CONFIDENTIALITY ORDER AS PER PARA [156](f)(ii)

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-2086
[2023] NZHC 3260

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

Hearing:	17 May 2023 and further memoranda received 22 and 23 June 2023 (culminating in judgment on 31 August 2023 dismissing stay application)
Counsel:	JBM Smith KC, M C Harris, JLW Wass and S T Coupe for the Plaintiff M D Arthur for the interim liquidators of the First Defendant No appearance by or for the Second to Fifth Defendants
Judgment:	17 November 2023

JUDGMENT OF GAULT J

This judgment was delivered by me on 17 November 2023 at 1:00 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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TABLE OF CONTENTS

Introduction

[1] This proceeding concerns a claim by Kea Investments Ltd (Kea) that the defendants have conspired to harm and defraud Kea, including by obtaining and attempting to enforce a default judgment against Kea from the Circuit Court of Kentucky in the United States of America in the sum of US$123,750,000 plus interest and costs.

[2] Kea is a British Virgin Islands (BVI) company whose shareholder is Sir Owen Glenn. He is also a director of Kea.

[3] This proceeding was initially commenced against Wikeley Family Trustee Ltd (WFTL), Mr Kenneth Wikeley and Mr Eric Watson. WFTL is a New Zealand company incorporated by Mr Wikeley on 23 July 2021. Mr Wikeley is a company director and businessman currently residing in Queensland, Australia. He is the sole director and shareholder of WFTL. Mr Watson is a New Zealand citizen and businessman. His place of residence is currently unknown to Kea.

[4] Mr Watson has taken no steps in the proceeding. However, WFTL and Mr Wikeley protested the jurisdiction of the Court and applied to dismiss the proceeding. My judgment dated 10 March 2023 set aside their protest to jurisdiction.[1]

[5] Kea applies for judgment by formal proof following a series of events described in more detail in my separate judgment of 31 August 2023:[2]

(a) on 29 March 2023, I directed the (first to third) defendants to file a statement of defence by 14 April 2023;[3]

(b) on 6 April 2023, I granted Kea leave to join Wikeley Inc as a defendant, and placed WFTL in interim liquidation with leave to continue this proceeding against WFTL;[4]

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1 *Kea Investments Ltd v Wikeley Family Trustee Ltd* [2023] NZHC 466.
2 *Kea Investments Ltd v Wikeley Family Trustee Ltd (in liq)* [2023] NZHC 2407.
3 At [12].
4 At [16]; minute dated 6 April 2023 at [7].

(c) no statements of defence were filed by 14 April 2023 as directed;[5]

(d) on 17 April 2023, Kea sought to proceed by way of formal proof. I indicated a hearing date was available on 17 May 2023 and shortened the time for Wikeley Inc to file its statement of defence to 10 working days, with leave reserved to Wikeley Inc to apply for variation;[6]

(e) on 20 April 2023, Kea filed its amended statement of claim, joining Wikeley Inc and USA Asset Holdings Inc as fourth and fifth defendants.

[6] Affidavits had been filed for the interlocutory applications but Kea filed a number of further affidavits for the formal proof hearing both because some of the interlocutory affidavits addressed matters on the basis of information and belief and to address subsequent matters. Kea also filed detailed, helpful submissions for the formal proof hearing.

[7] Insofar as it was necessary to extend the leave granted to Kea on 6 April 2023 to continue this proceeding against WFTL in interim liquidation, at the formal proof hearing on 17 May 2023, Kea sought such an order. Mr Arthur, for the interim liquidators of WFTL, indicated that the liquidators understood the order of 6 April 2023 granted leave unless and until it was revoked and, in any event, did not oppose further leave. I granted leave.

[8] Subsequent to the formal proof hearing, at which I reserved my decision, on 22 June 2023 Mr Wikeley applied for an extension of time and leave to appeal the 10 March 2023 judgment on *forum non conveniens* grounds and sought interim relief (stay) pending appeal. Mr Wikeley's applications were heard in July, with judgment delivered on 31 August 2023 dismissing his applications for extension of time, leave to appeal and interim relief (stay).[7]

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5 *Kea Investments Ltd v Wikeley Family Trustee Ltd (in liq)* [2023] NZHC 2407 at [22].
6 Minute dated 17 April 2023.
7 This reserved judgment was not progressed in the meantime.

Factual narrative

Sir Owen Glenn, Kea and Mr Watson

[9] In 2011–2012, Mr Watson sought to persuade Sir Owen Glenn to make investments with him. Investments followed, but the relationship broke down around 2013, which led to disputes. At that time, Kea was owned by the Corona Trust, a Nevis trust.

[10] In early 2012, a large logistics company which Sir Owen Glenn had established and built up over a number of years was sold for approximately US$350 million. The proceeds were held in the Corona Trust. At that time, Sir Owen Glenn was not an officer of the Corona Trust or of Kea. The protector of the trust was Mr David Miller, a former adviser and friend of Sir Owen Glenn's, and the corporate trustee was Pizarro Company Limited (Pizarro), a company run by Mr Peter Dickson. Mr Dickson was also the sole director of Kea.

[11] In March 2012, Sir Owen Glenn was introduced to an investment opportunity promoted by Mr Watson called "Project Spartan". Sir Owen Glenn encouraged Mr Miller and Mr Dickson to pursue the opportunity. They did so, but failed to keep Sir Owen Glenn informed of developments. Mr Dickson committed Kea to a very different transaction from that which Mr Watson had first promoted to Sir Owen Glenn. Project Spartan involved Kea and a company called Novatrust (which was the trustee of a trust of which Mr Watson was the settlor and the primary beneficiary) being shareholders in a joint venture company called Spartan Capital Ltd (Spartan), and Kea lending some £129 million to Spartan.

[12] Mr Watson also persuaded Kea to invest in, and then to buy shares in, a company called Red Mountain Resources Inc, a gas and oil company incorporated in Florida.

[13] Following disputes regarding the control of the Corona Trust, on the application of Sir Owen Glenn's daughter, Ms Connah (a beneficiary), the Nevis Court made orders in February 2013 suspending the powers of Mr Miller and Mr Dickson and appointed a new professional trustee, Harneys (Nevis) Limited (HNL). The orders

directed Pizarro, Mr Miller and Mr Dickson to provide all information and records concerning the Corona Trust to the claimant, who in turn passed them to HNL. The orders of the Nevis Court required Mr Miller and Mr Dickson to provide written details of all assets of Kea and all documents, correspondence and communications in connection with or related to the administration of Kea including all contractual documents.

[14] Through a review of Kea's records provided under the Nevis Court orders, HNL learned of the contracts relating to Project Spartan and Red Mountain Resources. These discoveries led to a falling out between Sir Owen Glenn and Mr Watson. A company associated with HNL, Harlaw, became a director of Kea in April 2013, and Mr Munro of Harlaw and HNL was the individual who dealt with Mr Watson on behalf of Harlaw and Kea.

[15] After a period in which Mr Munro and Sir Owen Glenn tried to work with Mr Watson in relation to the Spartan investment, in April 2014 Kea filed a petition in the BVI to wind up Spartan on the just and equitable ground. In response, Mr Watson caused Novatrust to bring proceedings against Kea and others in England alleging breach of contracts and breach of fiduciary duty in relation to the Spartan agreements. Evidence filed in the English proceedings led to Kea discovering Mr Watson's fraud on Project Spartan, and in 2015 Sir Owen and Kea commenced proceedings in England against Mr Watson (and others including Novatrust) as a result.

[16] The three proceedings were heard together in the English High Court in 2017. A judgment was issued by Nugee J on 31 July 2018. The Judge found that Kea's entry into Project Spartan had been procured by the deceit of Mr Watson, and that Mr Dickson had breached his fiduciary duties to Kea.[8] Mr Dickson was found to have engaged in serious misconduct including accepting unauthorised inducements from Mr Watson and backdating a loan agreement so that it appeared to have been signed before the Nevis Court had suspended Mr Dickson's powers and frozen Kea's assets.[9] The winding up petition and the claim by Novatrust against Kea were settled mid-trial.

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8 *Glenn v Watson* [2018] EWHC 2016 (Ch), culminating at [528].
9 At [429]-[431] and [492].

[17] On 14 September 2018, the English Court ordered Mr Watson to make an interim payment of approximately £25 million towards the Spartan judgment debt and an interim payment of around £3.8 million towards Kea's costs.

[18] Mr Watson did not meet the judgment debt arising from the judgment. In 2020 he was ordered to disclose certain records to Kea to enable it to enforce the judgment. He failed to comply fully with that order and was committed to prison for contempt of court.[10] Kea is still trying to enforce the judgment against Mr Watson.

[19] Also, the investments made by Kea in Red Mountain turned out to be worthless, and Kea later discovered that a fraud had been practised on it by Mr Watson. In 2018, Kea brought proceedings against Mr Watson in respect of that fraud and on 22 March 2019 a default judgment was entered against Mr Watson for US$6.37 million.

Mr Wikeley and Mr Watson

[20] Mr Wikeley told this Court that he has not lived in New Zealand since 2002, that he lived in Kentucky between 2012 and 2015, that his permanent home is in Mykolaiv, Ukraine, but that he currently lives with his sister in Ningi, north of Brisbane. However, following a hearing before Kós J in November 2012, Mr Wikeley was said to be resident in Melbourne.[11] The New Zealand companies register discloses multiple directorships and shareholdings after 2002 in respect of which Mr Wikeley's place of residence was given as New Zealand.

[21] Mr Wikeley and Mr Watson have a long history of business dealings together. The correspondence exhibited to Mr Wikeley's affidavit dated 23 November 2022 (filed under protest to jurisdiction) indicates their connection in 2012 and 2013. A witness statement made by Mr Watson's former associate, Mr Gibson, in proceedings in London describes Mr Watson and Mr Wikeley as members of a "relatively close-knit group" in relation to Red Mountain Resources. In December 2021, Mr Watson's son, Samuel (Sam) Watson, who has been associated with his

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10 *Kea Investments Ltd v Watson* [2020] EWHC 2599 (Ch) (finding of contempt) and *Kea Investments Ltd v Watson* [2020] EWHC 2796 (Ch) (committal sentencing).

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

father's businesses, presented for registration in New Zealand a company called BPKK Limited, whose sole director and shareholder was Mr Wikeley. BPKK Limited was restored to the register on 11 April 2023, having been earlier removed. Kea's English solicitor, Mr Graham of Farrer & Co LLP (Farrers), said that from his experience in seeking to enforce Kea's judgment, he had come across Sam Watson's name many times in connection with businesses formerly owned by structures associated with Mr Watson. For example, Sam Watson is a director of an English company that ran a cannabis products business called "Dr Watson". An extract from the Dr Watson website taken in April 2020 stated that the cannabis from which Dr Watson's products were made was grown on farms in Georgia associated with Richard Watson, Eric Watson's brother. In 2020, a proceeding was filed in Georgia by Richard Watson and a company associated with him called Hart Agriculture Corporation seeking orders against Kea. The complaint filed in that proceeding by the plaintiffs made reference to an affidavit of Mr Graham's that had been served in the proceedings against Mr Watson in England and not at that time referred to in open court. Mr Watson later admitted having provided that affidavit to his brother. Richard Watson has continued to seek similar orders against Kea preventing Kea from bringing proceedings against him and Hart Agriculture, most recently unsuccessfully in the US Court of Appeals for the Eleventh Circuit. It was Kea's case in the English committal proceedings that Hart Agriculture and the farms in Georgia are in fact Mr Watson's business. The committal judgment dealt with the interests in the Hart businesses; Nugee J held that Mr Watson "expected to obtain – and in all probability if it were ever in his interests to do so would obtain – at least the majority of the equity in the company, if not 100% of it".[12]

Mr Wikeley's incorporation of WFTL

[22] As indicated, Mr Wikeley incorporated WFTL on 23 July 2021. He appointed himself sole director and shareholder.

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[12] *Kea Investments Ltd v Watson* [2020] EWHC 2796 (Ch) at [216].

Kentucky default judgment

[23] On 19 August 2021, WFTL filed the Kentucky proceeding. It filed an amended claim on 3 December 2021. WFTL alleged in its claim that Mr Dickson, on Kea's behalf, had entered into a Coal Funding and JV Investment Agreement in 2012 (Coal Agreement) and that Kea had breached the agreement by failing to provide US$75 million in funding to the Wikeley Family Trust and failing to pay royalties of US$30 million, among other things.

[24] As Kea was not aware of WFTL's claim in Kentucky, it did not take the required steps to challenge the jurisdiction of the Kentucky courts. Default judgment was entered on 31 January 2022 for US$123,750,000 plus interest and court/service costs (the default judgment). Judgment was entered without any hearing and therefore without any examination by the Court of the merits of WFTL's claim and the quantum of loss and damage.

Statutory demand in BVI

[25] On 29 June 2022, Kea and its English solicitor received a letter from a BVI-based law firm attaching a statutory demand seeking to enforce against Kea the judgment debt of US$123,750,000 plus interest and court/service costs, totalling US$136,290,994. The statutory demand indicated that WFTL, as trustee of the Wikeley Family Trust (a New Zealand trust), had obtained the default judgment against Kea from a Court in Kentucky, USA dated 31 January 2022 for alleged breach of the Coal Agreement.

[26] This June 2022 letter was the first Kea had heard of both the Coal Agreement and the Kentucky Court proceeding. The Coal Agreement was not provided to Kea with the statutory demand; it was provided on 7 July 2022. Kea considers the Coal Agreement, and the claims made under it, are fabrications constructed by Mr Wikeley and Mr Watson to defraud Kea.

[27] Following enquiries with Kea's registered agent in BVI, Icaza, Gonzáles-Ruiz & Alemán Trust Limited ("Icaza"), Kea learned that the First Amended Complaint in

the Kentucky proceeding had been delivered to the offices of Kea's registered agent in BVI. However, Kea's registered agent did not pass the complaint on to Kea.

[28] On 12 July 2022, Kea applied to set aside the statutory demand in the BVI. That application was listed for 5 December 2022. This was subsequently adjourned.

Application to set aside default judgment

[29] Kea also instructed Kentucky lawyers to apply to set aside the default judgment based on the Coal Agreement. That motion to set aside the default judgment was filed on 21 July 2022, with Kea recording it was entering a limited appearance for the purpose of contesting the jurisdiction of the Kentucky Court.

Coal Agreement

[30] The Coal Agreement purports to be an agreement between Mr Wikeley "as trustee for the Wikeley Family Trust New Zealand" and Kea represented by Mr Dickson. It purports to be dated 23 October 2012 with both signatures witnessed by Mr Watson.

[31] The Coal Agreement purports to commit Kea to provide capital to fund coal investments presented by Mr Wikeley. The "Background" recitals state, among other things, that:

(a) Mr Wikeley has "developed investments, opportunities, relationships, and proprietary deals related to the coal industry";

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

(c) Kea "acknowledges that their advisors have done a feasibility study and found this Greenfields deal and the overall pipeline of investment deals

developed and those to be identified to provide a valuable and well above market investments return";

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

[32] The commitments purportedly made by Kea to Mr Wikeley, as trustee of the Wikeley Trust, under the Coal Agreement included the following:

(a) To "commit and provide capital to the venture as required for the benefit of both parties, with a minimum of US$75million over the next eight years", by way of a 20-year loan to Mr Wikeley at an interest rate of 3% per annum;

(b) To pay Mr Wikeley a "guaranteed" royalty of US$1.5m per year for the next 20 years "irrespective as to whether production has commenced or not, or if for any reason investment has been delayed";

(c) If Kea "fails for any reason to provide a minimum of $75m USD of capital":

(i) To indemnify Mr Wikeley for any losses and lost profits; and

(ii) To indemnify Mr Wikeley for the greater of US$93.75 million or 25% of the actual profits.

(d) Mr Wikeley could at any time after the seventh anniversary of the agreement "put his shares/this agreement in the venture to [Kea] for £125m USD [sic], anytime during the next 20 years of this agreement."

(e) "For simplicity and avoidance of doubt, [Kea] has agreed to guarantee [Mr Wikeley] all its just reward. This agreement is in full and final agreement of the terms between the parties."

[33] The Coal Agreement also contained a clause stating:

> **JURISDICTION**
> The parties have agreed that the jurisdiction shall be the USA. The contract will be governed by the laws in Lexington, Kentucky and any applicable Federal law.

[34] The default judgment sum of US$123.75 million reflects the indemnity of US$93.75 million plus unpaid royalties of US$30 million (US$1.5million for 20 years).

[35] Kea claims the Coal Agreement is a forgery, not signed by Mr Dickson in October 2012, or alternatively, even if it were signed by Mr Dickson, WFTL could not have made any lawful claims under it.

Interference with Kea

[36] While Kea's application to set aside the default judgment was pending, on 7/8 August 2022 Farrers received several communications from a "David Michael Tabet",[13] claiming that he and three Marshall Islands companies had been appointed "protective directors" of Kea and informing Farrers that it was no longer instructed for Kea and that Mr Tabet was authorised to settle the Kentucky proceedings (for US$100 million). The three Marshall Islands companies are all annulled (struck off).

[37] Kea claims these communications were part of a fraudulent scheme by Mr Rizwan Hussain to take over companies to which he is a stranger. Mr Hussain is the subject of a number of judgments of the English courts recording similar schemes.[14] For example, in *Business Mortgage Finance 4 Plc & v Hussain* the Court said:[15]

> The Defendants have targeted these securitisation structures relentlessly. One or other of them have pretended to occupy the roles of directors of the Issuers, trustees for the noteholders, receivers of the underlying assets, Servicers, advisers to the Issuers, and other positions. They purported (in their assumed role of directors) to forfeit the shares held by BMFH in the Issuers

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13 Kea believes that Mr Tabet is likely to be a pseudonym for Mr Hussain, referred to next.

14 See *Hurricane Energy Plc v Chaffe* [2021] EWHC 2258 (Comm) at [7]-[10]; and *Business Mortgage Finance 4 Plc & v Hussain* [2022] EWHC 449 (Ch)at [5] and *Business Mortgage Finance 4 Plc & v Hussain* [2022] EWHC 661 (Ch).

15 *Business Mortgage Finance 4 plc v Hussain* [2021] EWHC 17 (Ch) at [252].

> and sell them to Highbury. They managed to change important company filings at Companies House and made misleading announcements to investors over the RNS. None of this is legitimate. The Defendants have never occupied any of these roles. They are, for legal purposes, strangers to the Securitisations. The reasons they have given for their actions are spurious. The corporate assault has been going on for the best part of two years, in the teeth of earlier orders of the courts and the Claimants' reasoned protests. It must now stop.

[38] Kea says Mr Hussain was imprisoned for contempt of court at the same time, and at the same prisons, as Mr Watson was in prison for contempt. Kea's case is that the pair met while in prison.

[39] The communications issued by "Mr Tabet" in the name of Kea included a notice to the Kentucky Court purporting to withdraw Kea's motion to set aside the default judgment on the basis that Kea had settled WFTL's claim. On 8/9 August 2022, WFTL's lawyers notified the Kentucky Court that the case had been settled and sought to vacate the hearing of Kea's motion to set aside the default judgment. Kea's true directors did not authorise any such settlement. At the same time, letters sent by "Mr Tabet" in the name of Kea tried to stop Kea's Kentucky lawyers from acting for Kea against Mr Watson. "Mr Tabet" also wrote to Kea's registered agent in BVI seeking (unsuccessfully) to have Kea's register of directors and members changed.

[40] Kea says this was an attempt to replace a default judgment which was being attacked by Kea with a debt due under a settlement agreement, so as to further the conspirators' attempts to wind up or extort money from Kea (or by this time, Icaza's insurers, Icaza having exposed Kea to the default judgment by failing to pass on the Kentucky complaint). Kea says it also again links Mr Watson to Mr Wikeley's attempted frauds on Kea by the proceeding in Kentucky since the indicia in the method of the attack and the wording in the documents demonstrate that the person behind the attacks was Mr Hussain, and Mr Hussain can only have known of the Kentucky proceedings through Mr Watson.

[41] When Farrers wrote to "Mr Tabet" questioning the validity of his letters and pointing out the connection with Mr Hussain, the annulled Marshall Islands companies sued Farrers and Kea's BVI solicitors in England (purporting also to have Kea as a claimant in those proceedings). Kea says this, too, reflects Mr Hussain's modus

operandi. Those proceedings, together with other Hussain-backed proceedings against (or purportedly by) Kea, were all struck out in September 2022 by the English High Court, which held that Mr Hussain should be subject to a General Civil Restraint Order. Mr Watson was not a party to those proceedings, but he was held liable for Kea's costs on the basis that they had been conducted for his benefit. In making those orders, the Judge accepted that Kea had "good grounds for thinking that Mr Watson and Mr Hussain in these proceedings were acting in concert".[16]

[42] Another annulled Marshall Islands company which has been found by the English courts to be connected to Mr Hussain, FVS Investments Ltd (FVS), wrote to WFTL's Kentucky solicitors claiming to be a secured creditor of Kea in the sum of US$483 million, and offering to share the proceeds of the Kentucky proceedings. FVS is not a creditor of Kea. Kea contends this too is part of the fraudulent scheme, creating a paper trail to justify WFTL paying to FVS part or all of any recovery it obtains, including for Mr Watson's (and Mr Hussain's) benefit.

[43] In addition, on 11 August 2022 "Mr Tabet" purportedly on behalf of Kea wrote to (Long Harbour) entities in which Kea had an interest, and Mr Watson, asserting that Kea's interest had been assigned to Highbury Investments Limited (Highbury). Highbury is a Marshall Islands company that the English Court has found to be associated with Mr Hussain.

[44] Kea says it now appears that these developments are related, and that Mr Wikeley and Mr Watson, together with Mr Hussain, have conspired to defraud Kea through the instrument of the forged Coal Agreement and the default judgment.

WFTL's attempt to settle its claim for US$10 million

[45] On 15 September 2022, WFTL offered to settle its default judgment for US$10 million. The offers were expressly made on the basis that US$10 million was the sum which WFTL believed that Icaza (Kea's registered agent in BVI) would have by way of malpractice insurance. The offer was to expire upon the beginning of the hearing of Kea's motion to set aside. Kea says that the letter is not a privileged settlement

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16 *Blue Side Services SA v Kea Investments Ltd* [2022] EWHC 2449 (Comm) at 11:02am at [7].

communication because it was made for a dishonest purpose (namely to extract a settlement based on fraud),[17] and that this is not the conduct of a bona fide claimant. As Kea noted, WFTL suggested it would apply for an order in this proceeding that the settlement agreement not be read but it never did so. The fraud exception to settlement privilege applies where there is a "prima facie" case of dishonesty.[18] It applies even if the lawyer was an unwitting participant.[19] I consider the letter is admissible.

Continuation of Kentucky proceeding and actions in the USA

[46] In September 2022, WFTL gave notice to Kea that it had issued subpoenas in New York and in Kentucky to various banks, seeking disclosure of various records related to Kea, the Corona Trust, and Sir Owen Glenn. WFTL also sought from Kea extensive post judgment discovery and answers to interrogatories regarding Kea's officers, structure, and assets. Kea says the confidential information sought by WFTL goes well beyond information that could be relevant to enforcing the default judgment. Even though Kea is the only defendant to the Kentucky proceeding, WFTL's requests also related to Sir Owen Glenn, the Corona Trust and a related trust, the Regency Trust. WFTL sought documents going back to 1 January 2012 (before the purported date of the Coal Agreement). Kea says this also is not the action of an honest creditor who is seeking to enforce a judgment.

[47] Kea's motion to set aside the default judgment was heard on 7 October 2022. After the hearing, on 10 October 2022, WFTL gave notice that it would withdraw the original subpoenas and serve new Kentucky subpoenas on some 11 banks in Kentucky and New York, and a New Jersey subpoena on a bank in New Jersey, seeking details of all dollar transactions carried out by Kea since 1 January 2012.

[48] Kea's motion to set aside the default judgment was denied on 18 October 2022. The judgment stated:

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17 At the interlocutory stage, I left to one side the settlement offer to Kea since its admissibility had not been determined.

18 Admissibility is governed by New Zealand law: *Re RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch), [2017] 1 WLR 1991; *Rochester Resources Ltd v Lebedev* [2014] EWHC 2185 (Comm).

19 *Icepak Group Ltd v QBE Insurance (International) Ltd* [2013] NZHC 3511 at [45]. Kea did not allege that WFTL's Kentucky lawyers, who made the offer on behalf of WFTL, were acting dishonestly.

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

[49] On 21 October 2022, Kea issued a motion to amend, alter or vary (MAAV) the denial of its application. This was heard on 28 October 2022 and the Court indicated that it would deny the motion. Although Kea intended to appeal against the order of 7 October 2022 and the dismissal of the MAAV – and subsequently did so – it commenced this proceeding on 31 October 2022 given concern that the Kentucky Court of Appeal would also not consider the merits. Kea could not put up a bond to stay execution of the default judgment without risking compromising its challenge to the judgment in BVI.

[50] Kea issued a motion in Kentucky to quash the new overly-broad subpoenas. It also issued a motion seeking a protective order staying the post-judgment discovery requests pending appeal. On 21 December 2022, the Kentucky Court entered the order in relation to Kea's motion to quash the re-issued subpoenas and motion for a protective order in the form tendered by WFTL. The motion to quash was denied. The protective order was denied in part – responses were to be provided but with a protective order restricting sharing with Mr Watson, Mr Hussain and Mr Dickson.

Subsequent steps

[51] After my judgment of 10 March 2023 setting aside the first and second defendants' protest to jurisdiction, the following events occurred in the period before statements of defence were due on 14 April 2023, as set out in my judgment of 31 August 2023.[20]

[52] On 17 March 2023, the solicitors for WFTL and Mr Wikeley, Wilson Harle, informed the Court that WFTL and Mr Wikeley intended to seek leave to appeal in respect of the dismissal of their application to dismiss or stay the proceeding and the

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[20] *Kea Investments Ltd v Wikeley Family Trustee Ltd (in liq)* [2023] NZHC 2407 at [10]-[21].

setting aside of their protest to jurisdiction and that they intended to instruct new counsel. They sought that limited timetable orders be made to allow those steps to be taken.

[53] On 28 March 2023, Mr Wikeley incorporated Wikeley Inc.[21]

[54] On 29 March 2023, I directed the defendants to file a defence by 14 April 2023 but deferred making discovery orders as sought by Kea.

[55] On 30 March 2023, Mr Wikeley as director of WFTL purported to assign the default judgment and the Coal Agreement to Wikeley Inc.[22]

[56] On 3 April 2023, Wilson Harle filed an interlocutory application seeking an order declaring that Mr Browne had ceased to be the solicitor on the record for WFTL and Mr Wikeley, together with an (unsworn) affidavit in support.[23]

[57] On 4 April 2023, Wikeley Inc applied to the Kentucky Court to be substituted as plaintiff in the Kentucky proceeding on the basis of the purported assignments. That motion was filed by the Kentucky lawyers for WFTL (as trustee of the Wikeley Family Trust) and Wikeley Inc.[24]

[58] On 6 April 2023, Kea applied without notice to this Court for further interim orders having discovered that Mr Wikeley had taken steps purporting to divest WFTL of the default judgment and otherwise to avoid the effect of the New Zealand Court orders. I was satisfied that further interim orders should be made on a without notice basis.[25] I found that it appeared likely that Mr Wikeley and WFTL had acted in breach

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21 The principal place of business was said to be a virtual office and Mr Wikeley the sole director. Mr Wikeley gave the same address as his address as director.

22 Each document was signed by Mr Wikeley in Brisbane as director of both WFTL and Wikeley Inc.

23 The accompanying memorandum indicated that the application and affidavit had not been served on Kea (referring to counsel's fiduciary obligations and obligations of confidentiality) but that the plaintiff's solicitors would be advised by email that the documents had been filed. The documents were subsequently released to the new solicitors.

24 Wikeley Inc also filed motions that it would bring upon substitution to compel discovery from Kea and an anti-suit injunction restraining Kea from continuing this proceeding. The same day, WFTL's BVI lawyers served on Kea's BVI lawyers notices of the purported assignments issued under the name of Mr Wikeley as director of Wikeley Inc.

25 These orders included adding Wikeley Inc as a defendant.

of this Court's earlier interim orders by assigning or purporting to assign the Coal Agreement and the very substantial default judgment.[26] In the unusual circumstances, I considered it was just and equitable that WFTL be put into interim liquidation.[27]

[59] On 11 April 2023, any application for leave to appeal the 10 March 2023 judgment was due (20 working days after judgment). No application was filed, nor was any other correspondence received.

[60] Also on 11 April 2023, Mr Wikeley incorporated USA Asset Holdings Inc in Kentucky.[28] On the following day (12 April 2023), Mr Wikeley purported to appoint USA Asset Holdings Inc as the trustee of the Wikeley Family Trust and to change the governing law of the trust from that of New Zealand to that of "The Commonwealth of Kentucky a state within the United States of America".

[61] On 12 April 2023, Kea commenced proceedings in the Supreme Court of Queensland seeking ancillary interim relief. That Court made without notice orders in support of this proceeding under s 25 of the Trans-Tasman Proceedings Act 2010 (Australia).[29]

[62] On 13 April 2023, Mr Wikeley advised the interim liquidators of WFTL that he had replaced WFTL as trustee of the Wikeley Family Trust with the Kentucky company, USA Asset Holdings Inc. Mr Wikeley also stated to the interim liquidators that their appointment was an aspect of a campaign of oppression and intimidation by the directors of Kea. He called upon the liquidators to deliver up any assets or property under their control.

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26 Minute dated 6 April 2023 at [7].

27 Those orders were served on the first to third defendants the same day.

28 He nominated a virtual office space in Kentucky as the address of the company's principal office and as his own address.

29 With one exception, it is unnecessary to recount the subsequent steps in the Queensland proceeding which have included an application that Mr Wikeley be committed for contempt. The exception is a statement in Mr Wikeley's affidavit dated 26 April 2023 in the Queensland proceeding referred to [105] below. Nor is it necessary to refer to the steps taken by the interim liquidators in the United States Federal Courts.

[63] Also on 13 April 2023, the Kentucky lawyers for Wikeley Inc filed a reply in the Kentucky proceeding pursuing the 4 April 2023 motion for substitution.[30]

[64] I referred to this conduct by Mr Wikeley in my judgment of 31 August 2023:

> [48] My 6 April 2023 finding that it appeared likely that Mr Wikeley and WFTL had acted in breach of this Court's earlier interim orders reflected the fact that this Court's 12 December 2022 interim order provided that "none of the defendants shall sell, assign, gift, grant any security interest in or over, or otherwise in any way whatsoever transfer or encumber any interest any of them may have, directly or indirectly, in any rights any of them may have under or in connection with the Coal Agreement and/or the Default Judgment".
>
> [49] Further, the appointment of a new company as trustee of the Wikeley Family Trust on 12 April 2023 also appears to have contravened this Court's 12 December 2022 interim order which provided that "WFTL and Mr Wikeley shall not take any steps, and shall not cause or permit any other person, to appoint an additional or replacement trustee of the Wikeley Family Trust".

[65] The hearing of the motion for substitution in the Kentucky Court proceeded on 21 April 2023. At the hearing, the same Kentucky lawyers for WFTL, now acting for Wikeley Inc, advised the Court that they intended to file a parallel motion for substitution in the Court of Appeals (substituting Wikeley Inc as respondent). The Judge adjourned the application until after the Court of Appeals had ruled on the equivalent motion to be made in that Court. A motion for substitution was made in the Court of Appeals on 21 April 2023. Kea has opposed the motion.

Jurisdiction and service

[66] The Court has personal jurisdiction over each of the defendants:

(a) The proceedings were served on WFTL in New Zealand and on Mr Wikeley in Australia pursuant to s 13 of the Trans-Tasman Proceedings Act 2010 before the return date for the interim orders made on 4 November 2022. The Court's jurisdiction over them was confirmed when the Court dismissed their application to dismiss or stay

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[30] The Kentucky lawyers exhibited the Board Minute and Resolution of USA Asset Holdings Inc dated 12 April 2023 under which Mr Wikeley as director had purported to change the applicable law of the Wikeley Family Trust from New Zealand to Kentucky.

the proceedings and set aside their protest to jurisdiction.[31] An application for an extension of time and leave to appeal – on *forum non conveniens* grounds only – was dismissed.[32] Mr Wikeley's claims in his affidavit of 26 April 2023 in the Queensland proceedings that he still had reason to question the jurisdiction of this Court have no basis.

(b) Mr Watson was served pursuant to r 6.27(2)(a) and (h) of the High Court Rules 2016 in accordance with the Court's order for substituted service. Mr Watson has taken no steps to protest the Court's jurisdiction or otherwise.[33]

(c) Wikeley Inc and USA Asset Holdings Inc were joined to the proceeding by order of the Court, on the basis that Kea was entitled to serve the company out of the jurisdiction pursuant to r 6.27(2)(a) and (h).[34]

[67] The second amended statement of claim was served on Mr Wikeley and Mr Watson by email on 20 April 2023.

[68] The proceedings were served on Wikeley Inc on 21 April 2023 by personal service at the principal office recorded in the Kentucky Secretary of State's corporations register and by registered mail delivered to the registered agent of the company. The proceedings were served on USA Asset Holdings Inc on 21 April 2023 by delivery to the company's principal office and on 4 May 2023 by registered mail. Each of these companies was served outside New Zealand by a method permitted by the law of the country in which it was to be served.[35] The evidence establishes that the methods of service in Kentucky are not prohibited by the law of Kentucky for the service of documents in domestic (or international) actions.

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31 *Kea Investments Ltd v Wikeley Family Trustee Ltd* [2023] NZHC 466.

32 *Kea Investments Ltd v Wikeley Family Trustee Ltd (in liq)* [2023] NZHC 2407.

33 Order dated 24 November 2022. This order treated the documents as served upon prescribed email service of the order, which for the purpose of r 6.32(1)(a) amounted to service outside New Zealand by a method specified in r 6.1. There was no suggestion that service of Mr Watson outside New Zealand was effected contrary to the law of the country where service was effected (r 6.32(4)).

34 Orders dated 6 and 20 April 2023 respectively.

35 Rule 6.32(1)(b).

[69] The period for each defendant to file a statement of defence has expired:

(a) WFTL, Mr Wikeley and Mr Watson were ordered to file a statement of defence by 14 April 2023;

(b) The deadline for Mr Wikeley and Mr Watson to file and serve a defence to the second amended statement of claim expired on 5 May 2023 (10 working days after 20 April 2023).

(c) In accordance with the Court's order shortening the period for filing of a statement of defence to 10 working days, Wikeley Inc and USA Asset Holdings Inc were required to file statements of defence by 8 May 2023 (10 working days after 21 April 2023).[36]

[70] No statement of defence was filed.

[71] Even though a formal proof application can be brought without notice under r 15.9, the notice of hearing was emailed to Mr Wikeley and Mr Watson on 21 April 2023 warning them of the need to take steps if they wished to defend the claims.

Approach on formal proof

[72] When seeking judgment by way of formal proof under r 15.9, the plaintiff must file affidavit evidence establishing to the Judge's satisfaction each cause of action and sufficient information to enable the Judge to calculate and fix any damages claimed. The standard of proof is essentially the same as if the proceeding had gone to trial.

[73] In this case, there are strong allegations of fraud/dishonesty. The civil balance of probability standard of proof applies but in the case of serious allegations the quality of the evidence required to meet that fixed standard may differ in cogency, depending on what is at stake.[37] Here, cogent or strong evidence is required. Even so, fraud or

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[36] If there were any question about whether the method of service on USA Asset Holdings Inc on 21 April 2023 was sufficient and it needed to rely on service on 4 May 2023, Kea indicated it would seek, and I would have granted, a further abridgement of time for the defence.

[37] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [101]. See also *Napier v Torbay Holdings Ltd* [2016] NZCA 608; [2017] NZAR 108 at [38] and [42].

dishonesty may be inferred from primary facts.[38] In a circumstantial case, strands of evidence are to be assessed independently and then cumulatively.

Evidence

[74] Kea relies on evidence filed at the interlocutory stages of the proceeding only insofar as that evidence is admissible at a formal proof hearing. It supplemented that evidence with new affidavits giving direct evidence of some matters previously deposed to by Mr Graham of Farrers on information and belief. In addition, Kea filed new affidavits updating the factual background, providing expert evidence on Kentucky law, addressing recent events in Kentucky and Queensland, and supporting its damages claim.

[75] Kea relies on some hearsay statements. Such statements are admissible if the circumstances relating to the statement provide reasonable assurance that the statement is reliable and either the maker of the statement is unavailable as a witness or undue expense or delay would be caused if the maker of the statement were to be required as a witness.[39] "Unavailable as a witness" includes a person who is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or is not compellable to give evidence.[40] Kea may also rely on hearsay statements contained in business records where undue expense or delay would be caused if the person who supplied the information were required to be a witness.[41]

[76] Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.[42] This does not apply to proceedings to which Kea and the relevant defendant were both parties. So Kea may prove relevant elements of its claims against Mr Watson by reference to findings made in the Spartan proceedings.[43]

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38 *Thornley v Ford* [2021] NZHC 611 at [39], citing *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1 (HL) at [186] per Lord Millett.

39 Evidence Act 2006, s 18(1).

40 Section16(2)(b) and (e).

41 Section 19(1)(c).

42 Section 50(1).

43 Section 50 does not affect the operation of the law relating to res judicata or issue estoppel, or the law relating to an action on, or the enforcement of, a judgment: s 50(2) of the Evidence Act 2006.

First cause of action – conspiracy

Applicable law

[77] Kea submitted that the cause of action in conspiracy is governed by New Zealand law. In any event, Kea is entitled to rely on New Zealand law in the absence of a defendant appearing, pleading and proving foreign law.[44] Nevertheless, Kea produced a further expert opinion on Kentucky law from Mr Kelly. Mr Kelly's evidence demonstrates that nothing turns on the question of applicable law (even if it had been pleaded), since the relevant Kentucky law is materially identical or the relevant causes of action would be established on the same facts; and/or a Kentucky Court would reach the same conclusion as a New Zealand Court.

Elements of conspiracy

[78] The tort of conspiracy requires that two or more persons combine and agree that at least one of them will:[45]

(a) use unlawful means to cause damage to the plaintiff; or

(b) conspire to use means that may be lawful in themselves, but are done with the predominant purpose of injuring the plaintiff.

[79] The Court of Appeal in *Wagner v Gill* set out the essential elements of unlawful means conspiracy:[46]

(a) The existence of a combination of persons: In determining whether there is a combination of persons, inferences may be drawn from overt acts and coincidental behaviour.[47] Whether a company can conspire with its directors and/or shareholders is not settled. The better view is

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Mr Watson submitted to the English Courts and the Spartan Judgment has been registered under the Reciprocal Enforcement of Judgments Act 1934.

44 Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [3.87].

45 *JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19, [2020] AC 727 at [8].

46 *Wagner v Gill* [2014] NZCA 336, [2015] 3 NZLR 157 at [50].

47 Cynthia Hawes "Interference with Business Relations" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at 804.

that they can, but in any event Kea says that Mr Wikeley has conspired with the companies he established (WFTL, Wikeley Inc and USA Asset Holdings Inc),[48] and with Mr Watson and Mr Hussain.

(b) Unlawful action (unlawful means): This limb includes torts and crimes, but has also been held to include or potentially include a variety of other wrongs including breach of contract and breach of fiduciary duty.[49]

(c) Intention to injure the claimant: It is not necessary to prove that the conspirators' sole or predominant purpose was to injure the plaintiff.[50] It is sufficient that the conduct is directed at the claimant.[51]

(d) Actual damage caused to the claimant: This includes the expense caused to the claimant in exposing and resisting the wrongful activities of the defendants.[52]

[80] In lawful means conspiracy, it is unnecessary to prove that the acts in question are unlawful in themselves, provided the defendants' predominant purpose is nevertheless to injure the plaintiff.

Kea's pleading of conspiracy

[81] Kea's primary claim is that the defendants are combining by unlawful means with the intention of injuring Kea. Kea says:

(a) Mr Wikeley incorporated WFTL on 23 July 2021, approximately one month before WFTL filed its complaint in the Kentucky Court, for the

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48 *Wagner v Gill* [2013] NZHC 1304 at [90]-[94], [116]-[120]. See also *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch) at [77]-[78].

49 Cynthia Hawes "Interference with Business Relations" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at 824–825. See also *Wagner v Gill* [2014] NZCA 336, [2015] 3 NZLR 157 at [54] and [71]. In that case, the Court of Appeal described the concept of "unlawful means" as a controversial and difficult one but accepted that conduct did not need to be independently actionable by a plaintiff in order to qualify as unlawful means for the purposes of the tort.

50 At 814.

51 *Wagner v Gill* [2014] NZCA 336, [2015] 3 NZLR 157 at [106]. See also Cynthia Hawes "Interference with Business Relations" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at 817.

52 *British Motor Trade Association v Salvadori* [1949] Ch 556 (Ch) at 569.

purpose of defrauding Kea through WFTL in combination with Mr Watson as pleaded below.

(b) WFTL, Mr Wikeley and Wikeley Inc and USA Asset Holdings Inc are acting in combination with each other with the intention of injuring Kea by unlawful means:

(i) By making claims against Kea under the Coal Agreement when they know that none of them has any legitimate claims under any such agreement;

(ii) By WFTL and Mr Wikeley procuring the default judgment by fraud;

(iii) By WFTL and Mr Wikeley accepting the fraudulent "settlement" purportedly offered by Kea and otherwise by seeking to extract a settlement from Kea based upon the default judgment obtained by fraud;

(iv) By taking steps on the default judgment that they know to have been procured by fraud, namely, by resisting Kea's attempts to set aside the default judgment and attempting to enforce it;

(v) By executing the purported assignments (of the Coal Agreement and default judgment) and motions sought pursuant to them;

(vi) By executing and accepting the purported deed of appointment (of USA Asset Holdings Inc) and executing the purported change of governing law of the Wikeley Trust.

(c) Mr Watson is acting with the intention of injuring Kea by unlawful means:

(i) By causing and/or allowing Mr Hussain to purport to settle the Kentucky proceedings for US$100 million;

(ii) By causing and/or allowing and/or assisting Mr Hussain to advance fraudulent claims and abusive proceedings against Kea, Sir Owen Glenn and Kea's advisers for his benefit;

(iii) By causing and/or allowing and/or assisting FVS to assert to WFTL that it is a secured creditor of Kea for his benefit;

(iv) By supplying documents and information to WFTL to support the fraudulent claims of WFTL and Mr Wikeley against Kea under the Coal Agreement and in the Kentucky proceeding, which claims Mr Watson knows to be fraudulent, and causing or allowing WFTL to put Mr Watson forward as the witness to the Coal Agreement, the person who procured Mr Dickson's signature on the Coal Agreement and the person who received the alleged demands for payment thereunder.

(d) WFTL, Mr Wikeley and Wikeley Inc are acting in combination with Mr Watson:

(i) WFTL, Mr Wikeley and Wikeley Inc are advancing fraudulent claims against Kea to further the interests of Mr Watson as well as the interests of WFTL and Mr Wikeley and, since 28 March 2023, the interests of Wikeley Inc;

(ii) Mr Watson caused and/or agreed to assist WFTL and Wikeley Inc to bring its fraudulent claims and is assisting WFTL and Mr Wikeley in advancing their fraudulent claims ...

(e) It was and is reasonably foreseeable by WFTL, Mr Wikeley, Mr Watson, Wikeley Inc, and USA Asset Holdings Inc and intended by each of them, that the unlawful conduct was and is likely to cause harm to Kea by:

(i) causing loss to Kea by pursuing fraudulent claims under the Coal Agreement;

(ii) obtaining control over Kea for the purpose of fraudulently obtaining its assets;

(iii) assisting Mr Watson in continuing to avoid his obligations to Kea under the Spartan judgment, including by disabling Kea from enforcing that judgment by having it placed into liquidation or otherwise;

(iv) damaging Kea's reputation, by taking steps to enforce the default judgment, to have Kea liquidated in the BVI, and to damage Kea's standing with financial institutions;

(v) illegitimately obtaining Kea's confidential information and the confidential information of persons who are connected with or transacted with Kea and using that information to defraud or otherwise damage Kea;

(vi) diverting Kea's attention and resources to investigating and responding to their conduct; and

(vii) bringing abusive proceedings against Kea, Sir Owen Glenn, and the lawyers who have assisted them in the Spartan litigation and thus causing further loss and inconvenience to Kea in wasted time and costs.

[82] In essence, Kea says it has reason to suspect that Mr Watson is attempting to use the Kentucky proceeding to frustrate Kea's enforcement of its English judgment against him by winding up Kea and also by diverting its legal team and resources, to vex Kea and Sir Owen Glenn in their long-running dispute — including by forcing disclosure of their confidential financial information and causing them to waste legal fees which are unlikely to be recovered, and to extract value from Kea. Kea says that

Mr Wikeley also appears to be attempting to use the Coal Agreement and the Kentucky default judgment to extort Kea and its agents or associates. Kea says the immediate vehicle for this fraud is WFTL, which has obtained the default judgment.

[83] The interim liquidators of WFTL abide the Court's decision in respect of this cause of action.

Discussion

[84] As indicated, the background context is that:

(a) Kea and Sir Owen Glenn have spent years seeking to recover from Mr Watson losses from Mr Watson's Spartan fraud. This ultimately led to Mr Watson's imprisonment for contempt.

(b) Mr Wikeley and Mr Watson have a long history of business dealings together.

[85] On 23 July 2021, Mr Wikeley incorporated WFTL in New Zealand and appointed it trustee of the Wikeley Family Trust (a New Zealand trust). Mr Wikeley was the sole director and shareholder of WFTL.

[86] Soon after, on 19 August 2021, WFTL filed its claim in Kentucky under the Coal Agreement said to be entered in 2012. There was no pre-claim correspondence. Indeed, there is no correspondence in evidence of any demand under the Coal Agreement.

[87] As for the Coal Agreement itself, Kea has no records of it, its negotiation or its execution. None of Kea's directors since March 2013 have any knowledge of it. Mr Dickson, the purported signatory for Kea, did not mention it or provide any documents relating to it in response to Court orders in February 2013 which would have required him to mention it and provide such documents if it existed in 2012. As Kea submitted, the contemporaneous facts are inconsistent with the Coal Agreement being a valid agreement.

[88] The subsequent evidence also indicates that the Coal Agreement is not a valid agreement. Mr Wikeley's affidavit in this proceeding filed for the protest to jurisdiction stated that he understood there was a risk that he and WFTL could be held to have submitted to the jurisdiction of this Court if his evidence was not restricted to evidence in support of the application to strike out or stay and extended to answering the claims brought by Kea, and accordingly that the content of his affidavit was limited to matters relevant to jurisdiction and forum. Despite that statement, his affidavit addressed execution of the Coal Agreement albeit briefly. He stated that he lived in Kentucky, in the Hilton Hotel in Lexington, between 2012 and 2015 and worked on many coal projects when based there. In the context of finding investment funding for coal mining projects, he stated:

> … I made contact with Eric Watson by phone from Kentucky regarding funding coal projects that I was working on. That contact led to the coal funding agreement with Kea.
>
> 10. The agreement was drafted by me personally in Kentucky, signed by me in New York and given to Eric to arrange execution by Kea. I received a signed copy in Kentucky.

[89] In relation to performance of the Coal Agreement, Mr Wikeley said that while based in Kentucky he searched for and identified projects in Kentucky and other states which he referred to Mr Watson for funding by Kea. He said that in addition to telephone contact, he sent Mr Watson information on potential coal projects by email from Kentucky. He annexed some email correspondence relating to five projects.

[90] As I said in my earlier judgment,[53] the documents Mr Wikeley annexed to his brief affidavit provide little assistance in relation to the negotiation, drafting, execution, commercial terms, or performance of the Coal Agreement. The Background clauses refer to Mr Wikeley having provided Kea with "the financial models and analysis required to satisfy their due diligence over the past several months" and to Kea having done "a feasibility study". No such documents have been located.

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[53] *Kea Investments Ltd v Wikeley Family Trustee Ltd* [2023] NZHC 466 at [53]-[57].

[91] The brevity and generality of Mr Wikeley's affidavit is not explicable on the basis that it was confined to avoid submitting to this Court's jurisdiction. Despite that assertion, which is inconsistent with the limited submission to jurisdiction involved in a protest, his affidavit and the other affidavits filed in support purported to address the issue. Having dismissed the protest, I can take these affidavits into account. Mr Wikeley's affidavit said nothing about contact with Mr Dickson. As I said in my earlier judgment, even accepting that WFTL's Kentucky lawyer may have erroneously pleaded that Mr Wikeley presented the agreement to Mr Dickson on 23 October 2012, Mr Wikeley's affidavit did not address the timing discrepancy between:

(a) the Coal Agreement itself, on which his signature is dated 23 October 2012; and

(b) his account in his July 2022 affidavit in the Kentucky proceeding in which he said that he signed the contract in the presence of Mr Watson in New York City on 26 September 2012, that Mr Watson told him Mr Watson was meeting with Mr Dickson in Paris the following month and would have Mr Dickson sign the contract there, and that he was informed by Mr Watson on 23 October 2012 that Mr Dickson had signed the contract.

[92] Mr Graham's evidence indicates that Mr Dickson was in Paris for a Project Spartan meeting on 23 October 2012 but there is no mention of the Coal Agreement in the detailed meeting pack or emails setting up the meeting.

[93] The Coal Agreement is irregular on its face. As Kea points out:

(a) The date of 23 October 2012 beneath Mr Dickson's signature is typed whereas the dates beneath other signatures on the document are handwritten (being Mr Wikeley's signature and both of Mr Watson's signatures as witness).

(b) The first two pages of the three-page document show a paper clip at the top of the page, whereas the third page does not.

(c) The third page of the document, on which Mr Dickson's signature purportedly appears, is numbered "2" in the bottom left corner whereas the first two pages are not numbered at all. Also, the third page appears to have been copied with something obscuring the top left corner and with the slope of the top dotted line affected.

[94] From all the above, it appears that the page containing Mr Dickson's signature may have been taken from another document.

[95] I also accept Kea's submission that, despite the references in the background recitals to Kea having conducted due diligence over "several months", the alleged involvement of Kea's "advisors", and the quantum of Kea's alleged commitments:

(a) The terms of the Coal Agreement are grossly imprudent to Kea and commercially non-sensical (as explained next).

(b) The agreement is not professionally drafted. It contains spelling and other errors and irregularities (including expressing the expected profits variously as "$375m" and "£375m" and the call option price as "£125m USD"). Mr Wikeley claims to have drafted it himself, but it is highly unlikely that anyone from Kea would have signed such a sloppy document as and for an agreement genuinely recording the terms of a bona fide transaction following actual meetings, correspondence, due diligence, negotiations, exchanging and editing of drafts. As at October 2012, Kea was being represented in relation to the Spartan transaction by Duane Morris, a highly reputable solicitors' firm in London. The kind of agreement which Kea was being advised on can be seen from other agreements exhibited to Mr Munro's affidavit. Those agreements are very different from the sloppy and almost incomprehensible Coal Agreement.

[96] Kea's expert Kentucky lawyer, Mr Kelly, and his firm have a long history of advising clients in Kentucky on all aspects of mineral energy deals. The firm has extensive experience in many types of mineral-related transactions, including the

preparation of hundreds of contracts involving coal projects and investments. Mr Kelly has personally been involved in multiple actions involving coal and mineral energy contracts. Mr Kelly said that the Coal Agreement "bears no resemblance to the contract one would expect to see between sophisticated business parties relating to investments in coal projects" and that this "is particularly true for a contract obligating a party to invest many millions of dollars and to pay hundreds of millions of dollars". He explained that the "Greenfields" opportunity described in the agreement is "even more speculative than an ordinary coal mining project" and that, therefore, "one would not expect for an agreement to require the funding party to undertake the extremely broad and absolute indemnity obligations attributed to [Kea]".

[97] Mr Kelly also says that the generic jurisdiction clause, which purports to subject the parties of the jurisdiction of all 50 states in America, is highly unusual. The contract purports to choose the law of a city which does not have an independent legal system as the applicable law.

[98] As Kea submitted, despite it alleging in Kentucky (and in this Court) that the Coal Agreement is a fabrication:

(a) The original of the Coal Agreement relied upon by WFTL has never been produced:

(i) WFTL's lawyer in the Kentucky proceeding, Mr Regard, has refused to confirm whether or not he or WFTL possesses the original of the Coal Agreement on the basis that the request was "an informal discovery request not authorized within the Kentucky Rules of Civil Procedure".

(ii) The Wikeley defendants never responded to a request from Kea, made to its solicitors by letter dated 9 November 2022, that they produce the original of the Coal Agreement for inspection.

(b) The Wikeley defendants have not disclosed a single document evidencing the negotiations, execution, or performance of the

agreement. As indicated, they contended in their forum challenge that they could not enter into the merits without jeopardising their challenge (which was not accepted) but nevertheless served evidence purporting to go to the merits, in the form of an affidavit from Mr Branham (the same person who is now allegedly the sole director of Wikeley Inc) and in the form of emails between Mr Wikeley and Mr Watson between 6 October 2012 and April 2013 which were exhibited by Mr Wikeley. But there is no mention of Kea, or a Coal Agreement, or any obligation on Kea, or any demand for money in any of the emails. Indeed, in the emails that Mr Wikeley sent to Mr Watson and his associates on 2 and 3 October 2012, only a few days after Mr Wikeley claimed to have concluded negotiations with Mr Dickson and signed the Coal Agreement before Mr Watson in New York, there is no mention of Kea or Mr Dickson, nor any sense that Mr Wikeley is emailing Mr Watson on the basis that they have in fact secured funding from Kea for the deal. Three more emails, sent by Mr Wikeley to Mr Watson and his associates on 16 October 2012, 5 April 2013, and 6 April 2013, refer to some kind of coal investment opportunities without any reference to Kea or Mr Dickson. As well as the emails, Mr Wikeley annexed various reports, presentations and spreadsheets regarding coal ventures. Again, none refers to Kea or Mr Dickson or any funding to be provided by Kea. The Court may infer that Mr Wikeley/WFTL did not adduce any such evidence supporting their case because it does not exist.

[99] In addition to the irregularities on the face of the document, and Mr Wikeley's conflicting accounts as to its execution, Kea submitted, and I accept, there is further strong circumstantial evidence that the document is fake:

(a) Prior to commencing the Kentucky proceeding, WFTL made no demand on Kea and never once complained to Kea, in the 9 years since at least March 2013, that Kea had failed to provide funding on request and had never paid the annual "royalty" of "US$1.5m" ostensibly due to Mr Wikeley under the agreement; there was no pre-action

correspondence whatsoever. If the agreement were genuine, Mr Wikeley's silence over that time is incredible.

(b) Kea has no records of or in any way related to the Coal Agreement, or any similar agreement despite extensive searches. If the Coal Agreement existed, then Kea would have such records. In 2013 (after the Coal Agreement was purportedly signed), Mr Dickson was ordered to provide (among other things) all of Kea's records by the Nevis Court. This was how both the agreements relating to Spartan and Red Mountain Resources came into the possession of HNL and Harlaw (the director of Kea from 15 March 2013) (and later Kea's other directors). The documents disclosed under the Nevis Court orders, and many others, were collated by Farrers for the purposes of the Spartan litigation. Farrers holds over 600,000 documents related to Kea, including all of Kea's records from 2012 to 2014 (i.e., not only those relating to Project Spartan). Farrers has not located the Coal Agreement nor any document related to it amongst these 600,000+ documents.

(c) Mr Dickson and Mr Miller provided a list of Kea's assets under the Nevis Court order in 2013. This list included the Project Spartan investment and loan agreements and the Red Mountain investment, and also other assets. The disclosure was interrogated by the lawyers acting for Ms Connah and responded to by those acting for Mr Miller and Mr Dickson. Explanations were given about many other contracts and investments. A balance sheet as at 31 December 2012 was also provided. There was no mention of Kea's rights or liabilities under the Coal Agreement or anything like it.

(d) The fact that Mr Dickson and Mr Miller did not straight away mention the rights and liabilities under the Coal Agreement and provide a copy in answer to the Nevis Court orders is strong evidence that it did not exist. There was no reason for Mr Miller and Mr Dickson to withhold a legitimate commercial agreement, and every reason for them to disclose it.

(e) That strong evidence and inference is further strengthened by the fact that Kea has no records at all of the negotiation, execution and performance of or any demands made under the Coal Agreement. The agreement refers to months of "due diligence" and a "feasibility study" ahead of entry into the agreement, as well as the agreement providing for a long term relationship involving payments and requests for drawdowns over a number of years. If the Coal Agreement and WFTL's claims under it were genuine, there must have been some reference to it amongst these documents. There must have been email correspondence with Mr Miller and/or Mr Dickson. Even if one or two documents could have been missed, it is beyond belief that not one document was handed over.

(f) The inference that the Coal Agreement did not exist is further strengthened by:

(i) The fact that none of Sir Owen Glenn, Mr Munro of HNL/Harlaw, nor any of Kea's current directors had any knowledge of the Coal Agreement or any demand made thereunder prior to receipt of the BVI statutory demand, further strengthening the inference that it did not exist. It is, again, incredible that Kea could have entered into the agreement and failed to respond to demands for funding under it without Kea having a single document referring to it and without any director of Kea from February 2013 onwards having received any intimation of it.

(ii) The fact that there was no correspondence at any time since April 2013 asserting any breach of the Coal Agreement.

(iii) The fact that the defendants have not produced a single document showing or evidencing any requests for drawdowns under the agreement, or any documents evidencing that it was entered into or performed (other than the document itself).

[100] Mr Wikeley also claimed in his New Zealand affidavit that he was directed by Mr Dickson to deal with Mr Watson, that he sent deals to Mr Watson requesting funding and funding was promised as required under the Coal Agreement but never sent. However, there is no other evidence that Mr Watson was authorised to act on behalf of Kea – even before their falling out in 2014.

[101] For all these reasons, I consider that Mr Wikeley's affidavit in relation to the Coal Agreement is unreliable. Further, the affidavits of Mr Branham and Mr Snyder (filed for the protest) saying what they were told by Mr Wikeley do not carry weight, if admissible at all, in relation to whether the Coal Agreement is genuine. Indeed, even accepting Mr Snyder's reference to Mr Wikeley's frustration when funds did not arrive (from a source that he assumed was related to the involvement of Mr Watson with Sir Owen Glenn, Mr Dickson and Kea), it is more inexplicable, as Kea submitted, that Mr Wikeley failed to provide evidence of a single request or demand for funding under the alleged agreement – for bundled projects with a valuation of US$1 billion – at any time before filing the Kentucky proceeding in August 2021.

[102] I acknowledge that Kea has not adduced evidence from Mr Dickson (Kea's sole director at the time) stating that the Coal Agreement is a forgery. Kea's evidence is that it has not sought an affidavit from Mr Dickson because it does not regard him as a witness who can be trusted to tell the truth, given his misconduct in relation to Project Spartan. Given the Spartan judgment, there appears to be merit in that explanation. Mr Dickson was not called to give evidence in the Spartan case. Kea also submitted that if Mr Dickson had genuinely negotiated the Coal Agreement, the defendants could be expected to have provided evidence from him. That may be so, but in the circumstances I do not draw an adverse inference against the defendants from the absence of an affidavit by Mr Dickson that any truthful evidence from him would not have supported the defendants' case.

[103] The absence of evidence from Mr Watson would justify such an adverse inference but I acknowledge it is conceivable that he has taken no steps on the basis that he chose to rely on his co-defendants' (unsuccessful) forum challenge and I do not draw an adverse inference from the fact that he did not provide any affidavit.

[104] As Kea submitted, a separate forged document ostensibly signed by Mr Dickson has emerged recently. A purported agreement, also from 2012, said to be signed by Mr Dickson was put forward by the Hussain-related parties in the litigation by/against Kea in London in 2022. That purported agreement cannot have been signed by Mr Dickson. No such contract was mentioned by Mr Miller or Mr Dickson in response to the Nevis Court orders, and no record of any such document, or of the agreements to which it purports to relate, were produced by them in 2012, 2014 or 2016. It is inconceivable that a genuine agreement was executed in 2012 with a Marshall Islands company, and that in 2022 the same entity, by now annulled, purported to take a step in litigation which the English Courts have found to be connected with Mr Hussain and signed in a name which has also been used in other proceedings connected with Mr Hussain. Such a coincidence is beyond belief.

[105] Further, the evidence of events since the default judgment and the BVI statutory demand came to Kea's attention in 2022 indicates that Mr Wikeley and Mr Watson worked together to defend the default judgment and implement a fraudulent scheme to harm Kea. As Kea attempted to have the default judgment and the statutory demand set aside, Mr Wikeley and Mr Watson conspired with Mr Hussain, who Mr Watson likely met in prison,[54] to hijack Kea and substitute the default judgment with a settlement. Those steps were fraudulent. WFTL also tried to extract a settlement from Kea for a fraction of its claim by leveraging its registered agent's insurance policy.

[106] Mr Wikeley and WFTL also filed for the protest an affidavit from Mr Regard, the lead attorney acting for WFTL (and now Wikeley Inc) in Kentucky. He said that he arranged personal service on Kea's agent in the BVI, on 6 December 2021, because he "was aware at this time of the Hart Dairy cases in Georgia and Florida, in which Kea did not take steps after being served through Icaza". The Hart Dairy cases were anti-suit proceedings brought against Kea in 2020 by Hart Dairy Creamery Corporation and Hart Agriculture Corporation, both of which are associated with Richard Watson, Mr Watson's brother. The Hart companies sought anti-suit relief to prevent Kea from enforcing the Spartan judgment by tracing Mr Watson's assets into

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[54] I acknowledge the evidence of their prison records is hearsay but it is admissible under s 18(1) of the Evidence Act 2006 and I give it limited weight.

the Hart companies. Mr Watson is referred to in the complaint annexed to Mr Regard's affidavit. Mr Watson admitted providing Mr Graham's 16th affidavit in the Spartan proceedings to his brother for use in the proceedings in Georgia. The Hart Dairy cases do not involve WFTL or Mr Wikeley. They can only have come to the knowledge of Mr Regard from Mr Watson (directly or indirectly). There is no other obvious source of Mr Regard's knowledge of those proceedings. It is therefore further evidence of Mr Watson's involvement.

[107] These actions add force to the conclusion that the claimed loss of US$136 million was never genuinely incurred. So too does Mr Wikeley's conduct after this Court dismissed the protest. He declined to participate by filing a defence and breached the Court's interim orders by taking further steps to pursue the default judgment, including incorporating Wikeley Inc and USA Asset Holdings Inc and assigning the Coal Agreement and default judgment.

[108] Also, in an affidavit for the Queensland Court dated 26 April 2023, Mr Wikeley said:

> 12. Following the Orders made by this honourable court on 13 April 2023, I contacted my former attorney in the United States, Mr Andre Regard, to discuss the status of the Kentucky proceedings and steps that could be taken to comply with these orders. Mr Regard told me at that time that I no longer controlled Wikeley Inc. He informed me that I had been removed as president of the company and that a Kentucky resident, Mr Michael Branham had been appointed in my place. He told me that I had been removed as president by the majority shareholders of Wikeley Inc., being my sons, Oliver Leonard Wikeley and William Kennedy Wikeley.
>
> 13. On this basis, I am unable to comply with the Orders of this honourable court made 13 April 2023 [sic].

[109] This statement lacks credibility. The evidence of Mr Kelly indicates that under Kentucky law, given that Mr Wikeley was the incorporator and initial director of Wikeley Inc, shares could not have been issued to Mr Wikeley's sons, and Mr Branham could not have replaced Mr Wikeley as director, without Mr Wikeley's involvement.

[110] Taking all these facts together, I consider the Coal Agreement was not validly executed in 2012. The document was more likely created by or for Mr Wikeley much

later – before the Kentucky proceeding was commenced in August 2021. If Mr Watson signed it, he would also have known it was not a valid agreement.

[111] Even if I had found the Coal Agreement had been signed by Mr Dickson in 2012, I would have accepted Kea's submission in the alternative that the Coal Agreement would nevertheless be liable to be set aside for fraud or breach of fiduciary duty on the basis that Mr Dickson, Mr Wikeley and Mr Watson all knew that Mr Dickson signed without authority and in breach of his duties to Kea. Given its nature and terms as discussed above, Mr Dickson would have known that signing it was not in Kea's best interests and was inconsistent with his duties as a director under BVI's Business Companies Act 2004. Mr Wikeley and Mr Watson, as experienced businessmen, would have been aware that Mr Dickson could not have executed it without breaching his duties to Kea.

[112] Further, there was never any demand made of Kea by WFTL – before or after Mr Dickson was replaced as a director – for the reasons already given.

[113] For these reasons, as Kea submitted, WFTL can have no genuine claim against Kea under the Coal Agreement.

[114] I consider that Mr Wikeley combined with WFTL and Mr Watson to procure the default judgment, and they also combined with Mr Hussain, and more recently with Wikeley Inc and USA Asset Holdings Inc, to defend the default judgment or otherwise harm Kea. The participation of Mr Wikeley and Mr Watson is evident from the combination of facts already addressed:

(a) their prior involvement together (including as evidenced in the emails sent by Mr Wikeley to Mr Watson in 2012/2013 referred to above);

(b) Mr Watson's attempts to avoid the Spartan judgment in which he was found to have committed acts of deceit against Kea;

(c) Mr Wikeley's actions in the month before WFTL filed its claim in Kentucky;

(d) Mr Wikeley's explanation about the purported Coal Agreement in his Kentucky affidavit, including holding out Mr Watson as having obtained the signature of Kea's then director, Mr Dickson, which conflicts with the face of the document;

(e) Mr Watson's signature as a witness to the purported Coal Agreement;

(f) Mr Wikeley's claim that Mr Watson acted as Kea's agent in receiving alleged requests for funds under the purported Coal Agreement;

(g) WFTL's use in the Kentucky proceeding of discovered documents from the Spartan litigation trial bundle that could only have come from Mr Watson to assist WFTL with its fraudulent claim;

(h) the involvement of Mr Hussain – including steps purporting to settle WFTL's Kentucky proceeding – that also likely came about through Mr Watson;

(i) Mr Regard's reference to information from separate US proceedings commenced in Georgia (arising out of Kea's attempts to enforce its judgment against Mr Watson) that also likely came from Mr Watson;

(j) Mr Wikeley's steps in breach of this Court's interim orders, including incorporating Wikeley Inc and USA Asset Holdings Inc; and

(k) that Mr Watson has taken no steps, and Mr Wikeley has taken only limited steps, in this proceeding.

[115] The participation of WFTL, Wikeley Inc and USA Asset Holdings Inc is evident from Mr Wikeley's incorporation and use of these entities as set out above.

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

[117] I accept that Kea has suffered loss, not least the substantial costs associated with exposing the fraud and defending and bringing proceedings in multiple jurisdictions.

Relief

[118] Kea seeks damages, a permanent injunction, interest and costs. It submitted that a permanent anti-suit injunction is necessary but not sufficient to right the wrong done to Kea – not least because the defendants have ignored the interim injunction and Kea continues to incur costs.

[119] The ordinary measure of damages for tortious conspiracy is to put the plaintiff into the same position as if the conspiracy had not occurred.[55] This includes costs incurred in responding to the conspiracy.[56] Kea accepts that in the ordinary course it cannot recover, as damages, legal costs in proceedings between the same parties in the same jurisdiction and so does not seek its New Zealand lawyers' fees as damages. However, as Kea submitted, a plaintiff is entitled to recover as damages legal costs incurred in earlier proceedings in a foreign jurisdiction where costs are not recoverable in those proceedings, or are only recoverable to a limited extent.[57] Kea accepts that the ordinary principles of causation, foreseeability/remoteness and mitigation apply.[58] It also accepts this would include a reasonableness overlay where the plaintiff seeks the difference between indemnity costs and costs recovered in the foreign jurisdiction.

[120] Here, I accept Kea's submission that the defendants' wrongful conduct includes the wrongful invocation of the Kentucky Court on the basis of a forged document and fraudulent statements about the existence of, and claims made under, that document; the wrongful invocation of the BVI Court in reliance on the default judgment; and the wrongful use of legal process in the form of subpoenas for the production of documents also relying on the default judgment. Legal costs are the inevitable consequences of such conduct. Kea had no choice but to incur those costs.

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55 Bill Atkin "Remedies" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at 1485.

56 *British Motor Trade Association v Salvadori* [1949] Ch 556 (Ch) at 569.

57 *Union Discount Co Ltd v Zoller* [2001] EWCA Civ 1755, [2002] 1 WLR 1517 at [17].

58 *Kwok v Rainey* [2020] NZHC 923 at [256].

[121] As Kea submitted, the defendants' wrongful invocation of legal process in Kentucky and the BVI amounts to the breach of an equitable right where the conduct of litigating overseas is unconscionable.[59] As Kea acknowledged, normally, the remedy for breach of such equitable rights is an anti-suit injunction as a form of specific performance of the obligation not to sue overseas. But, as Kea submitted, this remedy has also been recognised in some contexts to be insufficient. Kea relied by analogy on the established line of cases in England providing for damages for breach of the legal right of an applicant not to be sued overseas in breach of a jurisdiction or arbitration clause.[60] Kea submitted that in principle the same logic — that damages in addition to an anti-suit injunction are necessary to do justice — should apply to a breach of a person's equitable right not to be sued in a forum overseas.[61] Kea also referred to a series of Australian decisions[62] where it was held that the cost of pursuing overseas litigation can be actionable damage in the tort of unlawful means conspiracy, and the English case of *Dadourian Group International v Simms*,[63] where the Court of Appeal upheld an award of damages for the costs of overseas proceedings and of an arbitration in a deceit claim, as costs caused by the tort.

[122] The unlawful means conspiracy found in this case is based on fraudulent use of the Coal Agreement and subsequent fraudulent steps (and breach of the interim orders). In the absence of a valid exclusive jurisdiction agreement, it is unnecessary to base the claim for damages on breach of an equitable right not to be pursued in Kentucky. I accept that Kea is entitled to recover damages in the tort of unlawful means conspiracy. Those damages include Kea's reasonable irrecoverable legal costs in the overseas proceedings caused by that conspiracy, subject to not seeking double recovery. The evidence indicates that attorneys' fees are not in the ordinary course

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59 *British Airways Board v Laker Airways Ltd* [1985] AC 58 (HL) at 81. See also *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24, [2023] AC 389 at [153]-[155].

60 Kea referred to *Ellerman Lines v Read* [1928] 2 KB 144 (CA); *Union Discount Co v Zoller* [2001] EWCA Civ 1755, [2002] 1 WLR 1517; *Donohue v Armco* [2001] UKHL 64, [2002] 1 All ER 749, *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889; *Starlight Shipping Co v Allianz marine & Aviation Versciherungs AG (The Alexandros T)* [2013] UKSC 70, [2014] 1 All ER 590; and *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T (No 2))* [2014] EWCA Civ 1010, [2014] 2 Lloyd's Rep 554.

61 Kea referred to Adrian Briggs *Civil Jurisdiction and Judgments* (7th ed, Routledge, 2021) at 667.

62 *Bennett v Talacko* [2017] VSCA 163; *Talacko v Talacko* [2018] VSC 751; *Talacko v Talacko* [2021] HCA 15, (2021)272 CLR 478 at [60]-[62].

63 *Dadourian Group International v Simms* [2009] EWCA Civ 169 at [109]-[148].

recoverable in proceedings in Kentucky but, in any event, Kea undertakes not to seek double recovery.

[123] The costs incurred by Kea are quantified in the affidavit of Mr Graham, who has co-ordinated the various proceedings in Kentucky, United States federal courts, Queensland, England and New Zealand. The amounts claimed are:

(a) £1,038,709.17 (English solicitors and counsel);

(b) US$549,634.58 (New York lawyers; Kentucky lawyers; BVI lawyers); and

(c) AU$154,166.95 (Australian lawyers).

[124] Against the Wikeley defendants, Kea seeks an award of 75% of those sums. Kea seeks a reduced award against Mr Watson since a costs order was made in the English proceedings against Mr Watson as indicated. The total costs in those English proceedings were £252,053.23, of which Mr Watson was ordered to pay £227,077.77. Therefore, as against the Wikeley defendants, the total English costs sought are 75% of £786,655.94 (£1,038,709.17 - £252,053.23), i.e. £589,991.96, plus 75% of the US and AU dollar sums (US$412,225.94 and AU$115,625.21). Together with the fact that Kea has not claimed the costs initially incurred in respect of its English legal team in the early stages of responding to the defendants' fraud, as explained by Mr Graham, Kea submitted the Court can be satisfied that the award does not exceed the loss properly claimable by Kea.

[125] I accept that the costs claimed have been incurred as a direct and foreseeable consequence of the conspiracy. In the absence of that conspiracy, there would have been no Kentucky or English proceedings to defend, and it would not have been necessary to bring proceedings in New Zealand, Queensland, or elsewhere.

[126] The co-ordinating role played by Kea's UK legal team (solicitors and counsel) explained by Mr Graham was appropriate given their knowledge from the earlier English proceeding particularly based on the underlying documents largely collected

through the Nevis proceedings and discovery in the English proceeding. The number of counsel involved was warranted given the breadth, complexity and urgency of the matters. The English costs claimed relate to the period from August 2022 and so do not include initial work that was charged to Farrers' main file relating to enforcement of the earlier English judgment against Mr Watson even though some of that work would likely have been recoverable in this proceeding. The English costs sought are reasonable and recoverable. So too are the BVI, US and Australian costs.

[127] Wikeley Inc and USA Asset Holdings Inc were only incorporated more recently. However, they joined the conspiracy and are therefore jointly and severally liable for the losses suffered.[64]

[128] I am also satisfied that Kea is entitled to a permanent injunction as sought in the second amended statement of claim. Given possible developments since the hearing, I will reserve leave in relation to further relief necessary to give effect to these orders.

Judgment not entitled to recognition

[129] In the second cause of action, Kea seeks a declaration that the default judgment is not recognised or enforceable as a matter of New Zealand law. It seeks this declaration to forestall attempts to deploy the default judgment in New Zealand or in other jurisdictions which will recognise or follow a decision of this Court. Kea says that a determination from the New Zealand Court that WFTL obtained the default judgment by fraud will give rise to an issue estoppel against WFTL that will be recognised — at least — in other common law countries such as England[65] and the BVI.[66] It says this Court – which has jurisdiction over WFTL as a New Zealand

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64 Stephen Todd "Multiple Tortfeasors and Contribution" in *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at 1452.

65 See "Forum non Conveniens, Lis Alibi Pendens, Jurisdiction Agreements and Anti-Suit Injunctions" in Lord Collins and Jonathan Morris (eds) *Dicey, Morris and Collins: The Conflict of Laws* (16th ed, Thomson Reuters, London, 2022) vol 1 at rr 46(2) and 47.

66 As Kea says, the declaratory judgment will be entitled to recognition because this Court has jurisdiction as of right over WFTL and the judgment is final and conclusive. An issue estoppel may therefore arise in respect of this judgment in BVI, bearing in mind that courts typically take a cautious approach. See *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 (HL) at 918 per Lord Reid and *van Heeren v Kidd* [2016] NZCA 401, [2017] 3 NZLR 141 at [170]-[171].

company and trustee of a New Zealand Trust – is best placed to grant that relief.[67] Kea also seeks a declaration that WFTL, Mr Wikeley, Wikeley Inc and USA Asset Holdings Inc are privies of each other, submitting that finding will assist the Courts of the BVI and other jurisdictions where the issue arises.

[130] The interim liquidators of WFTL abide the Court's decision in respect of this cause of action.

[131] As a preliminary point, addressed in my first interlocutory judgment,[68] this Court may grant a declaration that a foreign judgment is not entitled to recognition, even where enforcement proceedings have not yet been commenced. In *Pocket Kings Ltd v Safenames Ltd*,[69] the English High Court was satisfied that a pre-emptive declaration was appropriate in a case relating to Kentucky.

[132] For the Kentucky default judgment to be recognised or enforced, the following requirements must be met:[70]

(a) the parties must be the same (or be privies);

(b) the foreign court must have had jurisdiction, based on either the presence of the judgment debtor in the foreign jurisdiction at the time of the proceedings or its submission to the jurisdiction (either in advance in writing, or by appearing without protest);

(c) the judgment must be final and on the merits; and

(d) the judgment must not have been procured by fraud or a breach of natural justice or give rise to a breach of New Zealand public policy.

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67 Kea says that while the BVI Court may consider the question of fraud in the context of the application to set aside the statutory demand, that would only involve an assessment of whether Kea has a prima facie case, and would not give rise to a final determination of the point.

68 *Kea Investments Ltd v Wikeley Family Trustee Ltd* [2022] NZHC 2881 at [56].

69 *Pocket Kings Ltd v Safenames Ltd* [2009] EWHC 2529 (Ch), [2010] Ch 438. See also *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [125]-[126].

70 *Ross v Ross* [2010] NZCA 447, [2011] NZAR 30 at [13], citing *Kemp v Kemp* [1996] 2 NZLR 454 (HC) at 458.

[133] If those requirements are met, the judgment is entitled to recognition and may be relied on to establish res judicata or issue estoppel that prevents the judgment debtor from relitigating the matters decided.

[134] Kea says that the Kentucky Court did not have jurisdiction to grant a judgment that would be entitled to recognition in New Zealand, since Kea does not have a presence or assets in Kentucky, it has not submitted to the jurisdiction there, and is not bound by the jurisdiction clause in the Coal Agreement in circumstances where it was the product of forgery and fraud.

[135] Kea also says that the default judgment is not entitled to recognition in New Zealand on the grounds that it was procured by fraud and that recognition would be contrary to public policy (for the same reason and because it would be inconsistent with this Court's judgment). Kea submitted:

(a) Fraud in this context includes where the judgment creditor procured the judgment by misrepresentations made in bad faith,[71] although recklessness is also sufficient.[72] The presence of fraud is sufficient on its own to establish that the judgment is not entitled to recognition. The fraud in this case consists of:

(i) deploying a forged document to obtain a judgment;

(ii) deliberately misleading the Kentucky Court about facts relevant to the claim, including whether demands had been made on Kea; and

(iii) pursuing a claim in circumstances where Mr Wikeley knew that WFTL did not have any legitimate claims under the contract.

(b) A judgment debtor is entitled to raise allegations of fraud in recognition proceedings even if those arguments were or could have been run in the

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71 *Gordhan v Keremelidis* HC Christchurch CIV-2010-409-2982, 20 December 2011 at [26]-[31].

72 *Johnson v Johnson* [2016] NZHC 890, [2016] 3 NZLR 227 at [41]-[42]. See also *Richard v Cogswell* (1995) 8 PRNZ 383 (HC) at 386.

foreign proceedings and were not inferred by the foreign court.[73] In any case, Kea could not have raised its fraud defence in the Kentucky proceedings because:

(i) it was not aware of them before the default judgment was entered; and

(ii) the Kentucky court has refused to consider whether Kea has a meritorious defence.

(c) Kea seeks and requires a declaration to this effect, to protect against the use of the default judgment in New Zealand and/or in other jurisdictions where the New Zealand determination will be recognised and will itself give rise to an issue estoppel.

[136] I accept Kea's submission that the default judgment is not entitled to recognition in New Zealand. First, as already addressed, the Coal Agreement – including its jurisdiction clause – was procured by fraud. Kea does not have a presence or assets in Kentucky and has not submitted to the jurisdiction. Therefore, the Kentucky Court did not have jurisdiction to grant a judgment that would be entitled to recognition in New Zealand. Secondly, as also already addressed, the default judgment, based on the Coal Agreement, was procured by fraud. Thirdly, for the same reasons, recognition would be contrary to public policy.

[137] I also accept that a declaration is appropriate and not moot in circumstances where the defendants (except for WFTL which is now in interim liquidation) may still seek recognition of the default judgment for enforcement purposes overseas. That risk is evident from Mr Wikeley's actions with Wikeley Inc and USA Asset Holdings Inc.

[138] I also accept that WFTL, Mr Wikeley, Wikeley Inc and USA Asset Holdings Inc are privies of Mr Wikeley and of each other in relation to the impugned

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73 *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295 (CA) at 302–303 per Lord Coleridge CJ, 304 per Baggallay LJ and 308 per Brett LJ. See also see Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020), at [5.241]-[5.251] noting case law suggestions that legislative amendment would be necessary to change the law.

transactions that are the subject of this proceeding. Mr Wikeley incorporated or caused to be incorporated all of the companies and was sole director and shareholder. Apart from WFTL, which is now in interim liquidation, Mr Wikeley controls them (irrespective of the purported issue or transfer of some shares to two of his sons referred to above). In the circumstances already addressed, I infer that he incorporated the companies for the purpose of implementing or furthering the fraud. Insofar as it remains necessary given the joinder of Wikeley Inc and USA Asset Holdings Inc, I accept there is a sufficient degree of identification between WFTL, Mr Wikeley, Wikeley Inc and USA Asset Holdings Inc to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party.[74]

Declarations

[139] Kea's third cause of action seeks declarations against all defendants that the Coal Agreement, the purported assignments of the Coal Agreement and the default judgment, and the purported changes to the trustee and governing law of the Wikeley Family Trust were of no effect or are voidable and should be set aside.

[140] Kea seeks such further declaratory relief on the basis that the defendants will stop at nothing to enforce the Coal Agreement and so it is essential to establish conclusively that it is void or voidable, gives rise to no obligation on the part of Kea, and cannot be relied upon for enforcement purposes. It says also that the purported assignments are a transparent attempt to place the benefit of the Coal Agreement and default judgment outside the control of the New Zealand courts, to facilitate the conspiracy and to frustrate the Court's interim orders. It says the purported change of trustee and applicable law were transparent attempts to wrestle control of the Wikeley Family Trust from WFTL (soon after the appointment of interim liquidators) and from the jurisdiction of the New Zealand courts; and so to facilitate the perpetuation of the conspiracy; to seek to evade the clutches of the New Zealand courts and the interim orders; and to purport to divest WFTL (as a company subject to the jurisdiction of the New Zealand courts as of right) of its only alleged trust asset (if the Coal Agreement had been valid).

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[74] *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) at 268.

[141] Kea says it is important that the true position in respect of the Wikeley Family Trust is affirmed: that WFTL, as a party subject to the jurisdiction of the New Zealand Courts as of right, remains as trustee (through its interim liquidators) and the Wikeley Family Trust remains subject to New Zealand law and the control of the New Zealand Courts.

[142] The interim liquidators of WFTL abide the Court's decision in respect of the declaration that the Coal Agreement is void or voidable and of no effect. The interim liquidators support Kea's claim to the other declarations.

[143] As Kea submitted, the Coal Agreement is void because it is a forgery. A forged contract is no contract at all, "only bogus documents", and therefore null and void ab initio.[75] The fraud taints all the terms of the Coal Agreement, including the purported jurisdiction and choice of law clauses.

[144] As Kea submitted, an assignee cannot find itself in a better position than the assignor. Further, I also accept Kea's submission that the purported assignments of the Coal Agreement and the default judgment are invalid, for several overlapping reasons. First, these assignments were further steps in the perpetuation of the conspiracy, an attempt to evade the reach of the New Zealand courts, and are tainted by fraud. Secondly, the assignments by WFTL were in breach of the Court's interim orders, and a director of a company can have no authority to cause the company to carry out an act which has been enjoined by a court order.[76] These assignments are therefore void and unenforceable by Wikeley Inc, having been executed without authority.[77] Thirdly, the execution of an agreement by a director for the purpose of circumventing a court order or for the purpose of carrying out an unlawful means conspiracy is a breach of the director's duties to the company,[78] and of WFTL's powers as trustee. The assignments were also in breach of Mr Wikeley's duties under ss 131 and 133 of the Companies Act 1993 to exercise his powers as director in good faith,

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75 *Teal Investments Ltd v Higham Motors* (1975) Ltd [1982] 2 NZLR 123 (CA) at 125 per Cooke J.
76 *Glenn v Watson* [2018] EWHC 2016 (Ch) at [491].
77 *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846 (HL) at [30].
78 *Glenn v Watson* [2018] EWHC 2016 (Ch) at [492].

in the best interests of WFTL and for a proper purpose. Wikeley Inc as assignee had actual knowledge of the fraud through Mr Wikeley.[79]

[145] Mr Arthur noted that it now appears the purported assignments were made with the intention of giving effect to a decision recorded in a 30 March 2023 board resolution of WFTL to distribute all trust assets to Wikeley Inc. As he submitted, in support of Kea's submissions, those submissions remain valid and appropriate notwithstanding that the assignments purport to be in furtherance of a distribution to Wikeley Inc as a beneficiary because the purported assignment executed by WFTL in its capacity as a trustee must have been in breach of trust given no trustee can claim to discharge duties in entering into a contract that a Court has ordered the trustee not to enter. Wikeley Inc had knowledge of the circumstances known to WFTL and so dishonestly assisted in the breach of trust and knowingly received trust property in breach of trust.[80]

[146] Kea is entitled to the declaration sought that the purported assignments of the Coal Agreement and the default judgment are void and conferred no rights on Wikeley Inc, cannot lawfully be performed and conferred no rights on WFTL and Wikeley Inc.

[147] Mr Wikeley also purported to replace WFTL as trustee of the Wikeley Family Trust with USA Asset Holdings Inc and the latter, through Mr Wikeley as director, then purported to change the governing law of the Wikeley Family Trust from that of New Zealand to that of Kentucky. Kea also seeks declarations that these purported changes were invalid and of no effect.

[148] As Kea and the interim liquidators of WFTL submitted, the purported replacement of WFTL was not a valid exercise of any power of appointment held by Mr Wikeley. Section 94 of the Trusts Act 2019 provides that a person with the power to remove or appoint trustees must exercise any power of removal or appointment honestly and in good faith and for a proper purpose. The purported exercise of a power of removal and appointment in knowing breach of a court order is a breach of that

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79 Companies Act 1993, s 18(1) and (2).

80 He submitted the distribution and assignments would also be liable to being set aside under s 348 of the Property Law Act 2007.

duty. The interim liquidators have not seen any evidence or other information to indicate how such steps could have been taken in good faith and for a proper purpose. Furthermore, the power was exercised improperly as a further step in the conspiracy, seeking to place the trustee and trust outside New Zealand and the control of the New Zealand courts, and to undermine the effectiveness of the relief which Kea seeks in this proceeding.

[149] Further, as Mr Arthur submitted, at least until such time as the company is removed as trustee, the liquidator (as the person responsible for controlling the company) will also make decisions in relation to trust assets held by the company in liquidation.[81] The interim liquidators of WFTL therefore had legal control of the trust assets upon their appointment on 6 April 2023. They also had control of the trust assets through a charge. The interim liquidators took custody and control of WFTL's assets.[82] Those assets included the trustee's right of indemnity from trust assets.[83]

[150] It follows that the purported change of the law of the trust to the law of Kentucky was also invalid. Since Mr Wikeley appointed himself director of USA Asset Holdings Inc, that company knew that its appointment was made in knowing breach of the Court's orders.

[151] Kea is entitled to the declarations sought.

Additional orders

Leave to seal judgment by default

[152] Leave is required to seal judgment by default against a party served outside New Zealand (excluding Mr Wikeley served under the Trans-Tasman Proceedings Act 2010).[84] In the circumstances set out above, I am satisfied that leave should be granted. Kea was entitled to effect service on Mr Watson, Wikeley Inc and USA Asset

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81 *Levin v Ikiua* [2010] 1 NZLR 400 at [116].

82 Companies Act 1993, s 248(1)(a).

83 *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36, [2023] 2 WLR 133 at [105], [112]-[114], [156], [164]-[168] and [212]. In New Zealand see *Temple 88 Ltd (in liq) v Hassine* [2021] NZHC 2351 at [19] and [21]; and *LSF Trustees Ltd v Footsteps Trustee Co Ltd (in liq)* [2017] NZHC 2619, [2017] NZAR 1676 at [13]-[24]. The proprietary interest created by the trustee's lien prevails over s 116(1) of the Trusts Act 2019: s116(3).

84 High Court Rules 2016, r 15.11.

Holdings Inc without leave under rule 6.27. There is no reason to believe that service was effected, or may have been effected, contrary to the law of the country concerned relating to the method of serving documents in domestic actions on persons in that country. Service was effected in sufficient time to enable each party to appear.

Confidentiality

[153] Further to my interim order at the hearing prohibiting search of the Court file without Court order to protect confidential material, Kea seeks a direction under s 69 of the Evidence Act 2006 that Mr Graham's confidential affidavit as to Kea's losses not be disclosed to the defendants or made available to any person searching the Court file. Mr Graham said that he considers that there is a real and substantial risk that Mr Watson and his associates may use confidential information of Kea to seek to cause Kea further harm in furtherance of the conspiracy which is the subject of these proceedings. In addition, Kea's claims against Mr Watson in England are ongoing and there is ongoing litigation between Kea and WFTL and other entities associated with Mr Wikeley in Kentucky, the BVI and potentially elsewhere. Kea submitted that, in the unusual circumstances of this case, the public interest in disclosure of the information in proceedings is outweighed by the public interest in preventing harm to a litigant whose confidential information is at serious risk of misuse by the defendants and in the wider public interest in the protection of confidentiality in the details of the costs incurred by a person seeking legal advice.

[154] In the unusual circumstances of this case, I accept Kea's concern as to the risk of misuse of confidential information. Balanced against prejudice to the defendants and the principle of open justice, I consider this risk is sufficiently addressed by restricting access to the confidential spreadsheet attached to Mr Graham's affidavit dated 12 May 2023 and access to Mr Graham's confidential affidavit dated 16 May 2023, which break down Kea's costs in further detail, listing (where applicable) the English and non-English law firms by workstream and detailing the relevant invoice numbers and dates and payment details. The remainder of Mr Graham's 12 May 2023 affidavit, which summarises the costs sought and addresses other matters, should not be withheld from the defendants.

[155] Any requests by non-parties for access to documents on the Court file (other than Mr Graham's confidential spreadsheet and affidavit dated 16 May 2023) should be determined in accordance with the Senior Courts (Access to Court Documents) Rules 2017, with notice to Kea.

Result

[156] I make the following orders:

(a) A permanent injunction ordering the defendants to:

(i) consent and otherwise take all steps necessary to procure the discharge of the default judgment;

(ii) refrain from seeking to enforce or act on the default judgment anywhere in the world, including by dealing with it by assignment or otherwise, issuing subpoenas, issuing interrogatories, seeking discovery, or otherwise seeking disclosure of information concerning Kea;

(iii) withdraw, and desist from pursuing any further, any steps to enforce or otherwise rely on, the Coal Agreement;

(iv) cause their privies and assignees to comply with the orders in paragraphs (i)-(iii); and

(v) reserving leave in relation to further relief necessary to give effect to these orders.

(b) Declarations that:

(i) the default judgment was obtained by fraud;

(ii) the default judgment is not entitled to recognition or enforcement in New Zealand;

(iii) WFTL, Mr Wikeley, Wikeley Inc and USA Asset Holdings Inc are privies of each other in relation to the impugned transactions that are the subject of this proceeding;

(iv) the Coal Agreement and the purported assignments of the Coal Agreement and the default judgment were void, cannot lawfully be performed and conferred no rights on Wikeley Inc; and

(v) the purported appointment of USA Asset Holdings Inc as trustee of the Wikeley Family Trust and the purported change in the governing law of the Wikeley Family Trust were invalid and of no effect.

(c) Damages (jointly and severally except in respect of the English costs not sought against Mr Watson):

(i) against WFTL, Mr Wikeley, Wikeley Inc and USA Asset Holdings Inc of:

(1) £779,031.88

(2) US$412,225.94

(3) AU$115,625.21

(ii) against Mr Watson of:

(1) £589,991.96

(2) US$412,225.94

(3) AU$115,625.21

(d) Interest on damages under the Interest on Money Claims Act 2016.

(e) Costs, to be quantified separately by memorandum / affidavit filed within 20 working days, and determined on the papers.

(f) Ancillary orders:

(i) leave is granted under r 15.11 to seal judgment by default against Mr Watson, Wikeley Inc and USA Asset Holdings Inc; and

(ii) the confidential spreadsheet TGS-12/66 annexed to Mr Graham's affidavit dated 12 May 2023 and Mr Graham's confidential affidavit dated 16 May 2023 detailing Kea's losses are not to be disclosed to the defendants and are to be sealed on the Court file and not made available for inspection.

Gault J

Solicitors / Counsel:
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Mr M C Harris, Barrister, Auckland
Mr M C Smith and Mr S T Coupe, Gilbert Walker, Auckland
Mr M D Arthur, Chapman Tripp, Auckland