipation that the judgment creditor might obtain a fresh foreign judgment on a related cause of action. Where the order setting aside a judgment was itself under appeal, however, it may be appropriate to stay rather than strike out the enforcement proceedings on the same principle as discussed in [**5.153**] of the main work.

e. On the merits

5.156

Strategic Technologies Pte Ltd v Procurement Bureau of the Republic of China Ministry of National Defence [2020] EWCA Civ 1604, [2021] 2 WLR 448 held that the Administration of Justice Act 1920 (the predecessor to the reciprocal enforcement of judgments statutes) only permitted registration of an underlying judgment on the merits, and not an intermediate judgment which enforced or recognised an earlier judgment from a third country. The same approach would seem to apply to the Reciprocal Enforcement of Judgments Act 1934. The Court noted that the position had not been tested at common law.

5.160

In *Greys Avenue Partners LLC v Theyers* [2023] NZHC 370 at [49], Associate Judge Sussock held in the context of a default judgment that it was not "reasonably arguable that it is a pre-requisite to enforcement for a judgment to be on the merits" and following *Schnabel v Lui* [2002] NSWSC 15, such a submission was better considered in the context of whether the judgment was obtained in a way that was a breach of natural or substantial justice. For the reasons given in the main work, a default judgment may be entitled to recognition. However, we submit, this is because a default judgment is "on the merits" in that it determines the merits of the parties' substantive rights, not because being "on the merits" is not a requirement for recognition. Subject to that, there is logic in the Associate Judge's suggestion that concerns about how the default judgment was obtained should be assessed in the context of the natural justice defence.

C.3 Enforcement of foreign money judgments

a. Fixed sum of money

5.166

A judgment will not be enforceable where the creditor's right to payment under the foreign judgment can only be enforced once the creditor has exhausted other remedies, because the foreign creditor cannot expect more extensive rights from a New Zealand court than it has under the original decision on which it sues:

Hebei Huaneng Industrial Development Co Ltd v Shi [2020] NZHC 2992 at [75]. In principle this question should be judged according to the law applicable to the substantive liability, not the procedural law of the judgment court.

b. Not in respect of a fine, tax or penalty

c. Judgments in foreign currency

d. Jurisdiction and procedural requirements: enforcement at common law

5.178

In *Nguyen v MacKenzie* [2023] NZHC 2365 at [33]-[34], Associate Judge Sussock confirmed that while hearsay evidence is not generally admissible in support of an application for summary judgment, the more relaxed approach that applies to other kinds of interlocutory applications is available to the evidence called by a defendant in opposition to establish a reasonably arguable defence.

5.178, Note 279

See further *Yoonwoo C & C Development Corporation v Huh* [2023] NZHC 1395 at [54]-[72], concluding after an extensive review of the authorities that a claim for enforcement of a foreign judgment should be treated as a contract/debt claim (subject to a 6-year limitation period under s 4(1)(a) of the 1950 Act) and could not be characterised as a claim to enforce a judgment for the purpose of s 4(4) (which would be subject to a 12-year limitation period) notwithstanding that such a cause of action existed in New Zealand law, albeit rarely used.

5.180

In *Korea Deposit Insurance Corp v Huh* [2023] NZHC 2197, the Court dismissed an application to set aside a default judgment enforcing a Korean judgment. First, the fact that an amended statement of claim was not served on the defendant did not invalidate the proceeding, in light of r 6.20, but any irregularity could be cured by reducing the amount of the default judgment to remove the additional sum claimed in the amended statement of claim. Second, the plaintiff was entitled to default judgment for a liquidated sum under r 15.7 and the plaintiff was not required to seek judgment by formal proof.

e. Jurisdiction and procedural requirements: enforcement under 1934 Act

5.182

Consistent with the proposition in this paragraph that the registration process is intended to be streamlined with disputes about jurisdiction and defences left to an application to set aside, Johnstone J held in *Fiji National Provident Fund Board v Bese* [2023] NZHC 1226 that an application for registration could be brought on

a without notice basis (without needing to establish one of the requirements for a conventional without notice application under r 7.23, such as where notice would allow the defendant to defeat the order). The Judge rejected the view to the contrary expressed in *McGechan on Procedure* and *Sim's Court Practice*, following Heath J's observation in *Re Perkins* HC Whangarei CIV-2010-488-375, 25 August 2010 that it was common for registration applications to be made without notice. The Judge noted that Form G 30 (which r 23.4(1) requires to be used on applications for registration) contemplates applications without notice where the r 7.23 criteria are not present, and the contrary approach would introduce additional impediment that is procedurally unnecessary and "might imply an uncertainty about the appropriateness of the foreign judgment which is inconsistent with international comity". This did not prevent applications being made on notice in appropriate circumstances, such as where the judgment debtor has already been served and has notified objections to registration; otherwise the defendant's procedural protections were preserved by their right to apply to set aside the registration.

C.4 Enforcement of foreign non-money judgments

a. Non-money judgments generally

b. Judgments involving foreign land and judgments in rem

5.197

As noted in the main work, the question of a person's status is regarded as a matter *in rem*. It follows that where a person's status derived from a foreign judgment, the forum would apply its rules on the recognition of foreign judgments to determine whether to recognise the status and would not simply recognise, without more, the position under the relevant foreign law: *Koza Ltd v Koza Altin Isletmeleri AS (No 2)* [2022] EWCA Civ 1284, [2023] 1 BCLC 617. In that case the director's authority to act for a foreign company did not derive from a judgment, but from a subsequent legislative decree so according to the act of state doctrine the court would not question that status unless one of the recognised exceptions such as breach of public policy was engaged.

c. Receivership, insolvency and bankruptcy

C.5 Estoppel

a. Estoppel and foreign judgments

5.203

For a discussion of issue estoppel based on a foreign judgment (what the Court calls "transnational issue estoppel") see *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14.

b. Cause of action estoppel

c. Issue estoppel

5.215

For a discussion of whether the same issue was determined in earlier proceedings see *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21, where the Privy Council found that issue estoppel attached to the decision of the Brazilian courts considering a challenge to a Brazilian arbitral award for the purpose of subsequent enforcement proceedings in Cayman Islands.

d. Abuse of process

i. To prevent a successful plaintiff relitigating

ii. Where the unsuccessful party was neither party nor privy to the foreign judgment

iii. Where Henderson v Henderson *applies*

iv. Where the defence raised in New Zealand is abusive

e. Estoppel under the 1934 Act

D. DEFENCES TO RECOGNITION

D.1 Introduction

5.225

See *Guangzhou Dongjiang Petroleum Science & Technology Development Co Ltd v Kang* [2020] NZHC 3068 where Associate Judge Bell applied this rule despite apparent errors on the face of the foreign judgment.

D.2 Prior incompatible judgment

D.3 Fraud

a. When can the judgment debtor plead fraud?

5.243

In *Guangzhou Dongjiang Petroleum Science & Technology Development Co Ltd v Kang* [2020] NZHC 3068 at [44]-[49], the defendant testified that he had not raised a bribery allegation before the Chinese courts out of the fear of repercussions; Associate Judge Bell held that the defendant's failure to call cogent evidence that he would not have received a fair trial in China counted against his fraud defence. Although this approach is sensible it is difficult to square with *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295 (CA); the court noted the power to

strike out fraud claims for abuse of process (*Owens Bank Ltd v Etoile Commerciale Ltd* [1995] 1 WLR 44 (PC)) but that alone cannot require a defendant to justify their failure to run a fraud defence in the foreign court. Of course, the court is still free to draw an inference that the fraud defence was not run in the original court because there is no substance in it. The case demonstrates yet again why *Abouloff* should be revisited.

b. What constitutes fraud?

5.247

See *Guangzhou Dongjiang Petroleum Science & Technology Development Co Ltd v Kang* [2020] NZHC 3068 at [26]-[31] on the standard required for pleading fraud, distinguishing the different approach under the 1934 Act followed in *Svirskis v Gibson* [1977] 2 NZLR 4 (CA) (see [**5.253**] of the main work). The defendant had not called sufficient evidence of applicable Chinese law, or fact, to establish that the underlying contract involved bribery so as to engage the fraud defence.

See also *Yingling v Gifford* [2021] NZHC 314 rejecting a defence of fraud, and the summary of relevant principles at [38].

c. Position under 1934 Act

D.4 Breach of public policy

5.257

In *Kang v Guangzhou Dongjiang Petroleum Science & Technology Development Co Ltd* [2022] NZCA 281 at [59] the Court of Appeal endorsed its earlier observation in *Reeves v OneWorld Challenge LLC* [2006] 2 NZLR 184 (CA) at [79] that it would not be appropriate to draw an adverse inference from a judgment creditor declining to provide evidence rebutting allegations of this kind, in circumstances where the judgment creditor has the benefit of a prima facie enforceable judgment and it is for the judgment debtor to establish a sufficient evidential basis to make out a defence. We note that the position may change if the judgment debtor does put up such evidence, in which case the judgment creditor may assume a tactical onus to rebut it.

5.262

In *Guangzhou Dongjiang Petroleum Science & Technology Development Co Ltd v Kang* [2020] NZHC 3068 at [53] Associate Judge Bell accepted in principle that a judgment of a foreign court enforcing payment of a bribe to a foreign public official by a New Zealand resident should not be enforceable in New Zealand,

and the same ought to be the case where the bribing party is not a New Zealand resident even if the connection to New Zealand's values is not as direct, but held that Kang had not established a sufficient evidential basis for the defence. The Court of Appeal (in [2022] NZCA 281) emphasised that the defence was concerned with New Zealand conceptions of public policy, and it followed that Chinese law on whether a particular transaction was unlawful was not relevant. It accepted that it would be contrary to New Zealand public policy to enforce a judgment for payment of a bribe to a foreign official, in light of the Crimes Act and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions to which they give effect, but agreed with the Judge that there was no evidence of the kind of bribery alleged.

5.263

In *Lenkor Energy Trading DMCC v Puri* [2021] EWCA Civ 770, a Dubai court had given judgment against the defendant on a statutory cause of action that created personal liability for drawing a cheque where there are not sufficient funds to meet it, and where he was held liable to pay the proportion of the value of the cheques corresponding to the amount he and an associated company had received. The Court of Appeal rejected the argument that the judgment was tainted by the illegality of an associated contract to which the defendant was not party; this was not an attempt to enforce an illegal contract and the degree of connection between the claim and the illegality had to be balanced against the strong public policy in favour of finality.

a. Overview

5.269

In *Spiridonov v Stepanov* [2020] NZHC 3271, the Court rejected the proposition that a Russian court's alleged failure to investigate whether the defendant had partially repaid the debt, in circumstances where he had put receipts before the Russian court but had not appeared to defend the proceedings gave rise to a breach of natural justice. Cooke J found that a breach of natural justice must be "clear and significant" such that recognition would be "inconsistent with fundamental concepts of justice", and that the requirements of comity mean that a degree of latitude must be given to allow foreign courts to follow their own procedures: [25].

The Judge observed that while there may be room for argument about whether "more refined" breaches of natural justice of the kind identified in *Adams v Cape Industries plc* [1990] Ch 433 (CA) will be recognised, most cases will turn on whether the defendant has been given a proper opportunity to participate (so that if the defendant has chosen not to take that opportunity, the prospects of finding a breach of natural justice will be significantly diminished although not eliminated): [26].

On the facts, Cooke J found that there was no breach of natural justice where the defendant had notice of the proceedings and chose not to defend; the Russian court followed a process not substantially different to that which the New Zealand court would follow, particularly as it had already granted the defendant's application to set aside an earlier default judgment to give him an opportunity to defend. In effect, the defendant was attacking the merits of the Russian court's decision having chosen not to pursue that course in the Russian court: [31]

b. Notice of the proceedings

5.278

See *Guangzhou Dongjiang Petroleum Science & Technology Development Co Ltd v Kang* [2020] NZHC 3068 at [20] where the court's attempt to serve the defendant by post failed and the proceeding was instead served by public notice, as is permitted under Chinese law. The court was not required to determine whether this would have otherwise met the standards of New Zealand law, because the defendant was advised of the hearing by text and had time to arrange a lawyer to obtain an adjournment.

c. Opportunity to defend

5.280

What constitutes adequate notice and adequate opportunity to defend must be assessed in the circumstances and by reference to the judgment: in *Guangzhou Dongjiang Petroleum Science & Technology Development Co Ltd v Kang* [2020] NZHC 3068 at [21], the judgment demonstrated that the 15-day adjournment was sufficient to allow the defendant to put his case. Associate Judge Bell emphasised that a general absence of interlocutory steps such as discovery did not implicate natural justice. We note that although the court should refrain from casting parochial projections of what constitutes appropriate procedural components of a civil justice system on to foreign systems, there may be circumstances where the absence of (for example) document production was sufficient to deprive the defendant of a proper opportunity to defend themselves.

In *Greys Avenue Partners LLC v Theyers* [2023] NZHC 370, Associate Judge Sussock considered it arguable that a defence of breach of natural justice might be available where the debtor was unable to access documents necessary to defend the substantive proceedings.

d. Is a breach of "substantial justice" a defence?

5.282

See the discussion in *Spiridonov v Stepanov* [2020] NZHC 3271 at [**5.269**] above.

See also *Hebei Huaneng Industrial Development Co Ltd v Shi* [2021] NZHC 2687, finding it was arguable that the defence of natural justice could capture a situation where the operation of Chinese courts was such that the judgment debtor did not have an opportunity to put their case before an independent and impartial tribunal, particularly if there was evidence that a judicial committee separate to that before which the defendant appeared was involved in making the decision.

e. 1934 Act: adequate notice

D.5 What does not constitute a defence?

E. ENFORCEMENT OF COMMONWEALTH JUDGMENTS: SECTION 172 OF THE SENIOR COURTS ACT 2016

E.1 Overview

E.2 Procedure

5.294

See *Re Makepeace, ex p Jhooti* [2021] NZHC 2492.

6
Obligations

A. INTRODUCTION

B. CONTRACT

B.1 The proper law

(a) The law the parties intended to be applicable

6.16, Note 31

But note the point in *Enka Insaat VE Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 at [35] that the distinction between an express or implied choice "is not a sharp one", because "language may be more or less explicit and the extent to which a contractual term is spelt out in so many words or requires a process of inference to identify it is a matter of degree". Cf *Salih v Almarzooqi* [2023] NZCA 645 at [53]-[55].

(b) The law in the absence of choice: closest and most real connection

(c) The relationship between the alleged contract and the proper law

6.22, Note 43

See *Enka Insaat VE Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 at [31]-[32]. The Singapore Court of Appeal in *Lew v Nargolwala* [2021] SGCA(I) 1 adopted a nuanced version of the English putative proper law approach (at [70]-[73]), which comes close to treating the choice of law agreement as independent from the underlying (disputed) contract and, in the absence of choice, focuses on non-putative factors – namely "the circumstances of the transaction or relationship alleged to have given rise to a concluded contract" – in establishing the law with the closest and most real connection (at [76], [79]).

(d) Dépeçage: splitting the proper law

B.2 Scope of the proper law

(a) Capacity

(b) Formal validity

(c) Legality and mode of performance

B.3 New Zealand contract legislation

B.4 Particular contracts

6.44-6.45

In *Kidd v Van Heeren* [2021] NZHC 1414, the question arose as to the proper characterisation of a partnership duty to account. The Court considered that the proper law of the partnership may depend on whether the claim is to be characterised as contractual (as debt) or as proprietary (at [41]). On a contractual characterisation, the proper law would be the place with "the closest and most real connection" to the contract. On a proprietary characterisation, it would be either the firm's principal place of business or, if the partner's interest is in the firm's assets, the law of the place where the assets are located (at [42]). In this case, on either approach to characterisation, the proper law of the partnership was the law of South Africa.

Note the potential reform of choice of law in relation to insurance contracts: Ministry of Business, Innovation and Development *Exposure Draft Insurance Contracts Bill* (24 February 2022) cl 7; Insurance Contracts Bill 2024 (34-1).

6.46A

Enforceability of the promise to pay a mahr or dower have been treated as raising a contractual issue for the purposes of characterisation: *Salih v Almarzooqi* [2023] NZCA 645. The defendant in that case did not dispute that the promise to pay the mahr was to be characterised as contractual. However, this does not mean that the relevance of the mahr may not also arise in relation to other, non-contractual issues – for example, it may need to be taken into account when assessing the parties' rights under the Property (Relationships) Act 1976: see Maria Hook "Enforcement of a promise to pay a mahr: characterisation and public policy in the context of *Salih v Almarzooqi*" (11 August 2021) The Conflict of Laws in New Zealand: News and Comment <https://blogs.otago.ac.nz/conflicts>.

The Court held that the proper law of the nikah was New Zealand law, giving significant weight to the fact that New Zealand was the couple's intended place of residence. It further concluded that, pursuant to New Zealand law of contract, the nikah could not be properly interpreted without reference to its cultural context, including general principles of Sharia law. The Court did not explore to what extent this approach differed from the traditional doctrine of incorporation by reference, which allows parties to incorporate non-national law or principles into their contract to the extent permitted by New Zealand law (see *Shamil Bank of Bahrain EC v Beximco* [2004] EWCA Civ 19, [2004] 1 WLR 1784).

B.5 The United Nations Convention on Contracts for the International Sale of Goods

C. TORTS

C.1 The traditional position

C.2 The Act

(a) The lex loci delicti

6.60

For obiter dicta on the identification of the law governing an alleged conspiracy in a multinational fraud, see *Kea Investments Ltd v Wikeley Family Trustee Limited* [2022] NZHC 2881 at [47] and *Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 466 at fn 58.

(b) The flexible exception

6.68A

Zubaydah v Foreign, Commonwealth and Development Office [2023] UKSC 50 is a recent illustration of these points. The UK Supreme Court here engaged with the policy reasons for applying (or, in this case, disapplying) the lex loci delicti, as well as the nature of the claim arising out of the UK's official acts. It held that alleged complicity by the UK government in the CIA's wrongful conduct against a detainee held in various black sites in Afghanistan, Guantánamo Bay, Lithuania, Morocco, Poland and Thailand was governed by English law. The Court took into account that the plaintiff's presence in those countries was involuntary, so he did not have "a reasonable expectation that certain aspects of his situation or activities might be governed by the law of [those] countries" (at [93]); that the locations of the plaintiff's detainment were immaterial to the defendant, so it would have been "fanciful" to allege that they "ever considered that they were submitting themselves successively to the laws of [the foreign countries]" or "that they ever expected or intended their conduct to be judged by references to those laws" (at [94], see also [95]); and that the defendant was the UK government acting in its official capacity (at [100]-[101]).

(c) The parties' intention

C.3 Scope of the rules

6.73

In *American Eagle Fishing Llc v Ship "Koorale"* [2020] NZHC 1935, the High Court confirmed the orthodox common law position that the law of the forum applies to collisions on the high seas. The Court concluded that the rule is applicable even where both vessels are flying the same flag, while acknowledging that there was force in the submission that the law of the flag should govern in such cases (at [59]).

Courts in other jurisdictions have applied the law of the flag in such circumstances (see, eg, *The Eagle Point* 142 F 453 (1906), referred to by the defendant's counsel at [41]). There is also academic support for this solution (see, eg, C F Finlayson "Shipboard torts and the conflict of laws" (1986) 16 VUWLR 119 at 138). In the leading English case, *Chartered Mercantile Bank of India v Netherlands India SN Co* (1883) 10 QBD 521, the Court applied the lex fori in a case involving a collision between two Dutch ships. However, the claim was brought by the (English) shipper of the cargo (which had been damaged in the collision), so the decision is distinguishable. In any case the Court's rigid reliance on "general maritime law" (at 544) may not sit well with the principles and policies underpinning the modern conflict of laws. Drawing on the principles of the Private International Law (Choice of Law in Tort) Act 2017 for guidance, the law of the flag would seem an appropriate solution, on the basis that it would be more closely connected to the tort than New Zealand law (cf the submission for the defendant at [52]).

6.73A

The court does not have subject-matter jurisdiction over torts alleging an abuse of process in foreign proceedings: *W Nagel (a firm) v Chaim Pluczenik* [2002] EWHC 1714 at [96]); see *Mao v Buddle Findlay* [2022] NZHC 521 at [51], discussed at [**3.197**] of this supplement.

C.4 Accident Compensation Scheme

D. EMPLOYMENT

D.1 Employment relationships generally

6.83A

The boundaries of the Employment Court's and the Employment Authority's subject-matter jurisdiction to determine cases pursuant to foreign law are not entirely clear. In *Brown v New Zealand Basing Ltd* [2017] NZSC 139, [2018] 1 NZLR 245, William Young and Glazebrook JJ drew a distinction between contractual and statutory claims for this purpose. They pointed out that the Employment Court had jurisdiction over a range of claims, including claims for breach of contract, and they considered that there was "no reason why such claims should not be determined by reference to foreign law if such law is the proper law of the contract" (at [47], see *Royds v FAI (NZ) General Insurance Co Ltd* [1999] 1 ERNZ 820). They did not specifically consider the position of the Authority (as opposed to the Employment Court). Moreover, they did not form a view on whether the Employment Court "would have jurisdiction to give effect to statutory rights arising under a foreign statute which correspond generally to our

personal grievance rights" (at [49]). This distinction reflects the Supreme Court's bifurcated approach to choice of law more generally – treating the cross-border scope of statutory employment rights as a question of interpretation that falls entirely outside of the conflict of laws, while retaining conflict of laws reasoning for "contractual" employment matters.

In *Radford v Chief of New Zealand Defence Force* [2021] NZEmpC 35, [2021] ERNZ 85, the Employment Court did not distinguish between jurisdiction over contractual and statutory claims (at [129]-[131]), as William Young and Glazebrook JJ had. The main form of relief available to the plaintiff was a breach of contract claim under the law of Washington DC. The Employment Court concluded that, based on William Young and Glazebrook JJ's reasoning, it was clear that it would have jurisdiction to determine the claim. It further decided that there was no principled reason why the Employment Relations Authority should be treated any differently, concluding that "Parliament intended the Court and the Authority to be able to entertain cases which involve the application of foreign law" (at [138]). It found support for this conclusion in the breadth of the Authority's personal jurisdiction over foreign defendants (at [150], [151]; but see the point made at [**2.312**] that the broad powers for service out of the jurisdiction may not necessarily be indicative of a power to apply foreign law).

D.2 The Employment Relations Act

6.85A

In *Radford v Chief of New Zealand Defence Force* [2021] NZEmpC 35, [2021] ERNZ 85, the Employment Court held that the ERA was not applicable to a civilian working for the New Zealand Defence Force overseas as a "locally employed civilian" under s 90A of the Act. There was nothing in the Act preserving the application of the ERA to locally employed civilians and, based on traditional choice of law rules, the parties' agreement was governed by the law of Washington.

D.3 Other statutes

E. CONSUMERS AND FAIR TRADING

E.1 General rules

6.90

In *Thomas v A2 Milk Company Ltd No 2* [2022] VSC 725, 68 VR 283, the Supreme Court of Victoria concluded that it had jurisdiction to determine claims under the (New Zealand) Fair Trading Act 1986 and the Financial Markets Conduct

Act 2013 (although the Court proceeded on the assumption that New Zealand law would be applicable to the New Zealand claims: see [**2.342**] for discussion of the interrelationship between subject-matter jurisdiction and choice of law).

6.91, Note 232

See also *Chief Executive of the Department of Corrections v Fujitsu New Zealand Limited* [2023] NZHC 3598, criticised in Maria Hook "*Department of Corrections v Fujitsu*: is the Australian CCA (potentially) applicable in a New Zealand court?" [2024] NZLJ 22.

E.2 Fair Trading Act 1986

(a) Conduct outside New Zealand

6.93, Note 237

In refusing an application for leave to appeal, the Supreme Court in *Schaeffer v Murren* [2020] NZSC 98 noted that "[t]here may be room for argument as to the soundness of the [High Court's] conclusion in relation to the application of the Fair Trading Act" (at [14]). *Sequitur Hotels Pty Ltd v Satori Holdings Ltd* [2020] NZHC 2032 is a recent illustration of how s 3 (and a similar provision included in the Financial Markets Conduct Act 2013) might operate in practice.

6.95, Note 246

Cf *Sequitur Hotels Pty Ltd v Satori Holdings Ltd* [2020] NZHC 2032 at [51], [53].

(b) Conduct in New Zealand

6.97, Note 251

This was confirmed in *Body Corporate Number DPS 91535 v 3A Composites GmbH* [2023] NZCA 647at [102], where the Court of Appeal said that the Act applied to false and misleading conduct in New Zealand, which included communications made from outside New Zealand to recipients in New Zealand, "regardless of where the defendant is incorporated and where it carries on business".

E.3 Consumer Guarantees Act 1993

6.104

In *Body Corporate Number DPS 91535 v 3A Composites GmbH* [2023] NZCA 647 at [102], the Court of Appeal held that the Act applies "to an overseas manufacturer of goods that are supplied in New Zealand" (at [61]). This interpretation was "consistent with [the] text and purpose [of the Act]", with "broader principles

of private international law" and "with the approach adopted by the Australian courts to corresponding legislation". The relevant "territorial connecting factor", or "hinge", was the supply of goods in New Zealand (at [64], [65]).

E.4 Consumer credit contracts

F. CONTRIBUTION, INDEMNITY, DIRECT ACTION

F.1 Claims against wrongdoers or debtors

6.107

In *The Soldiers, Sailors, Airmen and Families Association – Forces Help (SSAFA) v Allgemeines Krankenhaus Viersen GmbH* [2022] UKSC 29, [2023] AC 597, the UK Supreme Court considered that claims for contribution under the Civil Liability (Contribution) Act 1978 were sui generis but "closely analogous to a restitutionary or quasi-contractual claim", and that "a strong case" could be made out "for a prima facie rule that the proper law of a contribution claim under the 1978 Act is the law with which B's claim against C is most closely connected" (at [33]).

6.110

The UK Supreme Court has since upheld an appeal in *The Soldiers, Sailors, Airmen and Families Association – Forces Help (SSAFA) v Allgemeines Krankenhaus Viersen GmbH* to conclude that the right of contribution under the Civil Liability (Contribution) Act 1978 does not have overriding effect and is to be determined by reference to the law governing the contribution claim: [2022] UKSC 29, [2023] AC 597. The Court could "see no good reason why Parliament should have intended to give overriding effect" to the Act (at [83]).

F.2 Direct action against insurer

6.112

Note the potential reform of this right of direct action, including the question of choice of law: Ministry of Business, Innovation and Development *Exposure Draft Insurance Contracts Bill* (24 February 2022) part 3, subpart 4; Insurance Contracts Bill 2024 (34-1).

7

Property and Trusts

A. PRELIMINARY MATTERS

A.1 Introduction: the role of property in the conflict of laws

A.2 The choice of law process for property

a. Characterisation: is a question of property involved?

7.15

For an illustration of the disputes that may be involved in characterising an equitable claim, see *Lun v Kong* [2023] NZHC 1370 where a claim was made for breach of fiduciary duty and in trust arising out of a contract concerning shares in a Chinese company. See [**2.334**] on the misplaced use of the concept of subject-matter jurisdiction.

b. Selection of the applicable law

A.3 The situs of property

a. Overview

b. Tangible property

c. Choses in action

i. Introduction

7.27

A considerable body of law is emerging on the application of conflict of laws principles to cryptocurrencies which do not neatly fall into existing taxonomies of property: see *Dicey* at [23-050] and *Ruscoe v Cryptopia Ltd (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 where the parties agreed that the law applicable to the

dispute over cryptocurrency held in an exchange by a New Zealand company was New Zealand law.

ii. Debts

7.29

See for the application of this principle *Livingstone v CBL Corporation Ltd* [2021] NZHC 755, holding that policies held by a company in liquidation in New Zealand could *not* be subject to s 9 of the Law Reform Act 1936 in relation to claims under the Financial Markets Conduct Act 2013 or Fair Trading Act 1986 if the insurer did not have a place of business in New Zealand. The Judge did not strike out the claims at that stage pending further evidence.

iii. Debts secured by letter of credit

iv. Claims in insolvency

v. Negotiable instruments

vi. Interests in trusts and deceased estates

vii. Powers

viii. Partnerships

ix. Shares and securities

x. Intellectual property rights

7.59

See *Burden v ESR Group (NZ) Ltd* [2022] NZHC 1818, [2022] 3 NZLR 380 at [46] for a discussion of the territoriality of copyright and on appeal *ESR Group (NZ) Ltd v Burden* [2023] NZCA 335.

A.4 Classifying property as immovable or movable

a. The classification process

b. Interests in land

c. The problem of mixed property rights

d. Intellectual property rights

e. Movable property

f. What if the lex situs does not classify the rights in question as property at all?

B. IMMOVABLE PROPERTY

B.1 Jurisdiction in disputes relating to immovable property

a. The Moçambique rule and its justification

b. The first exception: actions in personam to enforce contractual or equitable rights

7.70

In *Lange v Lange* [2021] NZCA 447, [2021] NZFLR 719 at [30], the Court noted criticisms of the *Moçambique* rule and observed that "its modern justification rests on considerations of comity and effectiveness, and those considerations suggest the rule should be limited to claims that directly impeach legal title."

7.72–7.73

These passages were quoted with approval in *Lange v Lange* [2021] NZCA 447, [2021] NZFLR 719 at [31].

7.85

This paragraph was cited with approval in *Lange v Lange* [2021] NZCA 447, [2021] NZFLR 719 at [30].

c. Second exception: administration of estates

d. Should the Moçambique rule be abolished?

e. The application of the Moçambique rule to intellectual property rights

7.90A

For discussion of jurisdiction in disputes over foreign patents see *GW Pharma Ltd v Otsuka Pharmaceutical Co Ltd* [2022] EWCA Civ 1462.

B.2 Choice of law: the lex situs

a. General rule

7.93–7.94

Haines v Herd [2019] NZHC 342 was upheld on appeal in *Herd v Haines* [2020] NZCA 396.

b. Contractual claims

C. MOVABLE PROPERTY

C.1 Jurisdiction over movable property

C.2 Choice of law for tangible movable property

a. General rule

b. Exceptions to the lex situs for tangible movable property

C.3 Choice of law for assignments of intangible property

a. General rule

b. Choice of law for voluntary assignments of intangible property

i. Assignability and discharge

ii. Formal and essential validity of the contract of assignment

iii. Capacity

iv. Priorities between multiple valid assignments

v. Shares and other intangible movables.

c. Choice of law for involuntary assignments of intangible property

C.4 Security interests

a. Introduction

b. The choice of law rules in the Personal Property Securities Act 1999

c. Goods and possessory security interests

d. Security interests in intangibles

e. Security interests in minerals

D. GOVERNMENTAL ACTS AND THE PROTECTION OF CULTURAL PROPERTY

D.1 Compulsory acquisition and governmental expropriation

a. Overview

7.162

While most cases involving governmental acts affecting property can be explained by reference to ordinary choice of law rules, the Supreme Court in '*Maduro Board' of the Central Bank of Venezuela v 'Guiadó Board' of the Central Bank of Venezuela* [2021] UKSC 57, [2022] 2 All ER 703 at [135] held that the English courts

would not pass judgment on the validity of acts affecting property within the territory of the foreign state, whether lawful or unlawful, and this was driven not by conventional application of choice of law rules but the exclusionary effect of the act of state doctrine. This is better understood as reflecting a limitation on the courts' subject-matter jurisdiction to determine the lawfulness of a foreign law where that is the gist of the claim (for example, bringing a claim that is essentially for judicial review); most cases involving executive acts within the territory of the foreign state will be explicable on choice of law principles (see [119] of the case, discussing the *Belhaj* decision, and the comment at [**2.355**] of this supplement).

b. The application of the lex situs to assets within the foreign jurisdiction

c. Should the court recognise an unlawful acquisition of title?

7.172

In *Deutsche Bank AG London Branch v Receivers Appointed by the Court; Central Bank of Venezuela v Governor and Company of the Bank of England* [2020] EWCA Civ 1249, [2020] 2 WLR 1, the English Court of Appeal was required to decide whether the act of state doctrine applies to executive acts which are unlawful under the law of the foreign state, in the context of a dispute between two boards both claiming to represent the Central Bank of Venezuela, one appointed by Nicolás Maduro and Juan Guaidó. The issue concerned a "Transition Statute" signed by Mr Guaidó, and appointments to the Board made thereunder, so was not confined to disputes over title to property. The Court of Appeal held that the act of state doctrine did not prevent it recognising the unlawful character of those acts in circumstances where the competent Venezuelan supreme court had so declared, and declined to follow the absolute view preferred by Lord Sumption: [147]-[152]. As Lord Mance pointed out in *Belhaj* at [65], to hold otherwise would risk ignoring rather than giving effect to the way in which the foreign state's sovereignty is expressed. Whether courts would go further to investigate the legality of a foreign act which is not the subject of a decision in the courts of the situs remains open.

The Supreme Court, in a judgment given by Lord Lloyd-Jones, reached a firm conclusion that the act of state doctrine required the courts to recognise the acts of the executive of a foreign state within the territory, regardless of whether lawful or unlawful. The Court applied Rule 2 identified by Lord Neuberger in *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964—"the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that stage"—and held that this was not a conventional application of choice of law rules but an exclusionary rule deriving from the sovereign character of the acts forming the subject matter of the proceedings, and not limited to acts affecting property so applied to the acts of appointment in issue in the case: '*Maduro Board*'

of the Central Bank of Venezuela v 'Guiadó Board' of the Central Bank of Venezuela [2021] UKSC 57, [2022] 2 All ER 703 at [135], [139]. At the same time, however, the Court held that the act of state doctrine did not require an exclusive focus on the acts of the executive; while judicial rulings do not themselves attract the deference required by the act of state doctrine to executive and legislative acts, they may be taken into account where the decision is otherwise entitled to recognition according to ordinary domestic rules applicable to foreign judgments, since that does not involve intrusion into the internal affairs of the foreign state that would be involved if the court was passing judgment directly on the validity of the executive act: [157], [169]. The Court remitted the question of whether the Venezuelan supreme court decision should be recognised, noting however that the rules of public policy demanded that it could not be so recognised if it proceeded on the basis of a view as to who was the recognised president of Venezuela that differed from the view of the United Kingdom executive to which the Supreme Court had earlier concluded it was required to defer: [170].

d. The public policy exception

e. Assets outside the jurisdiction of the expropriating state

D.2 The protection of cultural property

a. Introduction

b. Private international law problems

i. The impact of subsequent sales

ii. Claims by the state to recover cultural property

c. International conventions

E. TRUSTS AND EQUITY IN THE CONFLICT OF LAWS

E.1 Introduction

E.2 The role of characterisation

7.207 See also *Byers v Samba Financial Group* [2021] EWHC 60 (Ch); *Byers v Saudi National Bank* [2022] EWCA Civ 43, [2022] 4 WLR 22; *Byers v Saudi National Bank* [2023] UKSC 51, [2024] 2 WLR 237. As part of a summary of the general equitable principles relevant to dispositions of property, the Supreme Court explained at [21] that a claimant's equitable interest will cease to affect the subject property if the mode of disposition of the legal title is such that, under the law applicable either to the property or the transaction, the transferee

takes free of it, even if the property is transferred in breach of trust. It gave *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 as an example of where the claim was defeated by the applicable law of Saudi Arabia in relation to transfer of title to shares by registration.

7.209 See the subsequent case *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36, [2023] 2 WLR 133 on the trustee's propriety right of indemnity against trust assets.

E.3 The international trust and the Hague Trusts Convention

F. EXPRESS TRUSTS

F.1 Introduction

a. Proper law

b. Location of the trustee

c. Place of administration

d. Location of the assets

e. Personal connections

F.2 International trusts

F.3 Jurisdiction

a. The court's jurisdiction over trusts

b. Jurisdiction clauses

F.4 The proper law of the trust

a. The juridical importance of the proper law

b. Determining the proper law

i. The test

ii. Express choice of law

iii. Implied choice of law and closest connection

iv. Time for assessing the proper law

v. Splitting the proper law

vi. Failure of the trust

vii. Mandatory rules and public policy

F.5 Choice of law

a. The scope of the proper law: validity of the trust and other matters

b. The validity and effect of dispositions to trust

c. Administration of the trust

7.263

Dawson-Damer v Taylor Wessing LLP [2020] EWCA 352, [2020] Ch 746 at [39]-[47] held that the question of whether a trustee could assert legal professional privilege against a beneficiary was a procedural matter to be governed by the lex fori, not a matter of substance to be governed by the proper law of the trust.

d. Capacity to settle assets on trust, to receive assets as trustee, and to acquire a beneficial interest

e. Statutory trusts

F.6 Variation of trusts

a. Jurisdiction of the New Zealand court to vary trusts

b. Change in the proper law of a trust

G. CONSTRUCTIVE AND RESULTING TRUSTS, AND OTHER EQUITABLE OBLIGATIONS

G.1 Description of the problem

G.2 The correct approach to equitable and restitutionary claims

a. The choice of law process

b. The relationship between the substance of the claim and the remedy

c. The role of the lex causae

7.282

In *Huang v Chen* [2022] NZHC 1888 at [287]-[291], the Court applied the approach described in this paragraph to questions of remedy arising out of breaches of a joint venture contract governed by Chinese law that concerned New Zealand land. In particular, Gordon J found that (i) a constructive trust ought to be imposed as a consequence of breach of the contract, (ii) there was a breach of fiduciary duty, and (iii) the circumstances gave rise to a constructive trust on ordinary *Lankow v Rose* [1995] 1 NZLR 277 principles. The mesh of Chinese and New Zealand law was different in relation to each cause of action: (i) may be seen as the application of remedial provisions of the *lex fori* to vindicate

the substantive rights under Chinese law, in (ii) the Judge noted that Chinese law did not recognise the concept of fiduciary duty but did regard good faith as a fundamental principle, and the judgment may be characterised either as the application of New Zealand law by default, or (less convincingly) the application of the Chinese concept of good faith guided by New Zealand conceptions of fiduciary duty, and (iii) was the orthodox application of New Zealand law as the *lex situs* following *Schumacher v Summergrove Estates Ltd* [2013] NZCA 412, [2014] 3 NZLR 599. That approach was upheld by the Court of Appeal as correctly reflecting the approach described in [4.210]-[4.216] of the main work: [2024] NZCA 38 at [183]-[188].

See also *Lun v Kong* [2023] NZHC 1370 discussed at [**7.15**] above.

G.3 Jurisdiction over equitable and restitution claims

G.4 Choice of law for equitable claims

a. Constructive trusts

viii. Claims based on equitable interest in specific property

ix. Claims based on personal liability

x. Trustees de son tort

b. Resulting trusts

c. Knowing receipt, dishonest assistance, breach of confidence and breach of fiduciary duty

i. Knowing receipt

ii. Dishonest assistance

iii. Breach of confidence

iv. Breach of fiduciary duty

G.5 Choice of law for restitution and unjust enrichment

a. Introduction: the importance of characterisation

b. The choice of law rule for unjust enrichment

i. The law with the most significant connection to the claim

ii. Claims arising out of a pre-existing relationship

iii. Claims arising in relation to property

iv. The place where the enrichment occurred

8

Administration and Succession

A. INTRODUCTION

A.1 The structure of the rules on administration and succession

A.2 Overview of the applicable rules

A.3 The importance of characterisation

B. ADMINISTRATION OF DECEASED ESTATES

B.1 Introduction: the scope of administration

B.2 Obtaining probate or letters of administration

a. Jurisdiction to grant probate or letters of administration

b. Appointment of personal representatives

i. Resealing

8.36

In *Jennison v Jennison* [2022] EWCA Civ 1682, [2023] 2 WLR 1017, the English Court of Appeal held that the equivalent to s 71 of the Administration Act 1969 operated prospectively not retrospectively, so that if an executrix did not have standing to commence proceedings before probate was resealed then this defect was not cured by the resealing of probate. See also [**8.51**] below.

ii. Obtaining a fresh grant in New Zealand

iii. Application of the law of the domicile

iv. Where coordination is not possible

v. Revocation of grant

c. The standing of personal representatives before they obtain a New Zealand grant

8.51

In *Jennison v Jennison* [2022] EWCA Civ 1682, [2023] 2 WLR 1017, the English Court of Appeal confirmed that the standing of a foreign personal representative who has not obtained resealing or grant of probate in the forum is governed by the law of the forum as the place of administration. However, consistent with the view expressed in this paragraph of the main work and following *Chetty v Chetty* [1916] 1 AC 603 (PC), an executrix was treated as having acquired title to the deceased's estate upon his death by virtue of being named as executrix, so that the grant of probate was necessary only for the purpose of proving such title not establishing it. The consequence was that the executrix had standing to bring proceedings in relation to real estate in England owned by the deceased.

d. Appointment of personal representatives who are out of New Zealand

e. Protection of the estate

B.3 The process of administration

a. Vesting of title in the personal representative and collection of assets

i. Vesting of title in personal representatives

ii. The distinction between local and overseas assets

b. Payment of debts and taxes

8.71 The traditional English approach exemplified by *Re Lorillard* [1922] 2 Ch 638 (CA) prevents the personal representative from transferring assets from the ancillary administration in New Zealand to the place of primary administration to pay the claims of creditors in the place of primary administration where the creditors would be statute-barred under New Zealand law, thus favouring beneficiaries over creditors. In *ESL v JH* [2021] IEHC 383 at [4], the Irish High Court declined to follow *Re Lorillard* and thus rejected an approach that would "facilitate a form of legal arbitrage and forum shopping, whereby the testator and his beneficiaries preserve wealth in their family to the detriment of creditors by taking advantage of the differences in the legal protection for creditors in disparate jurisdictions."

c. Application of the Law Reform (Testamentary Promises) Act 1949

C. SUCCESSION TO DECEASED ESTATES

C.1 Jurisdiction over questions of succession

C.2 Choice of law generally for matters relating to succession

a. The scission principle: the distinction between movables and immovables

b. Deference to the courts of the applicable law

C.3 Succession to intestate estates

a. Succession to immovable property

b. Succession to movable property

c. When will the claim of a state to inherit property be given effect?

C.4 Succession by will

a. Formal validity

b. Capacity to make or take under a will

c. Material and essential validity

d. Construction

e. Revocation, multiple wills and election

i. Revocation

ii. Multiple wills

iii. Election

f. Powers of appointment

C.5 Other claims by beneficiaries

a. Statutory claims

8.126

In *Moleta v Darlow* [2021] NZHC 2016 at [73]-[76], the Court confirmed that although the jurisdiction of the New Zealand court over immovable property under the Family Protection Act 1955 was limited to property in New Zealand, it could take foreign assets into account in assessing whether and what provision to make for an applicant, provided the orders were limited to assets within the jurisdiction.

b. Relationship between dispositions on trust and forced heirship claims

c. Clawback

9
Family

A. INTRODUCTION

B. FAMILY RELATIONSHIPS

B.1 Introduction

B.2 Validity of marriage

a. Jurisdictional context

b. Formal validity

i. Lex loci celebrationis

ii. Meaning of formal validity

iii. Exceptions to the lex loci celebrationis

c. Capacity or essential validity

i. Dual domicile rule

ii. Relevance of the lex loci celebrationis

iii. Incapacity on the grounds of bigamy

9.38

But see *Parveen v Hussain* [2022] EWCA Civ 1434, [2023] 2 WLR 787 for the converse scenario, where the Court of Appeal held that neither the Matrimonial Causes Act 1973 nor the Family Law Act 1986 prevented the application of the law of the couple's antenuptial domicile in order to recognise an earlier divorce. When determining whether to give priority to the rule governing capacity to marry, or the rules on recognition of divorce, courts had to apply a flexible approach: "In deciding what justice requires, the court should give weight, and probably significant weight, to the general policy objectives of seeking to uphold the validity of a marriage and of seeking to avoid creating a limping marriage" (at [85]). Here, the Court applied the rule governing capacity to marry, which meant that a wife's marriage to her husband was valid even though her previous divorce was not entitled to recognition under the Family Law Act 1986. Under the law of Pakistan, the law of the antenuptial domicile, her previous divorce was effective and she had the capacity to marry.

d. Recognition of relationship as marriage

9.41

The Court of Appeal has said – by reference to this paragraph – that "[p]olygamous marriages will be recognised as marriages for most purposes": *Paul v Mead* [2021] NZCA 649, [2021] NZFLR 551 at [67], n 36. The Court also thought that s 2A(1) of the Property (Relationships) Act 1976 would extend "to any relationship recognised as a marriage as a matter of common law".

B.3 Validity of registered partnerships

a. Jurisdictional context

b. Validity of civil unions

c. Recognition of foreign registered partnerships

B.4 Divorce and "annulment"

a. Jurisdiction

9.54, Note 108

Where a court has made an order even though there was a fundamental lack of jurisdiction because neither of the parties was domiciled in New Zealand, s 27 provides a discretionary jurisdiction to declare the order invalid: *G v G* [2023] NZHC 166, [2023] 2 NZLR 553 at [59].

b. Choice of law

9.59, Note 123

The term non-marriage was disapproved in *Akhter v Khan* [2020] EWCA Civ 122, [2021] Fam 277 at [7]. The concept was criticised by Mostyn J in *Tousi v Gaydukova* [2023] EWHC 404.

c. Recognition

i. Section 44, Family Proceedings Act 1980

9.65A

The Court of Appeal in *Almarzooqi v Salih* [2021] NZCA 330, [2021] NZFLR 501 considered that s 44 was "something of a hybrid", combining aspects of subject matter and personal jurisdiction, "if not being particular to itself" (at [53]). The Court did not clarify why it thought that s 44 confers a degree of personal jurisdiction, although it concluded that s 44 only seemed to apply to questions of status and the continued existence of a marriage.

ii. Common law

9.69, Note 145

The relevance of *Indyka* to common law principles of recognition was discussed in *Almarzooqi v Salih* [2021] NZCA 330, [2021] NZFLR 501 at [47]-[50].

9.72, Note 151

The Court of Appeal in *Almarzooqi v Salih* [2021] NZCA 330, [2021] NZFLR 501 at [51] said that the "substantial connection" approach in *Indyka* "is now reflected in s 44".

B.5 Parentage

a. Paternity

i. Status of Children Act 1969

ii. Family Proceedings Act 1980

iii. Recognition of foreign declarations of paternity

b. Legitimacy

c. Surrogacy and assisted human reproduction

9.93A

Note that the Law Commission has recently considered issues relating to cross-border surrogacy and proposed reform in this area: *Te Kōpū Whāngai: He Arotake / Review of Surrogacy* (R146, 2022).

d. Adoption

i. Adoption in New Zealand

ii. Recognition of overseas orders

9.103, Note 220

Norman v Attorney-General [2021] NZCA 78, [2021] NZFLR 234 at [72].

9.105, Note 223

It has been held that a "factual adoption" effected without a court order that would be accepted as a valid legal adoption under the foreign law satisfies this rule: *Chen v Wu* [2020] NZHC 3302, (2020) 33 FRNZ 644 at [80]-[85].

9.106, Note 226

Chen v Wu [2020] NZHC 3302, (2020) 33 FRNZ 644 at [87], describing this provision as "curious and poorly worded".

iii. Succession

C. RELATIONSHIP PROPERTY AND ADULT MAINTENANCE

C.1 Introduction

C.2 Relationship property

a. Overview

b. Personal jurisdiction

9.119, Note 259

See the amendments to [**2.209**] in this supplement for further developments on this point.

c. Application of the PRA

i. General

ii. The default rule: s 7

iii. Contracting in: s 7A(1)

iv. Contracting out: s 7A(2)

9.131, Note 276

In *Wooldridge v Kumari* [2021] NZHC 1975, [2021] NZFLR 461 at [32], the Court considered that the "clear terms of s 7A lend no support to the suggestion that parties may impliedly agree" on foreign law.

9.134

In *Wooldridge v Kumari* [2021] NZHC 1975, [2021] NZFLR 461 at [32], the Court considered that enforcement of a choice of law agreement would be contrary to s 7A(3) where the applicant had not received legal advice and was not in a position to assess her rights and interests, including whether it was in her interest to agree to the foreign law being applicable.

d. Where the PRA does not apply

i. Whether the PRA excludes residual common law conflict of laws rules

ii. Content of residual conflict of laws rules

e. Relationship property agreements

C.3 Adult maintenance

9.152A

New Zealand has now ratified the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (concluded 23 November 2007, entered into force 1 January 2013) (the 2007 Convention) (see [**9.155**]). Its main features are outlined in part D.3 of this work on child support. That is because the primary focus of the Convention is on child support. However, New Zealand has opted to extend the entire Convention to spousal

maintenance, with the result that all of its features will be available vis-à-vis countries that have done the same (Art 2). Some parts of the Convention are automatically applicable to spousal maintenance (all parts except for Chs II and III on cooperation and establishment of a system of Central Authorities, which, however, apply to applications for recognition and/or enforcement that form part of a claim for maintenance arising from a parent-child relationship (Art 2(1)(b)).

The Convention also gives States the option to extend the Convention to maintenance obligations arising from other family relationships (Art 2(3)). New Zealand has not entered a declaration to that effect even though, under New Zealand law, maintenance is available outside of spousal and parent-child relationships (ie civil unions and de facto relationships). This omission may in part be explained by the reluctance of other Contracting States. The European Union, for example, has refrained from extending the Convention to other family relationships, undertaking instead to "examine the possibility" of doing so within seven years (compare Brazil, which has extended the Convention to obligations to provide maintenance "arising from collateral kinship, direct kinship, marriage or affinity, including, in particular, obligations in respect of vulnerable persons"). Given that any extension would only become effective in the case of matching declarations, there would have been limited *immediate* practical benefit in New Zealand extending the scope of the Convention to civil unions or de facto relationships. Be that as it may, it is a shame that New Zealand did not take the opportunity to lead the way by being one of the first countries to extend the Convention in this manner, which might have provided an incentive for other countries to follow suit.

The Convention is implemented by the Child Support (Reciprocal Agreement with Hague Convention Countries) Order 2021. The Order achieves this largely by providing that the definition of "domestic maintenance" in s 2(1) of the Act has effect as if it included "payments required to be made under administrative assessments or court orders made by a contracting State" (see Schedule 2).

a. Introduction

b. Orders made by the New Zealand court

i. Maintenance orders

ii. Personal jurisdiction

iii. Appropriate forum

iv. Variation of nuptial agreements or settlements

9.166, Note 361

But see *Poros v Bax* [2020] NZHC 1602 at [67].

c. Recognition and enforcement of foreign maintenance orders generally

d. Overseas maintenance orders from Commonwealth and designated countries

i. Confirmation of provisional orders from Commonwealth and designated countries

ii. Registration of orders from Commonwealth and designated countries

iii. Discharge or variation of registered or confirmed orders

e. Orders from Convention countries

f. Australian orders in New Zealand and New Zealand orders in Australia

D. CARE OF CHILDREN

D.1 Parental responsibility

D.2 Child abduction

D.3 Child support

9.195A

New Zealand has now ratified the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (concluded 23 November 2007, entered into force 1 January 2013) (the 2007 Convention) (see [**9.200**]). As between Contracting States, the 2007 Convention will largely replace the obligations assumed under UNCRAM and the Commonwealth Scheme. It does not affect the bilateral agreement with Australia on child and spousal maintenance as given effect in Child Support (Reciprocal Agreement with Australia) Order 2000.

The Convention has three main functions. First, it provides for the recognition and enforcement of maintenance decisions of other contracting States. A decision must be recognised and enforced if it falls within one of the six bases of recognition and enforcement set out in Art 20(1). These bases are broad in scope. It is sufficient, for example, that either the respondent or the creditor was habitually resident in the Contracting State at the time proceedings were instituted. The obligation to recognise and enforce maintenance decisions is subject only to the narrow exceptions listed in Art 22 (for example, that recognition and enforcement would be manifestly incompatible with public policy).

The effect of these rules is to make maintenance decisions more enforceable as between contracting States. The Convention is designed to capture maintenance in all its forms (Art 19), from countries that have a sufficiently close connection to the matter (see Art 20(1)). Not only does this mean that foreign maintenance decisions can more easily be enforced in New Zealand; New Zealand decisions, too, will enjoy more widespread recognition overseas.

The second main function of the Convention is to provide for administrative cooperation between contracting States in the establishment, management, enforcement and collection of maintenance (Chapters II and III). This framework builds and improves on mechanisms that were first introduced under UNCRAM (see Alegría Borrás and Jennifer Degeling *Explanatory Report on Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (HccH) at [2], [4]), and it replaces UNCRAM insofar as the two Conventions coincide (Art 49). Cooperation takes place through a system of Central Authorities established under the Convention.

An important focus of cooperation is the transmission of applications for maintenance, which makes it easier for claimants to access maintenance in (to them) foreign legal systems. A claimant resident in Country A (the requesting State) can apply through the Central Authority in Country A to obtain a maintenance decision in Country B (the requested State). The Convention does not, however, provide for uniform rules of jurisdiction (see Art 10(3)). This means that it is a matter for the law of Country B whether it has jurisdiction to make a maintenance decision (for example, on the basis that the child or the debtor is resident in the country). The Convention merely restricts proceedings for maintenance where there is an existing decision from a country that is a party to the Convention and the creditor is habitually resident in that country (Art 18).

The third function of the Convention is to ensure that processes for the cross-border recovery of maintenance are accessible, efficient and simple. This means, for example, that foreign maintenance decisions are to be registered or declared enforceable "without delay" (Art 23), and that registration or enforcement does not ordinarily require an application to the court (Art 23, cf Art 24). In New Zealand this task falls to the Inland Revenue.

The Convention is given effect by the Child Support (Reciprocal Agreement with Hague Convention Countries) Order 2021. The Order achieves this largely by providing that the definition of "child support" in s 2(1) of the Act has effect as if it included "payments required to be made under administrative assessments or court orders made by a contracting State" (see Schedule 2).

a. Introduction

b. Orders made by the New Zealand court

i. Under the Child Support Act 1991

9.201

Under the Child Support (Reciprocal Agreement with Hague Convention Countries) Order 2021, which gives effect to the 2007 Convention, the grounds of

jurisdiction to make a child support assessment have been extended considerably. The Order states that ss 5(1)(d) and 6(1)(b) of the Act have effect as if they included a child and parent who are "habitually resident in a contracting State". The 2007 Convention itself does not provide for uniform rules of jurisdiction, so the rationale for extending ss 5(1)(d) and 6(1)(b) in this way is unclear.

ii. Commonwealth and designated countries

iii. Convention countries

c. Recognition and enforcement of foreign child support orders generally

d. Orders from Convention countries

e. Australian orders in New Zealand and New Zealand orders in Australia

E. PROTECTION OF ADULTS

E.1 Impaired adults

E.2 Family violence

10

Corporations and Insolvency

A. INTRODUCTION

A.1 Introduction

A.2 Jurisdiction, recognition and insolvency

a. Recognition

b. Jurisdiction and regulation

c. Insolvency

B. CORPORATIONS

B.1 Recognition, status and capacity of corporations

a. Recognition of foreign corporations

b. Internal management, capacity and contracting

10.17

See *Autoterminal International Ltd v LOFA Trustee Ltd* [2020] NZHC 1843 (authority to lodge a caveat determined by the law of incorporation).

See also **[5.197]** for discussion of the status of directors of a foreign company: in *Koza Altin Isletmeleri AS (No 2)* [2022] EWCA Civ 1284, [2023] 1 BCLC 617 at [139] the English Court of Appeal rejected the proposition that the status of directors of a foreign corporation should be treated as a choice of law question where it depended on a foreign judgment, and should be assessed by reference to English rules on recognition of that judgment. In most cases questions of internal management, capacity and contracting will be resolved according to a choice of law analysis; that case was unusual because the issue was whether directors had been validly appointed by a Turkish judgment and subsequent legislative decree which were alleged to be corrupt.

10.18

In *Autoterminal International Ltd v LOFA Trustee Ltd* [2020] NZHC 1843 at [63]-[65] the High Court agreed that the right to bring a derivative action was a matter of substance to be governed by the law of the place of incorporation.

c. Changes in status: amalgamation, relocation and liquidation

B.2 Regulation of foreign corporations under the Companies Act 1993

C. CROSS-BORDER INSOLVENCY

C.1 Overview

a. The coordination of insolvency procedures across borders

b. The principle of "modified universalism"

10.42

See also *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802.

C.2 The Insolvency (Cross-border) Act 2006 and the UNCITRAL Model Law

10.44A

The jurisdictional considerations involved in the liquidation of a New Zealand company with affairs overseas were considered in *Island Grace (Fiji) Ltd (in receivership & interim liquidation) v Satori Holdings Ltd (in interim liquidation)* [2023] NZHC 219. A shareholder in the defendant company opposed it being

placed into liquidation and argued that the *forum conveniens* was Fiji, where the defendant was registered as a foreign company and where it participated in a joint venture to build a resort.

Associate Judge Andrew dismissed the suggestion that the New Zealand Court lacked jurisdiction to determine an application to liquidate a New Zealand company, and held on the facts New Zealand was the appropriate forum.

The Judge also addressed the procedure where a shareholder (not being a defendant) wished to oppose liquidation. The Judge held that a non-party had no right to file a protest to jurisdiction under r 5.49; the correct course was to become a party by filing a statement of defence under r 31.16(2). This would not have constituted a submission to the jurisdiction that precluded him from raising *forum non conveniens* arguments.

An appeal was dismissed: *Griffiths v Island Grace (Fiji) Ltd (in receivership and interim liquidation)* [2023] NZCA 627 and see [**10.95**] below.

10.44

King v Harrison [2022] NZHC 2184 confirmed that it was not a purpose of the regime to confer a private right of action on insolvent parties dissatisfied with the conduct of an administrator.

a. Scope of application

10.49

A scheme of arrangement or reconstruction may qualify, but the extent of the court's powers may differ from a liquidation. In the latter case creditors' rights are generally unaffected, the focus is on a fair distribution of the company's assets and the liquidation ends with the dissolution of the company. On the other hand, it is the purpose of a scheme of arrangement to alter creditors' rights to keep the company operating: *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802, [2019] 1 All ER (Comm) at [93]. See also [**10.66**] below.

10.50

See *Official Trustee in Bankruptcy v Sadler* [2020] NZHC 1060 for recognition of an Australian bankruptcy arising out of a debtor's petition as foreign main proceeding.

In *Stanley v Fielding* [2023] NZHC 2259 n 3, Campbell J suggested that the relevant time for assessing whether the debtor had a "centre of main interest" or "establishment" in the place of bankruptcy (such that the foreign proceeding

could be recognised as a "foreign main proceeding" or "foreign non-main proceeding" under sch 1 of the Insolvency (Cross-Border) Act 2006) was at the commencement of the foreign bankruptcy or insolvency procedure, not the time of making the application in New Zealand. On the facts, this would have meant that the sch 1 procedures were available even though the debtor had subsequently moved to New Zealand.

b. Access of foreign representatives and creditors to courts in New Zealand

c. Recognition of foreign proceedings

10.61

In *Protasov v Derev* [2021] EWHC 392 (Ch), an order in the nature of a freezing order was made under Article 19 pending recognition of the Russian bankruptcy as a foreign main proceeding, but the Court held that it should not be continued after a recognition order had been made because at that point the full insolvency regime came into play to protect the parties' rights in a way that was inconsistent with the imposition of a freezing order.

d. Consequences of recognition

10.64

In *Protasov v Derev* [2021] EWHC 392 (Ch) the Court held that the automatic consequences of recognition prescribed by Article 20 precluded the superimposition of a freezing order.

10.66

In *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802 at [94], the Court of Appeal held that there was no power to vary or discharge substantive rights under English law (precluded by the rule in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399) by the expedient of procedural relief designed to conform the rights of English creditors with those they would have under foreign law. In that case, the application sought to stay the claims of English creditors (governed by English law) indefinitely to support the scheme of restruction given effect in Azerbaijan after the conclusion of that process.

10.66

In *Official Trustee in Bankruptcy v Sadler* [2020] NZHC 1060 the High Court entrusted the "administration and realisation of all of [the debtor's] assets located in New Zealand" to the Australian Official Trustee.

e. Cooperation between courts and concurrent proceedings

f. Seeking assistance from foreign courts

C.3 The court's common law powers

a. The recognition of foreign insolvencies

10.86

As to immovable property, the English Court of Appeal held in *Kireeva v Bezhamov* [2022] EWCA Civ 35, [2022] 3 WLR 1253 that the immovables rule meant that recognition at common law of an insolvency did not, in the absence of statutory intervention, confer on a foreign office-holder any interest in or right to immovable property in the jurisdiction; the court was not prepared to recognise an exception to the immovables rule based on the principle of "modified universalism" or to construe s 426 (the equivalent to New Zealand's s 8 of the Insolvency (Cross-Border) Act 2006) as creating such an exception.

b. The provision of "active assistance" by the New Zealand court: s 8 of the Insolvency (Cross-border) Act 2006

10.89

The potential for productive cooperation between courts who are seised with aspects of a cross-border insolvency is illustrated by the proceedings relating to the insolvency of the Halifax group of companies. Liquidators having been appointed in both New Zealand and Australia, a common issue arose about how assets should be distributed. The liquidators in each case sought directions, and the High Court of New Zealand and Federal Court of Australia conducted a joint hearing, with the same evidence and arguments presented to both courts, and the judges (with consent) conferring but issuing separate judgments: *Re Halifax New Zealand Ltd (in liq)* [2021] NZHC 1113 and *Kelly (Liquidator), Re Halifax Investment Services Pty Ltd (in liq) v Loo* [2021] FCA 531. That course of action began as an application to the Federal Court for a letter of request to the New Zealand court: see *Re Halifax Investment Services Pty Ltd (No 5)* [2019] FCA 1341, (2019) 139 ACSR 56. It appears from that the parties relied on both the provisions of the Model Law (in particular arts 25-28) and the power in s 8 as the basis of this procedure. Although not dependent on the existence of the Trans-Tasman Proceedings Act 2010 the closeness and similarity of the two legal systems underlying that regime made this an obvious candidate for innovative judicial cooperation. Substantive appeals were heard on the same basis: *Loo v Quinlan* [2021] NZCA 561; *Loo, Re Halifax Investment Services Pty Ltd (in liq) v Quinlan* [2021] FCAFC 186, (2021) 156 ACSR 194.

10.91

In *Stanley v Fielding* [2023] NZHC 2259 at [32], Campbell J held that at least in relation to countries with similar provisions to s 8, the discretion should be exercised (a) in light of the Insolvency (Cross-Border) Act's purpose to provide a framework for facilitating insolvency proceedings; and (b) in favour of granting assistance unless there is some compelling reason not to, consistent with the modified universalism principle, which would include being inconsistent with public policy.

10.94

In *Stanley v Fielding* [2023] NZHC 2259 at [37]-[38], Campbell J rejected the argument that relief was not available under s 8 to enable foreign office holders to do something they could not do under their own law. The Judge noted that s 8(3) instead authorised the New Zealand Court to make an order that it could have made if the issue had arisen in New Zealand; at most, the fact that the foreign officers could not do the relevant thing in their own jurisdiction would go to the discretion.

The Judge also rejected the proposition that an applicant must demonstrate the "necessity" of the assistance to the New Zealand court; this is a requirement but would have been demonstrated to the foreign court before it sought the New Zealand court's assistance, so again it would be a consideration in the exercise of the court's discretion: [42].

The Judge also held that a difference between the procedures applicable to the debtor's insolvency and the procedures that would apply in a New Zealand insolvency was not sufficient; some differences are almost inevitable and the debtor needed to show that these amounted to a breach of public policy: [48].

c. Liquidation of overseas companies under the Companies Act 1993

10.95

In *Griffiths v Island Grace (Fiji) Ltd (in receivership and interim liquidation)* [2023] NZCA 627 at [19], the Court of Appeal held that the New Zealand High Court "and only that court, has original jurisdiction to appoint a liquidator to a New Zealand-registered company." That is consistent with the general rule that the English courts will only regcognise the authority of a liquidator appointed under the law of the place of incorporation: see *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 at [13]. The Court of Appeal's judgment should not be read as excluding the prospect of a company having liquidators appointed by a court outside the place of incorporation ancillary to the primary liquidation,

where for example that was necessary to deal with particular assets, and this is accommodated by the Court's reference to "original" jurisdiction.

d. Bankruptcies and liquidations of debtors in New Zealand with affairs overseas

10.102

In *Grant v Arena Alceon NZ Credit Partners LLC* [2023] NZHC 3048 the High Court held that the Court did not have jurisdiction to make orders under s 266(1) of the Companies Act 1993 requiring foreign companies to comply with liquidators' requirements under ss 239AG and 261 to produce documents relating to the affairs of New Zealand companies in liquidation.

10.104

For the principles applicable to service of a bankruptcy notice overseas, see *Commissioner of Inland Revenue v Makuru* [2020] NZHC 2563; see also [**2.109**] of this supplement.

e. Avoidance of insolvent transactions, and transactions at an undervalue

10.109

Cf *R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2, [2021] 2 WLR 335 at [64]-[65] distinguishing the insolvency cases in finding that the power to require production of documents for a fraud investigation was not extraterritorial such that an order could be directed to the overseas parent of an English company.

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