IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-004164
[2016] NZHC 2022

IN THE MATTER OF	an application to enforce a foreign judgment
BETWEEN	EMAJOR Plaintiff
AND	EMAJOR Defendant

Hearing: 23-27 May 2016

Appearances: A Holgate for Plaintiff
J K Goodall and A Mitra for Defendant

Judgment: 30 August 2016

JUDGMENT OF GILBERT J

This judgment is delivered by me on 30 August 2016 at 11.30 am pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Counsel:
A Holgate, Barrister, Auckland
J Goodall, Barrister, Auckland

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Introduction

[1] The plaintiff, Ms Emajor,[1] seeks an order declaring that a judgment she obtained on 20 June 2007 from the Superior Court of Justice for the Federal District of Mexico City (the Superior Court) is enforceable in New Zealand against the defendant, Dr Emajor. The Superior Court upheld a decision of the Twenty Fourth Family Court in Mexico City (the Family Court) ordering Dr Emajor to pay 35 per cent of all his direct and indirect income to Ms Emajor as maintenance (25 per cent for their daughter and 10 per cent for Ms Emajor) or 7,000 pesos per month, whichever was the greater. Ms Emajor also seeks judgment for arrears of maintenance calculated on this basis of approximately $262,000.

[2] There is no dispute that the Mexican courts had jurisdiction in the matter. Indeed, it was Dr Emajor who invoked the jurisdiction of the Family Court in Mexico by initiating the divorce proceedings which ultimately led to the judgment of the Superior Court that Ms Emajor now seeks to enforce. Both parties were legally represented throughout in both the Family Court and the Superior Court.

[3] The general rule is that a final judgment given on the merits by a foreign court with jurisdiction to give that judgment is binding on the parties, whether it be right or wrong, except in very limited circumstances, including that it was obtained by fraud or contrary to substantial justice. Once appeal processes have been exhausted in the foreign jurisdiction, the parties are entitled not to be vexed with further re-litigation of the matters that have been finally determined between them in the judicial process.

Issues

[4] Dr Emajor pleaded three affirmative defences in his second amended statement of defence: first, that the claim is partly barred by the Limitation Act 1950; second, that the judgment is not enforceable at common law because it is not for a specified sum of money; and third, that the orders are not enforceable because they are contrary to the public policy of New Zealand.

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[1] These are not the parties' real names. Pseudonyms have been used for the Plaintiff and the Defendant throughout this judgment to protect their personal and private information.

[5] Dr Emajor did not plead fraud as a separate ground of defence although it is accepted that fraud can come within the public policy exception. Fraud is a serious allegation and cannot be pleaded unless there is a proper foundation for it. It requires a high standard of proof, commensurate with the seriousness of the allegation, and proper particulars of the alleged fraud must be provided. Dr Emajor pleaded, as a particular of his third affirmative defence, that the maintenance orders are contrary to New Zealand public policy because the orders made in the Family Court and by the Superior Court were procured by a misrepresentation by Ms Emajor:

> [Ms Emajor] procured the maintenance orders by misrepresenting the extent of her assets to the Family Court and Superior Court. In particular, [Ms Emajor] denied receiving the total sum of US$602,230 deposited into her account at Broadway Bank on 9 December 2003 and 21 October 2004.

[6] This pleading falls short of alleging that the misrepresentation was fraudulent because it leaves open the prospect that any misrepresentation may have been innocent. However, Mr Goodall presented Dr Emajor's case on the basis that the alleged misrepresentation was fraudulent and he put the fraud allegation to the forefront in his closing submissions as one of the principal grounds of defence. Mr Holgate took no issue with this and I therefore consider it on that basis.

[7] Mr Goodall's second principal submission in closing was that enforcement of the Mexican judgment would be contrary to substantial justice in New Zealand. He argued that this substantial injustice arose because of the error in Ms Emajor's statement of defence and counterclaim regarding the deposits and because of the Mexican Courts' alleged failure to assess alimony in a judicial manner, by assessing the evidence and giving reasons for its decision. As to the latter assertion, the relevant pleading is again contained in the particulars of the third affirmative defence that the maintenance orders are contrary to the public policy of New Zealand:

> The maintenance orders requiring [Dr Emajor] to pay a percentage of his future income were arbitrary and in the nature of a penalty.
>
> Particulars
>
> (i) the orders were not made by reference to the maintenance and living costs of [Ms Emajor] and [her daughter];
>
> (ii) there was no evidence of [Dr Emajor's] actual income or income-earning potential, and so no way for the Courts to

assess whether the percentages were an appropriate form of relief;

(iii) there was no explanation stated by the Court as to the reason for the particular percentages.

In making the maintenance orders, the Family Court wrongly ignored the clear documentary evidence that [Ms Emajor] had received deposits of US$602,230 into her account at Broadway Bank on 9 December 2003 and 21 October 2004. On appeal, that evidence was wrongly discounted.

[8] Mr Goodall's third principal submission in closing was that the Court's inherent jurisdiction to enforce a Mexican judgment for maintenance was impliedly excluded by the enactment of Part 8 of the Family Proceedings Act 1980. The pleading to support this submission is also contained in the particulars of the third affirmative defence:

Enforcement is prohibited by, and/or is contrary to, the pre-existing avenues for recovering maintenance in this case.

Particulars

(i) Mexico and New Zealand are parties to the 1956 UN Convention for the Recovery of Maintenance Abroad. As such, [Ms Emajor] can apply for maintenance orders in New Zealand, assessed according to New Zealand law, under Part 8 of the Family Proceedings Act 1980; and

(ii) Child support is available under the New Zealand Child Support Act 1991.

[9] Mr Goodall's fourth and final principal submission in closing was that the maintenance orders are not enforceable because they are not for a specified sum of money. This is the second affirmative defence.

[10] Mr Goodall made three ancillary submissions in closing: first, that any enforcement must be limited to arrears because the maintenance orders can be varied at any time; second, that any arrears dating back more than six years prior to the commencement of this proceeding are time-barred (the first affirmative defence); and third, he raised a minor issue regarding quantum.

[11] Mr Goodall did not pursue other pleaded particulars of the third affirmative defence, correctly in my view. These included that the legal process in Mexico City was conducted in a manner that was prejudicial to Dr Emajor's rights. Mr Goodall particularised this allegation by stating, among other things, that: Dr Emajor did not

reside in, or visit, Mexico during any part of the proceeding; he did not understand the Court process or the true nature of Ms Emajor' counterclaims; he was unable to communicate, and did not communicate, directly with his attorney; he was not told about the Family Court summons requiring him to attend for examination and he did not give oral evidence; he was not consulted about the appeal; and so on. These complaints cannot assist Dr Emajor. He initiated the proceedings in Mexico and must take responsibility for his decision to leave the conduct of them largely in the hands of his former brother-in-law and good friend, Emilio, and his attorney, Carlos Delgado.

[12] The issues requiring resolution are therefore:

(a) Did Ms Emajor obtain the maintenance orders by fraudulently misrepresenting the extent of her assets to the Family Court and the Superior Court, in particular by denying receipt of the deposits?

(b) Were the orders obtained contrary to substantial justice because there was an error in the statement of defence and counterclaim arising from Ms Emajor's failure to acknowledge receipt of the deposits and because the decision was arbitrary?

(c) Is the Court's inherent jurisdiction to enforce the judgment impliedly excluded by Part 8 of the Family Proceedings Act 1980 which enables the Court to make orders for spousal and child maintenance at the request of Convention countries such as Mexico?

(d) Are the orders unenforceable at common law because they are not for a specified sum of money?

(e) Is enforcement limited to arrears because maintenance orders can be varied at any time if there is a change in circumstances?

(f) Are arrears that accrued more than six years prior to the commencement of this proceeding irrecoverable because of the Limitation Act 1950?

Background

[13] Because Dr Emajor contends that the judgments were obtained by fraud and contrary to substantial justice, it is necessary to examine in some detail the course of the Court proceedings in Mexico, the strategic decisions made by both parties, the evidence given and the judgments that were obtained. There is some overlap of the facts relevant to each issue. It is therefore convenient to set out all the relevant facts in chronological order before addressing the specific issues.

Marriage

[14] The parties met in Auckland in 1995, having been introduced by Ms Emajor's brother, Emilio, who was then one of Dr Emajor's patients at his dental practice in Remuera, Auckland. The parties married in Ms Emajor's home town of Cuernavaca, Mexico, in 1996 but returned to Auckland after their honeymoon. Their daughter was born in Auckland in December 2000.

[15] The parties relocated to Mexico in July 2003 having sold their home, cars and the dental practice. The home sold for $1,756,000 with settlement on 24 January 2003. Dr Emajor said in his evidence that the parties each received distributions from the trust which owned this property together totalling $1,389,263 and the trust was then wound up. The payments from the trust comprised repayment of loans, $757,909.95 advanced by Dr Emajor, $200,469.98 advanced by Ms Emajor and a joint distribution to them both of $428,883.68. No evidence was given as to the balance of $366,737. This may have been the amount owing under a mortgage. The Court was also not given any evidence about the amounts received on sale of the dental clinic or the cars.

[16] Dr Emajor said that the proceeds of these sales were deposited into a Credit Suisse bank account held in the parties' joint names. However, a letter he sent to Credit Suisse dated 6 May 2003 refers to investments totalling approximately

AUD 950,000, equivalent to approximately NZD 1,064,000 at that time. This leaves unaccounted for approximately NZD 325,000 from the sale of the house plus whatever proceeds were received following sale of the dental clinic and the cars.

Transfer of funds

[17] After the move to Mexico, Dr Emajor said that most of the funds in the Credit Suisse account were transferred to an existing account held in Ms Emajor's name with Broadway Bank in San Antonio, Texas. The parties did not want the monies to be held in Mexico because of the declining value of the Mexican peso. The transfer totalled USD 602,230.48 and was effected in two tranches:

(a) USD 183,901.68 on 9 December 2003; and

(b) USD 418,328.80 on 21 October 2004.

[18] Although the second of these transfers followed an instruction from Dr Emajor to Credit Suisse to realise all securities and transmit all funds to the Broadway bank account, he produced a subsequent Credit Suisse bank statement dated 11 January 2005 and headed "Statement of Account Final Closing" showing the redemption of further fund units on 7 January 2005 yielding a net closing balance of AUD 195,096.16, roughly equivalent to NZD 212,000. The Court was given no evidence about what happened to these funds but the bank statement confirms Dr Emajor's evidence that "most", but not all, of the Credit Suisse funds were transferred to the Broadway bank account.

[19] Ms Emajor said that the Broadway bank account was established by her father in 2000 on learning that she was pregnant, as a gift to his unborn grandchild. She said that her father deposited money into that account although there is no evidence as to the extent of the deposit or deposits or when these were made. Ms Emajor also said that both of her parents were signatories on the account. She added that her father managed the account and was able to use the money in it for investment purposes. The Court received no evidence to substantiate these claims. Ms Emajor says that she tried to obtain the information from the bank but was advised that the relevant records are no longer available.

House extensions

[20] The parties moved into Ms Emajor's parents' house in Cuernavaca. They paid approximately USD 150,000 to build a substantial extension to the house to provide self-contained accommodation for them and their daughter. The extension was funded from monies held in the Broadway bank account.

[21] Dr Emajor did not work during the two year period the family lived together in Cuernavaca. They nevertheless enjoyed a high standard of living. While this was partly funded by Ms Emajor's parents, it appears that further funds were withdrawn from the Broadway bank account to meet various expenses.

Separation

[22] The parties separated in June 2005. As at 17 April 2005, the date of the most recent available bank statement, the sum of USD 397,747.60 was held in Ms Emajor's Broadway bank account. It is not possible to say that these monies solely comprised the balance remaining of the two deposits made from the Credit Suisse account. That would require an assumption that there was no money in the account at the time the first of these deposits was made and that no other money was contributed to the account. There was no challenge to Ms Emajor's evidence that her father deposited money into the account, at least when he established it in 2000. Without any evidence about the size of that deposit or any other movements in the account, it would be pure speculation to conclude that all of the money in the account at the time of separation was sourced from Credit Suisse.

[23] Following separation, Dr Emajor moved to Mexico City, approximately one and a half hours' drive from Cuernavaca and lived in an apartment he rented from Emilio. Dr Emajor purchased a dentist chair and equipment but was unable to obtain registration to practise as a dentist. He then tried to establish a weight loss clinic but this was also unsuccessful.

[24] Dr Emajor left Mexico to live in Auckland on 20 October 2005. He says he made this decision because: he was unable to work in Mexico; he was running out of

money; he was not able to establish regular contact with his daughter; and he wanted to spend time with his brother who had become terminally ill.

[25] Prior to his departure, Dr Emajor endeavoured to negotiate a separation agreement with Ms Emajor with Emilio's assistance. Emilio was familiar with the process having been through two divorces. Unfortunately, these negotiations came to nothing.

Family Court proceedings

[26] Dr Emajor filed proceedings in the Family Court in Mexico City through the attorney he engaged with Emilio's help, Mr Delgado. The proceedings were filed on 13 October 2005, one week prior to Dr Emajor's departure, and sought various orders including: divorce on the grounds that Ms Emajor was violent and aggressive and suffered from a psychological illness; custody of his daughter; repayment of all of the monies held by Ms Emajor in the Broadway bank account; and a half share of the house in Cuernavaca.[2] Dr Emajor attached to his writ of claim copies of two Credit Suisse bank statements showing the two transfers to Ms Emajor's account referred to in [17].

[27] The claim for repayment of these monies was worded as follows:

> The provision of accounts for the amount of USD$602,230.48 (six hundred and two thousand, two hundred and thirty dollars 48/100 currency of the United States of North America) that he the undersigned granted in deposit to the defendant party when we came to live in Mexico.
>
> From the amount mentioned in the previous fact the reimbursement of the amount of USD$450,000.00 (four hundred and fifty thousand dollars 00/100 currency of the United States of North America) that he the undersigned granted in deposit to her the defendant party when we came to live in Mexico, and in case of objection to the delivery he claims that enough and sufficient personal property is to be seized to guarantee the payment and in the case that she does not do so, with the results of the seized personal property, same is to be put up for auction and payment is to be made to him the undersigned.
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> …

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[2] Dr Emajor says that he did not realise until the statement of claim was translated to him recently that he had sought custody of his daughter. He says that he only intended to seek visitation rights.

> … the defendant party told me that she had to have the management of my investments closer to Mexico and not from Singapore where the undersigned had his patrimony in the Bank Credit Suisse due to which she told me that she had an account in San Antonio, Texas, in the United States and that I deposit my money there, that she knew that this money was not hers, and that I trust her, as the defendant manifested to the undersigned that me as foreigner, I could not open an account in the United States, and being in that moment my wife and mother of my daughter I trusted her, without thinking that later on she wouldn't want to give my patrimony back to me, I clarify that, in good faith I gave it to her to take care of, trusting her, but I did not gift it to her.

[28] Because Dr Emajor was going to be out of the country, he granted power of attorney to Mr Delgado and Emilio to enable them to take all necessary steps in the proceeding on his behalf, including to receive notices, file documents and appear for him in Court.

[29] Ms Emajor filed a defence to the claim opposing all of the orders sought by Dr Emajor. In response to Dr Emajor's specific claim that he "granted in deposit to [Ms Emajor]" USD 602,230.48, the statement of defence reads:

> The submission that [he] claims for the amount that [he] indicates is notoriously unfounded and inadmissible, because in the first place, [he] never gave me any deposit, neither are we married under marriage partnership regime, nor I owe [him] any amount, on the contrary he shall explain to Your Honour and [me] the undersigned, for his refusal to provide alimony to his minor daughter and wife since July 2003.
>
> The complaint about the return of any amount is also unfounded, in view of the aforementioned statements.
>
> …
>
> This fact is not true and is refused.

[30] Ms Emajor filed a counterclaim seeking an order dissolving the marriage for cause on various grounds including abandonment and adultery. She also sought custody of their daughter and provisional and final alimony for her and her daughter. Ms Emajor claimed alimony in the total sum of 3 million pesos up to the date of her claim, 12 June 2006. She supported this claim by setting out various living expenses she said she had incurred. She claimed that Dr Emajor had abandoned her and left her in debt and without any financial support. She stated that she had "no other option but to ask for economical support [from her] parents".

[31] Mr Delgado filed a reply to Ms Emajor's counterclaim. He accepted that Dr Emajor would be obliged to pay maintenance for his daughter if custody was granted to Ms Emajor but claimed that no order for spousal support should be made because: Ms Emajor had kept the patrimony (the monies deposited in the Broadway bank account); she was well qualified, capable of working and had worked in New Zealand during the marriage; and Ms Emajor was responsible for the failure of the marriage because she did not get treatment for her psychological illness. He claimed that Dr Emajor had not ceased paying maintenance for his daughter because Ms Emajor, in bad faith, had kept the monies transferred to the Broadway bank account:

> I state that the mentioned claim that [Ms Emajor] expects to enforce does not proceed, as Ms Emajor kept the whole patrimony…
>
> … it is inadmissible toward [Ms Emajor] but not towards the daughter … alimony has to be given to the minor because the obligation of [Dr Emajor] … which he … accepts to give within his economical capacity and in accordance to the need of the minor but not in regards to superfluous impulses from [Ms Emajor]… and in accordance with providing alimony to [Ms Emajor], it is not applicable in virtue that [she] is a person who counts with her own means of livelihood, as she is a person extremely qualified with a Degree in Business Administration, as well as [she] manifests that she, in the defend of a suit and counterclaim that was [she] who supposedly helped [Dr Emajor] working in New Zealand, due to which if she, during the marriage, worked [Dr Emajor] does not have to pay any alimony. In addition to that [Ms Emajor] … with her hysteria and arrogance … provoked the failure of the marriage between the parties because [she] did not take her treatment against depression or hysteria, she got very sick…
>
> … she worked together with [Dr Emajor] … she never fully dedicated herself to the household …
>
> Clarifying that [Dr Emajor] in the main never stopped providing alimony as [Ms Emajor] in bad faith kept the patrimony…
>
> In consequence I request your Honour to establish alimony only in favour of my minor daughter, in a just and appropriate manner to the needs of the minor, but not in regards to the eccentricities that my counterpart expects to enforce.
>
> …
>
> [Dr Emajor] asked [Ms Emajor] to return the money that he had given her or explain about the same, consisting of USD 602,230.48… that said amount was from the sale of all his patrimony in New Zealand, … [Ms Emajor] refused… [Ms Emajor] told [Dr Emajor] that he discounted from the said amount what had been invested in the house of Cuernavaca property of hers and not of her parents as she maliciously expects to enforce … [Dr Emajor]

> reserves the right to enforce further and I offer this as evidence of the procedural fraud that [Ms Emajor] expects to enforce.
>
> From the above it is deduced that [Ms Emajor] counts with the own resources of [Dr Emajor] for her livelihood, from which, at the time, [Dr Emajor] asked her to return him half and [Ms Emajor] kept the other half, situation to which she said no … that she was going to give him nothing… she would say… that [Dr Emajor] gifted it to her, as a friend, semi relative lawyer advised her, false situation quite obvious… And in regards to what she says that she has subsisted thanks to the charity of her brothers… is false, as [Ms Emajor] kept all of [Dr Emajor's] patrimony.

[32] Mr Delgado also denied that Dr Emajor left Ms Emajor in debt and he challenged the nature and extent of the expenses which she claimed to have incurred.

Provisional order for custody and child maintenance

[33] On 28 August 2006, the Family Court in Mexico City made a provisional order granting Ms Emajor custody of the couple's daughter. The Court also granted provisional child support in the sum equal to 25 per cent of "the income and other ordinary and extraordinary provisions that [Dr Emajor] receives in his work place".

[34] On 7 September 2006, Mr Delgado filed a writ exhibiting evidence of a provisional alimony payment made by Dr Emajor of 5,000 pesos for his daughter. This was in the nature of a bond, as required by the Court. Mr Delgado reiterated to the Court in the writ that Dr Emajor was willing to pay child support in whatever amount the Court considered appropriate to meet his daughter's reasonable needs:

> As [Dr Emajor] has never stopped complying with the alimony, it is his wish to consign [her] the amount of the alimony that your Honour determines, being a fair alimony and in accordance with the needs of the minor without being superfluous.

[35] At this time, Dr Emajor was employed in a dental practice in Albany. He took up this position soon after arriving back in New Zealand in late October 2005 and remained there until March 2007. It would have been a simple matter to provide evidence of his earnings to the Family Court. However, it appears that this was deliberately not done. Instead, the Court was given the impression that the only basis for assessing his income for the purposes of fixing child support came from immigration documents completed at the time Dr Emajor arrived in Mexico in July 2003:

> When [Dr Emajor] arrived in Mexico, with [Ms Emajor] his migratory document was issued with the position of Vice-president of the company Inmobiliaria Garcia Emajor S.A. Dr Emajor C.V.
>
> In which he was going to undertake the position of [blank space] with a salary of $20,000.00 (twenty thousand pesos 00/100 M.N. [Mexican Currency] monthly).
>
> But it is the case that when he left Mexico, [Dr Emajor] does not receive any amount, either when he comes back, or how the activity will develop in the future, then it will be determined if he continues with that salary or not.
>
> On the basis of the above and with the purpose of safeguard the alimony of the parties' minor daughter, I exhibit the amount of $5,000 (five thousand pesos 00/100 M.N. [Mexican Currency] that will be covered under the basis of the amount aforementioned, as [Dr Emajor] is currently resettling in New Zealand; however, in conformity with the results of the trial, he will determine the length of time he is in Mexico, and for such circumstance, nowadays it is difficult to determine the income sum of [Dr Emajor] as he is a Dentist who works on his own and, when coming to Mexico, he left his business…

[36] These statements were highly misleading. Dr Emajor was never employed while he was in Mexico and there was no prospect of him returning to Mexico and "continu[ing] with that salary". Nor was it correct to say that "nowadays it is difficult to determine the income sum of Dr Emajor". Dr Emajor had been employed at the Albany clinic for nearly a year by this time. The salary indicated to the Family Court of 20,000 pesos per month would have been roughly equivalent to NZD 3,200 per month at the time Dr Emajor arrived in Mexico in July 2003. By September 2006, when this writ was filed by Mr Delgado, 20,000 pesos was equivalent to only approximately NZD 2,800. These amounts, provided to the Family Court as an indication of Dr Emajor's earnings for the purposes of setting alimony, would have been a small percentage of his actual earnings as a dentist in Auckland at that time.

[37] At a preliminary hearing the following day, 8 September 2006, the Family Court ordered the parties to present written statements of evidence within 10 working days.

[38] Ms Emajor's statement of evidence did not address the monies that were deposited into her Broadway bank account from Credit Suisse. Dr Emajor's statement, which was signed by Mr Delgado on his behalf pursuant to the power of attorney, relied on a limited number of supporting documents. These were the

immigration permit, the marriage certificate, his daughter's birth certificate, and bank statements from the joint account with Credit Suisse showing the two transfers together totalling USD 602,230.48 to Ms Emajor as the beneficiary. The Court's assistance was sought to require a report from the National Banking and Securities Commission to establish that the funds were held in Ms Emajor's bank account. Letters Rogatory were also requested to obtain details of Ms Emajor's transactions on the Broadway bank account and its current balance.

Hearings in the Family Court

[39] On 27 September 2006, the Family Court issued an order summoning both parties to appear at a hearing to be held on 24 October 2006 to respond personally to "interrogatives". The order warned that if Dr Emajor did not appear without just cause, he would be deemed to have "confessed" to any "interrogatives" found to be proper and lawful. Emilio reported to Dr Emajor that he would speak to Mr Delgado and find out whether it was important that Dr Emajor attend the hearing in person.

[40] Following discussions, it was decided that Dr Emajor would not attend the hearing in person; the claim for return of the monies held in the Broadway bank account would be deferred until a later date; and the lawyers would focus on obtaining the divorce, and dealing with visitation rights and orders for alimony.

[41] Lilia Figueroa López, an experienced family lawyer and law professor, was engaged by Ms Emajor to assist this Court as an expert. Ms Figueroa López stated that because the parties were married under the separate property system, the Family Court had no jurisdiction to make rulings about the distribution of the assets of each spouse. For that reason, Dr Emajor's claim for return of the monies could not proceed in the Family Court in any event and would have to be determined by another court.

[42] On 11 October 2006, Emilio sent Dr Emajor an email after speaking to the lawyer:

> I just finished a very long phone conversation with your lawyer,,, not easy,,, this is the summary of it.

> The final audience is set for the 24th of October,,, cannot be changed,,, the outcome won't change because you are there or not,,, the only situation that might change is that you might come to an agreement with [Ms Emajor], before the audience,,, I see that very unlikely, but that is the only thing that might happen if you were there.
>
> The judge WILL grant your divorce,,, effective immediately with papers to be delivered to you or your lawyer middle of Nov,,, at least that is done… the other issues that we are fighting for?, the funds that disappeared they need to more evidence and original statement from the bank,,, plus translations and apostillados, you already know all the hassle to translate them, certify them by the embassy, etc etc,,, that the lawyer suggests to "stay" on that issue and fight it later in the 'legal' court, right now we are in the "family court" ,,, we can sue her later,,, otherwise we never finish with the main issue, which for me is, get the divorce papers and the visiting rights,,, I hope you agree with me.
>
> …
>
> They will grant you visiting rights …
>
> The judge will say how much you have to pay every month for [your daughter's] schooling, food etc,,, we already put down a deposit of 50,000 pesos to show that you have been paying,,, because she "alleges" that you have not paid anything.

[43] Dr Emajor replied later that day accepting Emilio's advice:

> I won't go to Mexico this time if the divorce can be arranged "by paper".
>
> I agree to sort this first and the money later although it won't be easy providing support because [Ms Emajor] has the money and I am also paying for [my partner's two daughters]…
>
> Can you please confirm that I don't have to go as time is running out.

[44] On 18 October 2006, Emilio sent Dr Emajor an email confirming that it was not necessary for him to attend the hearing:

> I have just finished speaking to your lawyers, they both said that you don't need to be there,,, they will argue that you have no money to come, since [Ms Emajor] kept it all,,, the divorce order should come out,,, visiting rights to [your daughter] too,,, and all the other issues will also be attended to,,, as we said, about the money, and to don't complication the proceedings too much, we can treat that at a later date,,, but they will try to get a ruling on it too.

[45] Ms Emajor attended the hearing on 24 October 2006 but Dr Emajor did not. As a result, he was deemed to have confessed to various interrogatives found to be proper and lawful, including that he had abandoned his wife and daughter on 1 June

2005, that he had not provided any child support since then, and that he had a good income as a dentist. No interrogatives were proposed by either party in relation to the monies allegedly transferred from Credit Suisse to the Broadway bank account or the amount in that account, presumably because Dr Emajor's claim for return of these monies was not to be, and could not be, pursued in the Family Court. Further, Mr Delgado advised the Court that he did not wish to examine Ms Emajor and as a result her evidence was unchallenged.

[46] José Mateos, an experienced family lawyer who practises in Mexico City, was retained by Dr Emajor as an expert to assist this Court. Mr Mateos explained that the decision not to examine Ms Emajor on her evidence was highly prejudicial to Dr Emajor's case because it meant that she could prove dissolution for cause, thereby becoming entitled to spousal alimony.

[47] Ms Emajor's lawyer presented an email to the Court suggesting that Dr Emajor was leading a lavish lifestyle in New Zealand. Ms Emajor received this email from the former husband of Dr Emajor's new partner in New Zealand. Following a dispute about the admissibility of this email, it was agreed that the Judge should not make final orders at that stage and the hearing was adjourned until 7 December 2006. The Court records show that the adjournment was granted because the parties were having conciliatory discussions.

[48] Emilio reported to Dr Emajor on 25 October 2006 advising that the email had been unhelpful to their argument in defence of the claim for alimony that Dr Emajor had no money, was not working and could not even afford to travel to Mexico to attend the hearing:

> I just got a call from your lawyer in Mexico,,, spent about half an hour talking with him on the phone, he was telling me about all the demands from [Ms Emajor], and the way he was going to answer them, then today he called me and says please tell me what to say,,, they showed him an email from [Dr Emajor's new partner's] "ex" to [Ms Emajor] telling her that you are driving a Porsche, and that you just bought [your new partner] a new car, and that you travel and live lavishly, etc etc etc,,, you can imagine,,, … I just need to know to prepare the right answers for the judge, who is ruling on how much you should pay for [Ms Emajor] and [your daughter] ,,, [Ms Emajor] is asking for 10 thousand dollars per month, as you can imagine this won't happen, but we are arguing that you have no money,,, that

> you have no job,,, etc, etc, and that is the reason why you can't come to Mexico,,, [the] email does not make our job easy.
>
> After an hour of arguing that emails are not admissible in court,,, and debating other issues,,, the judge did not rule on anything and postponed the ruling for next month,,, I would have loved to give you better news,,, but they had this "card" that we did not know about,,, and I think it was better to postpone before we get some stupid $$$ ruling on alimony.

[49] In the meantime, Ms Emajor had appealed against the Family Court's order made on 28 August 2006 on the basis that her claim for provisional spousal alimony had not been considered by the Court. The appeal was based on the presumption that, because she had declared herself to be dedicated to the home and care of her daughter, she was in need of alimony and entitled to such an order. The appeal was determined by the Superior Court on 30 November 2006. The Superior Court ordered Dr Emajor to pay provisional monthly alimony to Ms Emajor in an amount representing 10 per cent "of the total of the ordinary and extraordinary income that [Dr Emajor] receives for the concept of his work". This was payable in addition to the existing order that he pay 25 per cent of his income for the maintenance of his daughter. The Court ordered that the total monthly payments were not to be less than 7,000 pesos. Although not stated in the judgment, the minimum figure of 7,000 pesos per month appears to have been based on Mr Delgado's statement to the Court, evidenced by the immigration documents, that when Dr Emajor arrived in Mexico he expected to earn a salary of 20,000 pesos per month (7,000 pesos equates to 35 per cent of 20,000 pesos).

[50] Two further short hearings took place in the Family Court on 7 December 2006 and 29 January 2007 before a final hearing was set for 8 March 2007. Dr Emajor did not attend any of these hearings in person.

[51] Emilio sought instructions for the final hearing on 8 March 2007 in an email to Dr Emajor on 1 March 2007:

> You cannot imagine how much I have been bothering your lawyer for some 'results',,, finally today I got some information that I want to share with you,,, I will make it much shorter, we spoke for one hour,,, with all the legalities of the case,,,

> On March 8th there is an audience, the one that was supposed to take place in December,,, we can "give up" all our demands and ask for a sentence,,, this will give you 3 things,,,
>
> 1 your divorce
>
> 2 a visitation schedule
>
> 3 the judge will set an amount for alimony (we are 'working' for this amount to be minimum, since you don't have a job, yet).
>
> Or we can demand, that all the demands be attended to,,, like having proof from the bank in the United States of America that [Ms Emajor] took the $,,, like having [Ms Emajor] go to a psychiatrist to be assessed that she is not 'normal',,,
>
> To have [her brothers] testify and show proof that they are not supporting [Ms Emajor and your daughter] ,,, we have shown proof that all the improvements to the house in Cuernavaca were paid by your bank account,,, that [Ms Emajor] kept all your house effects,,, etc, etc, etc,
>
> I can go on and on,,, all these arguments need to be debated, they say 'no',,, we say yes,,, and this goes on, and on, for another 6 or nine months,,, then 'sentence' will be passed.
>
> This is in very short form, no bull s….,,, the bottom line,,, what do you want me to do??? Do we keep on fighting?, or do we get your divorce and visitation rights done???
>
> Please let me know asap,,, because I need to speak to the lawyer for him to prepare, one way or the other.

[52] Dr Emajor responded to Emilio on 3 March 2007 that he wanted to obtain the divorce and get on with his life. His email included the following instruction:

> … I want to get on with my life which is with [my new partner] and her children as well as have the opportunity to not only visit [my daughter] but for her to come here on holiday also. That is my wish…
>
> Therefore, I would like to get rid of [Ms Emajor] and *have my divorce* instead of fighting with lawyers fees, time, and no guaranteed end result.
>
> I do not agree to paying alimony because your father actually said to me that *they would keep the money to look after [my daughter] and I wouldn't have to pay anything for the rest of her life* (of course you know if she was with me I would pay for everything). I would like him to honour that pledge.
>
> Thankyou for giving me a choice and I hope you understand my reasons.
>
> (Emphasis in original)

[53] Dr Emajor's assertion that he had reached an agreement with Ms Emajor's father that she could keep the money in the Broadway bank account and in return she would not seek alimony is contrary to Dr Emajor's claim for return of this money. Dr Emajor said he made an offer along these lines at the time he was negotiating for a settlement prior to leaving Mexico in October 2005 but this was rejected. Even if there had been such an agreement with Ms Emajor's father, and even assuming it was binding on Ms Emajor, the agreement was repudiated by Dr Emajor when he sued for return of the money immediately before leaving Mexico.

[54] At the hearing on 8 March 2007, Mr Delgado advised the Judge, in accordance with Dr Emajor's instructions, that he was withdrawing reliance on the evidence previously signalled to support Dr Emajor's claims. This included the anticipated report from the National Banking and Securities Commission and the evidence from Letters Rogatory of Ms Emajor's Broadway bank account in San Antonio, Texas. As Mr Mateos explained, this essentially amounted to a withdrawal of Dr Emajor's claim for divorce for cause and an admission of Ms Emajor's claim for divorce; it was tantamount to a "confession of judgment".

Family Court decision

[55] In his written decision issued on 2 April 2007, the Judge found that Dr Emajor had not proved his claims, as was inevitable following Mr Delgado's withdrawal of the required evidence. The Judge found that Ms Emajor had proved her counterclaim for divorce because the parties had been separated for more than a year; Dr Emajor had failed to comply with his alimony obligations from the date of separation; and Dr Emajor was deemed to have confessed to having abandoned his wife and daughter. The Judge granted custody of the couple's daughter to Ms Emajor.

[56] The Judge noted the applicable jurisprudence to the effect that Dr Emajor carried the burden of proving that spousal and child maintenance was not required: "The husband has the obligation of feeding the woman and the children who have in their favour the presumption of needing food, unless proving the contrary. The obligation ceases when the creditors [woman and children] have no longer the need

of them [food], but the burden of proof corresponds in these cases to the debtor". The burden of proof not having been discharged, the Judge ordered definitive maintenance on the same terms as the provisional maintenance, including spousal maintenance on the same terms as ordered by the Superior Court. However, the Judge dismissed Ms Emajor's claim for arrears of maintenance in the sum of 3 million pesos on the basis that she had not proved that these were valid expenses.

[57] Emilio sent a copy of the judgment to Dr Emajor and summarised it in the following terms:

> Herewith again, the resolution of the court in Mexico,,, basically they say that, "the judge grants your divorce,,, that you have to pay alimony in the amount of 7,000 pesos, (this is fantastic, I was worried he was going to say 25,000, after all the allegations [Ms Emajor's] did), I know she is going to be very upset with this ruling, and even maybe appeal the ruling, but there is not much she can do,,, I know she kept the $, and you should not have to pay anything,,, but the law requires that they make a ruling to protect the child…

[58] Dr Emajor was delighted with this outcome and sent an email in reply to Emilio on 24 April 2007 in which he made the following comments:

> A million thankyous!
>
> Dearest Emi,
>
> What a relief, what a process you have gone through…
>
> [My partner] and I thank you from the bottom of our hearts, we can't really believe it, but we have read the papers again and again, you know what I mean. [My partner] never thought that [Ms Emajor] would grant a divorce, now she thinks that you are a god amongst men for making this happen.
>
> Please tell me about my funds that I left. Do I owe you money, if so, how much and how can I pay you. What is the easiest way of arranging funds for [my daughter]?

Appeal to the Superior Court

[59] Both parties appealed to the Superior Court against the Family Court decision. Dr Emajor says that he was not aware of the appeal and was not consulted about it.

[60] Mr Delgado argued on appeal that Ms Emajor was not entitled to alimony because she had not proved that she did not work and because she retained the sum of USD 602,230, being the total of the two transfers from Credit Suisse to the Broadway bank. The Superior Court rejected these submissions in its judgment dated 21 June 2007. The Court observed that Ms Emajor was presumed by law to be in need of alimony as the innocent spouse entitled to a divorce. The Court held that it was for Dr Emajor to prove that Ms Emajor worked or owned property and was therefore able to support herself. Having failed to prove this, the Superior Court concluded that the Family Court was correct to order alimony in Ms Emajor's favour. In any event, the Superior Court held that, having relinquished his reliance on the evidence that was intended to establish it, Dr Emajor had not proved that Ms Emajor retained the sum of USD 602,230 and noted that the deposits dated back to 2003.

Maintenance payments made

[61] Dr Emajor did not ever comply with the order by paying 35 per cent of his income. Instead, he initially made payments to Ms Emajor at the minimum stipulated rate of 7,000 pesos per month. He paid a total of 90,000 pesos between 10 May 2007 and 19 November 2008, equivalent to NZD 11,250. Nothing further was paid until Dr Emajor was contacted by the Department of Inland Revenue in New Zealand in August 2012. Dr Emajor then paid child support in accordance with assessments made by the Department of Inland Revenue covering the period from 1 April 2012 to 31 March 2016. I accept Dr Emajor's evidence that these payments totalled NZD 49,291.70.

[62] Roderick White, an independent financial analyst engaged by Ms Emajor, calculates that Dr Emajor paid a total of NZD 58,324 over the period from 1 April 2008 to 31 March 2014. Based on Dr Emajor's net taxable income over this period, Mr White calculates that Dr Emajor should have paid NZD 320,507 leaving a shortfall of NZD 262,184. However, this calculation is based on Mr White's understanding that Dr Emajor had only paid NZD 47,074 in response to the assessments made by the Department of Inland Revenue whereas, in fact, the total

paid was NZD 49,291.70. This was the minor quantum dispute referred to by Mr Goodall.

Change in circumstances

[63] Dr Emajor's circumstances have changed since the orders were made. He remarried in December 2008 in reliance on the judgment and now has two stepdaughters to support. He believes that Ms Emajor's circumstances have also changed in that she may have received an inheritance following the death of her father. Dr Emajor says that, depending on the outcome of this proceeding, he intends to make immediate application for a variation of the orders made in the Mexican Courts based on these changes in circumstances. He also intends to ask the Court to set an end date for the alimony payments, rather than leaving this as a matter of interpretation and potential dispute.

Were the judgments obtained by fraud?

Legal principles

[64] It has long been established that it is a good defence to a claim based on a foreign judgment that the judgment was obtained by fraud.[3] In the celebrated case of *Abouloff v Oppenheimer* decided well over a hundred years ago in 1882, Lord Coleridge CJ stated that the reason for the rule was obvious; it was based on the fundamental rule of law that no man shall take advantage of his own wrongdoing.[4]

[65] Unlike domestic judgments, where the principle of finality in litigation prevails, the defence in England is not limited to situations where evidence of the fraud only became available after the judgment was obtained. The defence is available even where the fraud was raised and rejected by the foreign court. As Lord Bridge explained in *Owens Bank Ltd v Bracco*, this is because the common law

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3 *Abouloff v Oppenheimer* (1882) 10 QBD 295 (CA); *Vadala v Lawes* (1890) 25 QBD 310 (CA); reaffirmed in *Jet Holdings Inc v Patel* [1990] 1 QB 335 (CA) and *Owens Bank Ltd v Bracco* [1992] 2 AC 443 (HL).

4 *Abouloff v Oppenheimer* at 300.

courts dealing with the enforcement of foreign judgments gave primacy to the principle that fraud unravels everything.[5]

[66] In *Abouloff v Oppenheimer*, Lord Coleridge CJ stated that in order to invoke the fraud exception it was necessary to demonstrate fraud in the strict sense of intentional deception:[6]

> … the question for the Courts of this country to consider is whether, when a foreign judgment is sought to be enforced in this country, the foreign court has been misled intentionally by the fraud of the person seeking to enforce it, whether a fraud has been committed upon the foreign court with the intention to procure its judgment.

[67] These principles were applied by the Court of Appeal in New Zealand in *Svirskis v Gibson* in the context of an application to enforce a judgment of the Supreme Court of Queensland under the Reciprocal Enforcement of Judgments Act 1934.[7] Section 6(1)(d) of the Act, which corresponds to the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK), provides that registration of a foreign judgment under the Act shall be set aside if the Court is satisfied that the judgment was obtained by fraud. Cooke J, who gave the reasons for the judgment of the Court, set out what must be proved to establish fraud in this context:[8]

> What must be shown was that there was fraud practised on the Queensland court, by misleading the court by evidence known to be false.

[68] However, Mr Goodall submitted that it is not necessary to establish conscious wrongdoing or that the fraudulent statement was made in evidence. He referred to Barker J's decision in *Richards v Cogswell* in which His Honour stated, citing *Halsbury's Laws of England*, that "fraud does not necessarily have the pejorative connotation of wilful deception".[9] Barker J held that the plaintiff was not entitled to hold a judgment that had been entered by default on the basis of a defective statement of claim which "alleged facts which bore little reality to the dealings between the parties". The provisional registration of the judgment under the Reciprocal Enforcement of Judgements Act was accordingly set aside.

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5 *Owens Bank Ltd v Bracco* at 489.
6 *Abouloff v Oppenheimer* at 301.
7 *Svirskis v Gibson* [1977] 2 NZLR 4 (CA).
8 At 9.
9 *Richards v Cogswell* (1995) 8 PRNZ 383 (HC) at 386.

[69] Mr Goodall also relied on the Court of Appeal's decision in *Amaltal Corporation Ltd v Maruha Corporation* which confirmed that the meaning of "fraud" in the context of a civil claim in deceit remains as stated by the House of Lords in *Derry v Peek*:[10]

> As to the state of the defendant's mind, the leading authority is still *Derry v Peek* (1889) 14 App Cas 337 at 374 per Lord Herschell:
>
> > First, in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (i) knowingly, (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false … [T]o prevent a false statement from being fraudulent, there must, I think, always be an honest belief in its truth.
>
> It follows that a statement honestly believed to be true – even if implausible – is not capable of amounting to fraud. But if the defendant knows the statement to be untrue that defendant will be responsible, irrespective of his or her motives. If fraud be established it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made.

[70] Mr Holgate submitted that only fraud in the strict sense, involving deliberate dishonesty, is enough to displace the estoppel arising out of a final judgment by a court of competent jurisdiction. He referred to the Supreme Court's decision in *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* where, in the context of a domestic judgment, the Court stated that the fraud exception to the principle of finality in litigation requires proof of fraud in the strict legal sense.[11] The Court cited Lord Wilberforce's statement to this effect in *The Ampthill Peerage*:[12]

> There must be conscious and deliberate dishonesty, and the declaration must be obtained by it.

[71] Although *Redcliffe* and *The Ampthill Peerage* both concerned domestic judgments, I see no justification for applying a different test for fraud in the case of a foreign judgment. The test articulated in those cases, requiring proof of fraud in the strict legal sense, was the standard applied in *Abouloff v Oppenheimer* (misled intentionally with intent to procure the judgment) and by the Court of Appeal in

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10 *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608 (CA) at [48]-[49].

11 *Commissioner of Inland Revenue v Recliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 at [29].

12 *The Ampthill Peerage* [1977] AC 547 (HL) at 569.

Svirskis v Gibson (misleading the court by evidence known to be false). I conclude that this is the relevant test. Although the Court of Appeal's decision in *Svirskis v Gibson* was decided under the Reciprocal Enforcement of Judgments Act, I consider that the concept of fraud referred to in that Act is simply a codification of the common law exception that has always existed. I therefore consider that the Court of Appeal's formulation of the test for fraud in *Svirskis v Gibson* is binding on this Court. While it would make no difference to the outcome in the present case, I respectfully differ from the conclusion reached by Asher J in *Johnson v Johnson* that all that is required to prove fraud in this context is to establish that the statement was made recklessly, not caring whether it was true or false, as would be sufficient for the tort of deceit.[13]

[72] In any event, it is not enough to prove fraud. It must be shown that the judgment was obtained or procured by the fraud. This requires proof that the Court was materially misled and would not have given the judgment had it known the true position. In *Redcliffe*, the Supreme Court stated that the fraud "must go to the heart of the judgment".[14]

Has fraud been proved?

[73] There is no doubt that the transfers referred to in [17] were made. This was demonstrated by the bank statements Dr Emajor attached to his writ of claim in the Family Court. They showed the payments from the joint account with Credit Suisse and that Ms Emajor was the beneficiary.

[74] Dr Emajor's statement in support of his claim for reimbursement of USD 450,000 was that he had "granted [the money] in deposit to the defendant". Ms Emajor's response was that "[he] never gave me any deposit" and she did not "owe him any amount". Neither party appears to have stated the position entirely accurately in their pleadings although it must be borne in mind that close analysis of the pleadings is complicated by the fact that these have been translated from Spanish into English and the requirements of pleadings may be different in Mexico from what is expected in pleadings in New Zealand.

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13 *Johnson v Johnson* [2016] NZHC 890, [2016] 3 NZLR 227.
14 Above n 11 at [30].

[75] Dr Emajor's claim was advanced on the basis that the monies were his and Ms Emajor was liable to repay them to him on demand. That does not appear to be an accurate statement of the position; the monies in the Broadway bank account represented a combination of monies belonging to Dr Emajor (repayment of loans and his share of the joint distribution made by the trust following sale of the house in Auckland referred to at [15]), monies belonging to Ms Emajor (repayment of loans and her share of the joint distribution) and monies contributed by Ms Emajor's father.

[76] Ms Emajor's pleaded response that Dr Emajor "never *gave* [her] any deposit" could have been technically correct because the monies were not all his to give and, in any event, he did not *give* them to her. Ms Emajor drew a further distinction between what actually occurred and what was pleaded by Dr Emajor saying that "he never gave me, hey here is the deposit. He made the transfer himself."

[77] It is important to consider the circumstances in which the statements in the pleadings were made. It is clear from the evidence that both parties were under considerable stress at the time. Both faced the difficulty of dealing with unfamiliar legal processes and were guided by their respective attorneys. The precise wording of the pleadings was settled by the attorneys, not by the parties. I also consider that there is some validity in Ms Emajor's observation that lawyers do not always succeed in bringing clarity:

> Well I would say that I, I tried to keep it as clear as possible, lawyers tend to make stories and confusions and use different words for their advantage. But I did try to keep it very clear.

[78] Dr Emajor experienced the same problem, complicated in his case by the language difficulty. This no doubt explains why he did not realise until recently that he had sought custody of his daughter in his statement of claim, not merely visitation rights as he intended. It may be that the decision to seek custody was a strategic one, intended by his attorneys to place additional pressure on Ms Emajor, and that Dr Emajor was unaware of this. It does not matter how this significant discrepancy in his pleading came about but it helps illustrate why the Court should exercise caution before attributing the precise wording of the pleadings to the particular party

and relying on the specific words chosen by the attorneys for the purposes of making a finding of fraud against that party, as Mr Goodall invites the Court to do.

[79] Ms Emajor's response to Dr Emajor's claim in the statement of defence would be considered evasive in New Zealand because she did not acknowledge that the transfers were made to her account. However, it would have been futile to argue that those transfers were not made in view of the bank statements attached to Dr Emajor's writ which demonstrated that they had been. The real issue on the pleadings was whether Dr Emajor was entitled to a half share of the house in Cuernavaca and either payment of USD 450,000 from the bank account or an order for sale of Ms Emajor's assets to this value. This claim was legitimately contested, as signalled in the pleadings settled by the lawyers.

[80] I am not persuaded that Ms Emajor's pleaded response to Dr Emajor's claim for payment of this money amounts to fraud. I do not consider that she made a knowingly false statement to the Court misrepresenting the extent of her assets as alleged by Dr Emajor in his claim.[15] On Dr Emajor's own pleadings, these monies did not form part of Ms Emajor's assets; he contended that the monies belonged to him and he sought an order for repayment of them. That issue has not yet been determined because Dr Emajor elected to defer it.

Was the judgment obtained by fraud?

[81] In case the matter goes further and it is determined that Ms Emajor did fraudulently misrepresent the extent of her assets in her statement of defence, I now consider whether the judgment was obtained by such fraudulent misrepresentation. For the reasons that follow, I consider that it was not.

[82] The purpose of pleadings is to define the issues. Any contests identified by the pleadings are determined by the evidence. There was a legitimate contest about Dr Emajor's property claims and they were inevitably going to have to be determined by the evidence. The pleadings alone were incapable of procuring the judgment.

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[15] As set out in [5] above.

[83] Dr Emajor's property claims were for a half share of the house in Cuernavaca and for payment of USD 450,000 or seizure and sale of sufficient assets in lieu. These claims were not determined by the Family Court because Dr Emajor decided to defer his pursuit of them. It appears that the Family Court had no jurisdiction to determine them anyway. The contest defined by this part of the pleadings was not determined and was not relevant to the judgment which dealt with the other pleaded claims. It follows that the judgment was not in fact obtained by the statement Ms Emajor made in this part of her defence to the property claims.

[84] At the time of the Family Court and Superior Court decisions, Dr Emajor's obligation to provide child support arose under Article 303 of the Civil Code for Mexico City. This relevantly provided that "parents are obliged to give child support to their children". In terms of Article 285, this obligation remained whether or not Dr Emajor lost paternal authority.

[85] Dr Emajor also became obliged to pay spousal alimony as a result of his claim for divorce for cause being dismissed and Ms Emajor's counterclaim for divorce being upheld. As the unsuccessful party, Dr Emajor was declared the "guilty spouse" and became obliged to pay alimony to Ms Emajor as the "innocent spouse". This obligation arose under Article 288 which has been translated as follows:

> **Article 288**
>
> In the cases of contested divorce, the family judge will sentence the guilty spouse to the payment of alimony in favour of the innocent spouse, taking into account the circumstances of the case, among them, the following:
>
> i The age and the state of health of the spouses;
>
> ii The professional qualifications and the possibility to access employment;
>
> iii The duration of the marriage and the past and future dedication to the family;
>
> iv Collaboration with his/her work in the activities of the spouse;
>
> v Economic means of one and the other spouse, as well as his/her needs; and
>
> vi The rest of the obligations that the debtor spouse has.

> In all cases, the innocent spouse who lacks property or that during the marriage he/she had prominently dedicated to the household or to the care of the children, or who is unable to work, he/she will have the right to alimony. In the resolution, the bases to bring up to date the amounts of maintenance and the security will be determined…

[86] It is clear from these provisions that Dr Emajor was obliged to pay child support and, because he was declared the guilty spouse, he was also obliged to pay alimony to Ms Emajor. Mr Mateos confirmed this. However, the income and assets of both parties were relevant to the assessment of the appropriate amounts to be paid for both child and spousal support. This was provided for in Article 288 quoted above in relation to spousal maintenance. Article 287 was to similar effect in relation to the maintenance of children: "the former spouses will have the obligation to contribute, in proportion to their goods and income, to the needs of the children, to the livelihood and the parenting of these until they are adults". The means of the liable party were to be balanced with the needs of the party entitled to receive support. The opening sentence of Article 311, which Mr Mateos said applied to both spousal and child support, read: "Support shall be provided in accordance with the ability of the supporting party and in accordance with the needs of the entitled to receive it".

[87] Dr Emajor chose not to provide any evidence to the Family Court to displace the presumption that Ms Emajor and their daughter were in need of financial support. He did not provide the Court with any information about his current income or the assets held by him and Ms Emajor.

[88] The monies in the Broadway bank account were not advanced by Dr Emajor in his pleadings as a reason why Ms Emajor did not need alimony and it would have been inconsistent with his property claim for him to have done so. He could not say, for the purposes of his property claim, that these monies were his and should be repaid to him and at the same time say, in defence of her claim for spousal and child support, that Ms Emajor's ongoing access to these monies meant that she did not require such support.

[89] In any event, the Superior Court appears to have accepted that USD 602,230.48 was transferred to Ms Emajor's bank account as demonstrated by

the Credit Suisse bank statements that were attached to Dr Emajor's writ. However, the Court had no information about the amount currently held in the account and was not satisfied that Dr Emajor had proved that these monies provided sufficient income to enable Ms Emajor to support herself. The Superior Court dealt with this aspect of Dr Emajor's appeal in the following passages of its judgment:

> In respect to [his] third grievance, nor does he have the reason to note that the alimony does not correspond to the plaintiff, as during the procedural consequences, it was not accredited that she does not work and that she does not have the ability to work. Independently from that which was stated that the plaintiff retained from the appellant the amount of $602,230.48USD (six hundred and two thousand, two hundred and thirty 48/100 dollars currency of the United States of North America), as from the beginning, we will say to the appellant that in conformity with article 282 of the procedural law, it results inadmissible to pretend to prove that the plaintiff "does not work" or that "she does not have the ability to work", as these constitute negative facts; conversely, taking into consider[ation] that the appellant has the presumption of needing alimony on the grounds of article 311-Bis of the Civil Code, it was the beseecher to demonstrate that his opposing party worked or that she owns property that permits her to obtain sufficient for her subsistence, and for not having done so, the Judge rightly determined an alimony in favour today's appellant, especially that [Ms Emajor] is the innocent spouse and it corresponds to her the alimony in terms of the numeral 288 of the substantive code. Besides, independently that it was not demonstrated in the summary that the defendant in the main retained from the appellant the amount of $602,230.48 USD (six hundred and two thousand two hundred and thirty 48/100 dollars currency of the United States of North America), as [he] relinquished several written communications with which [he] pretended to accredit such circumstance; that act would result insufficient to demonstrate that presently the defendant counts on her own income that allows her to subsist, as it refers to situations of the year two thousand and three.

[90] In summary, the amount of money remaining in the Broadway bank account was not material to the Family Court's decision because Dr Emajor did not resist the claim for spousal and child support on this basis; he did not claim that such support was not required because Ms Emajor had these monies. He chose instead to seek an order requiring Ms Emajor to pay him USD 450,000 and an order declaring that he was entitled to a half share in her parents' house to compensate for the USD 150,000 spent on it.

[91] For the reasons given by the Superior Court, the judgment requiring Dr Emajor to pay spousal and child support was the inevitable consequence of his decision not to produce evidence that would be capable of displacing the

presumption of need. While the Superior Court accepted that USD 602,230 had been transferred to the account, as it correctly pointed out, there was no evidence as to the balance remaining at the time of the hearing in the Family Court some two and a half years later from which it could infer that Ms Emajor had sufficient income of her own and did not need alimony.

[92] Further, because Dr Emajor did not pursue the avenues open to him to obtain evidence showing the extent of the parties' assets and any liabilities, and because he did not provide any evidence as to his current income, he left the Court with no choice but to base its assessment of quantum on the scant information Mr Delgado provided regarding Dr Emajor's expected income when he arrived in Mexico. This explains why the Court made the unusual, but permissible, order requiring Dr Emajor to pay maintenance calculated as a percentage of his income subject to the proviso that the payments were not to be less than a specified minimum amount.

[93] In all of these circumstances, and despite Mr Goodall's careful and thorough submissions, I am not persuaded that either the Family Court or Superior Court judgment was obtained by any fraudulent misrepresentation about the extent of Ms Emajor's assets, as alleged by Dr Emajor.

Were the orders procured contrary to substantial justice?

Legal principles

[94] Mr Goodall submitted that the public policy exception to the enforcement of a foreign judgment is a broad one that is designed to guard against injustice. He commenced his analysis by referring to Lord Lindley's judgment in *Pemberton v Hughes* in 1899:[16]

> If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent – namely, its competence to entertain the sort of case which it did deal with, and its competence to

[16] *Pemberton v Hughes* [1899] 1 Ch.781 at 790-791.

> require the defendant to appear before it. If the Court had jurisdiction in this sense and to this extent, the Courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed.

[95] Mr Goodall next referred to Lord Denning's statement in *Gray v Formosa*:[17]

> … I am content to decide this case on the simple basis that the courts of this country are not compelled to recognise the decree of the court of another country when it offends against our ideas of justice.

[96] In that case, Donovan LJ expressed the exception as conferring a jurisdiction on the courts to avoid "flagrant injustice":[18]

> I interpret that to mean that the courts here always retain a residual discretion so that flagrant injustice can be avoided.

[97] Mr Goodall relied on the English Court of Appeal's decision in *Adams v Cape Industries Plc* as having particular relevance to the present case.[19] Slade LJ, who delivered the judgment of the Court, confirmed that the test remained as stated in *Pemberton v Hughes*, namely, "did the proceedings in the foreign court offend against our views of substantial justice?"[20] The Court of Appeal declined to enforce judgments obtained by default in a United States Federal District Court in Texas partly because the plaintiffs' claims involved tortious actions for unliquidated damages but the judgment sums were not based on any judicial assessment of the damage caused to each particular plaintiff. This was contrary to the requirements of the federal system in the United States, contrary to the requirements of English law and contrary to English concepts of substantial justice. The Court explained:

> The notion of substantial justice must be governed in a particular case by the nature of the proceedings under consideration. The purpose of an in personam monetary judgment is that the power of the state through the process of execution will take the defendant's assets in payment of the judgment. In cases of debt and in many cases of contract the amount due will have been fixed by the acts of the parties and in such cases a default judgment will not be defective for want of judicial assessment. When the claim is for unliquidated damages for a tortious wrong, such as personal injury, both our system and the federal system of the United States require, if there is no agreement between the parties, judicial assessment. That means that the extent of the defendant's obligation is to be assessed objectively by

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17 *Gray v Formosa* [1962] 3 WLR 1246 (CA) at 1251.
18 At 1252.
19 *Adams v Cape Industries Plc* [1990] 1 Ch 433 (CA).
20 At 566.

> the independent judge upon proof by the plaintiff of the relevant facts. Our notions of substantial justice include, in our judgment, the requirement that in such a case the amount of compensation should not be fixed subjectively by or on behalf of the plaintiff.

[98] As noted in [5] above, this aspect of Dr Emajor's defence is founded on his third affirmative defence that the maintenance orders are contrary to the public policy of New Zealand. The public policy exception to the enforcement of a foreign judgment in New Zealand has been described as a narrow one. This was emphasised by the Court of Appeal in *Reeves v One World Challenge LLC*.[21] The Court cited with approval the test applied by the majority of the Supreme Court of Canada in *Beals v Saldanha*,[22] namely that enforcement would only be denied on this ground if the foreign judgment "shock[ed] the conscience of the reasonable [New Zealander]" or would be "contrary to our view of basic morality".[23] The majority in *Reeves* (Anderson P and O'Regan J) agreed with and specifically adopted the following observation of Major J in *Beals*:

> [75] The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application.

[99] The majority in *Reeves* also cited with approval the statement made by Tamerlin J in the Australian case of *Stern v National Australia Bank*:[24]

> The thread running through the authorities is that the extent to which the enforcement of the foreign judgment is contrary to public policy must be of a high order to establish a defence. A number of the cases involve questions of moral and ethical policy, fairness of procedure, and illegality, of a fundamental nature.

[100] I proceed on the basis that the public policy exception in New Zealand is a narrow one, consistent with the position in Canada and Australia, and is as stated in by the Court of Appeal in *Reeves*.

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21 *Reeves v One World Challenge LLC* [2006] 2 NZLR 184 (CA).
22 *Beals v Saldanha* [2003] 3 SCR 416.
23 At [50] and [104].
24 *Stern v National Australia Bank* [1999] FCA 1421 at [143].

Analysis

[101] Mr Goodall submits that the "error" in the pleadings relating to the deposits in the Broadway bank account "tainted" the maintenance orders for the reasons given in support of his fraud submission. I have already concluded that this aspect of the pleading was not determined by the Family Court and was not relevant to the maintenance orders. It necessarily follows from these findings that this submission must also fail in this context.

[102] Mr Goodall's primary submission under this heading is that the Mexican judgment offends against substantial justice because it imposes a punitive obligation that was arrived at arbitrarily, without any evidential foundation and was not supported by any reasoning. He submits that it was incumbent on the Court to make a careful assessment of the evidence, apply the proportionality test and issue a fully reasoned decision explaining to Dr Emajor why it considered the orders were justified.

[103] Dr Emajor pleaded that the Court did not take into account Ms Emajor's living costs and he complains that there was no evidence of his actual income or earning potential and therefore no way that the Mexican Court could assess whether the percentages arrived at were appropriate.

[104] The Family Court determined spousal and child maintenance by starting with the legal presumption that they were in need of support. The Court also took into account that Dr Emajor was deemed to have confessed to the interrogatives which established that he had "completely abandoned" Ms Emajor and his daughter and had ceased providing financial support to them in June 2005. The Court therefore had sufficient evidence of need.

[105] I do not consider that Dr Emajor can be heard to complain that the Family Court made its order in the absence of any evidence of his actual income or earnings potential. The fact that the Court did not have this evidence was solely because Dr Emajor chose not to provide it. Instead, his attorney advised the Court that Dr Emajor had "no money" and "no job" and could not afford to travel to Mexico to attend the Court hearing. Dr Emajor's attorney also supplied the Court

with the misleading information compiled for immigration purposes concerning the modest salary Dr Emajor expected to receive when he arrived in Mexico.

[106] Dr Emajor must have anticipated that final orders for alimony would be made by the Family Court based on a percentage of his income subject to a minimum figure unless he provided the Court with evidence about his actual earnings. That was the approach the Family Court had adopted when making provisional orders for child maintenance and it was also the approach confirmed on appeal by the Superior Court when it ordered provisional spousal maintenance on the same basis. Absent any new information, it is difficult to see how the Family Court could have been justified in departing from the orders confirmed by the Superior Court.

[107] The provisional order for child maintenance made in the Family Court on 28 August 2006 was based on the salary in Mexico of 20,000 pesos per month indicated by Dr Emajor's attorney and his claim that Dr Emajor was "currently resettling in New Zealand" and it was "difficult to determine" his income. Dr Emajor can hardly complain that by using this information, which his attorney provided, the Court acted arbitrarily in setting the amount of child and spousal support. It is worth noting that Dr Emajor did not appeal against this decision.

[108] By expressing the quantum of the order as a percentage, the Court was able to allow for any fluctuations in Dr Emajor's income and guard against the risk that the payments would be unaffordable. While Mr Mateos said that this type of order is highly unusual, I accept Ms Figueroa López's evidence that, although rare, such orders are occasionally made. She estimated that in her 30 years in practice, she had seen such orders made on more than 20 occasions. The Family Court order requiring Dr Emajor to pay a percentage of his income for alimony subject to a minimum amount cannot be regarded as a one-off aberration by the Family Court given that this approach was confirmed on appeal by the Superior Court on two occasions in this case.

[109] In my assessment, there is nothing about the Family Court judgment, confirmed by the Superior Court, to "shock the conscience" of the average New Zealander or that would be contrary to our view of basic morality. Dr Emajor's

own reaction to the judgment, having "read it again and again", was extremely positive. He expressed "a million thankyous" to Emilio for his role in achieving it and stated that his partner now regarded Emilio as "a god amongst men".

[110] This ground of defence fails.

Is the Court's inherent jurisdiction to enforce the Mexican judgment excluded by the Family Proceedings Act 1980?

[111] Mr Goodall submits that the Court's inherent jurisdiction to enforce maintenance orders made by courts in Mexico is impliedly excluded by the enactment of Part 8 of the Family Proceedings Act. He argues that this is because:

(a) Parliament has provided in Part 8 a specific avenue of recovery for residents of Mexico seeking spousal and child maintenance from liable parties in New Zealand.

(b) The Part 8 procedure reflects specific policy choices made by Parliament that would be undermined if maintenance orders made in Mexican courts were able to be enforced in New Zealand at common law. For example, spousal maintenance orders in New Zealand are generally of limited duration and must be for a fixed periodical sum of money rather than expressed as a percentage of earnings.

(c) The Part 8 regime is being used by persons from Convention countries who have procured maintenance orders in foreign courts.

(d) Child support can also be assessed under the Child Support Act 1991, as has occurred in this case.

[112] Mr Goodall relied on the following comments in the English Court of Appeal's decision in *Etri Fans Ltd v N.M.B.*:[25]

> [H]ere the area covered by that inherent jurisdiction has been the subject of detailed and precise Parliamentary intervention, the circumstances in which the court will grant a stay under its inherent jurisdiction in situations dealt with by the statutory provisions, but where it could or would not do so in

[25] *Etri Fans Ltd v N.M.B.* [1987] 1 WLR 1110 (CA) at 1114.

> exercise of its statutory jurisdiction, will be rare. The jurisdiction is truly a residual one principally confined to dealing with cases not contemplated by the statutory provisions. The facts of this case fall within the situation dealt with by the statute, and I am satisfied there could be no question of the court using this inherent power to grant a stay in favour of the applicants, even if they were joined in the proceedings.

[113] The inherent jurisdiction of the Court may be excluded by statute. However, as the Supreme Court made clear in *Zaoui v Attorney-General*, the statutory purpose to remove such jurisdiction must be made plain.[26]

[114] As observed by the Court of Appeal in *Ross v Ross*, there is no express provision in the Family Proceedings Act excluding the inherent jurisdiction of the High Court to enforce a debt arising out of a maintenance order made by a foreign court that has not been complied with.[27] The Court of Appeal concluded in *Ross v Ross* that the inherent jurisdiction of the Court to enforce a judgment of the Supreme Court of New York was not excluded by necessary implication, even if it had been a maintenance order rather than a money judgment. This was because the United States is not a designated country for the purposes of Part 8 of the Family Proceedings Act. The Court left open the question as to whether the inherent jurisdiction of the High Court is excluded in the case of maintenance orders made in countries where the Part 8 procedure is available, as is the case here.

[115] The Part 8 procedure provides a pathway for persons resident in a Convention country such as Mexico to obtain spousal and child maintenance orders against a liable party residing in New Zealand. This can include future maintenance and past maintenance. However, unlike the position with Commonwealth or designated countries, Part 8 does not provide a mechanism for the enforcement of orders for past maintenance made in Convention countries. The only way that such orders can be enforced in New Zealand is by having recourse to this Court's inherent jurisdiction and suing on the foreign judgment as a debt. Parliament cannot have intended to remove this inherent jurisdiction of the Court because this is the only way such judgments can be enforced in New Zealand.

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[26] *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC) at [35]-[37] and [44].
[27] *Ross v Ross* [2010] NZCA 447, [2011] NZAR 30 (CA) at [25].

[116] It should also be noted that Part 8 does not empower the Family Court in New Zealand to vary final orders made by a court of competent jurisdiction in a Convention country so as to alter the quantum of accrued arrears. The Superior Court in Mexico has finally determined the amounts payable by Dr Emajor for past spousal and child maintenance; it was not suggested that the Courts in Mexico have power to vary these orders retrospectively. The Superior Court judgment therefore gives rise to an issue estoppel binding on both parties in relation to past maintenance.

[117] For these reasons, I do not consider that Parliament expressly, or by necessary implication, excluded the jurisdiction of the High Court to enforce final and conclusive past maintenance orders made by a court of competent jurisdiction in a Convention country such as Mexico.

Are the orders unenforceable because they are not for a specified sum of money?

[118] Mr Goodall's next submission is that the orders are not enforceable at common law because the orders do not specify the sum of money to be paid. He relied on *Sadler v Robins*, an English case decided over 200 years ago, in which the Court declined to enforce a decree of the High Court of Chancery in Jamaica because the amount of money payable under the decree was neither ascertained nor ascertainable in England.[28] This was because the amount payable was to be determined after deducting full costs expended by the defendants in the suit, such costs to be taxed by one of the Masters of the Jamaican Court. This case is distinguishable because the orders made by the Superior Court in Mexico have been perfected.

[119] In *Beatty v Beatty*, the English Court of Appeal enforced a maintenance order made by the Supreme Court of the State of New York requiring the defendant to pay maintenance at the rate of USD 20 per week.[29] Although the order did not stipulate the amount due, it was ascertainable. The order was made by a court of competent jurisdiction and was final and conclusive. There was no need to return to the Court that had made the order to perfect it. Scrutton LJ rejected a submission that the

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[28] *Sadler v Robins* (1808) 1 Camp 254; (1808) 170 ER 948 (CA).
[29] *Beatty v Beatty* [1924] 1 KB 807 (CA).

judgment was not final because the amount due was not apparent on the face of the judgment itself and required an assessment of the number of weeks that the instalments had been in arrears and undertake an arithmetical calculation to arrive at the amount due:

> I cannot accept that contention. No doubt a judgment to be final must be for a sum certain. But a sum is sufficiently certain for that purpose if it can be ascertained by a simple arithmetical process.

[120] Mr Goodall also referred to *Taylor v Begg*.[30] However, that case is of little assistance because it concerned whether a Scottish judgment, which did not stipulate the amount due, was a "judgment" for the purposes of s 2(1) of the Administration of Justice Act 1922 and therefore capable of registration under that Act.

[121] Mr Goodall submits that the amount due under the Superior Court judgment is not ascertainable because this Court cannot be sure what the Mexican Courts meant by the terms "income", "ordinary and extraordinary", and "receives for the concept of his work". I do not accept this submission. The order requires Dr Emajor to pay the relevant percentages of all net income he receives from his employment. Mr White has been able to calculate this sum with precision based on Dr Emajor's tax returns and by deducting the amounts he has paid. There is no dispute about the amount payable in terms of the judgment.

[122] The judgment of the Superior Court of Mexico is final and conclusive. No further steps are required to perfect it. The amount due is ascertainable from the terms of the order and is enforceable.

Is enforcement limited to arrears?

[123] There can be no doubt that the orders are only enforceable in relation to accrued arrears. This is because the orders can be varied at any time by the Family Court in Mexico if there is a change of circumstances. It follows that the orders are not final and conclusive as to the future.

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[30] *Taylor v Begg* [1932] NZLR 286 (SC).

Is part of the claim barred by the Limitation Act 1950?

[124] The orders required monthly payments. A debt became due each month. At common law, an overseas judgment is treated for limitation purposes as a contract debt. The limitation period for contract debts is six years. This proceeding commenced on 21 August 2013. It follows that recovery of any arrears that accrued prior to 21 August 2007 is barred by the Limitation Act.

Result

[125] The plaintiff is entitled to an order declaring that the judgment of the Superior Court of Justice for the Federal Court of Mexico City made on 20 June 2007 is enforceable against the defendant in New Zealand.

[126] The plaintiff is entitled to judgment for the accrued arrears calculated in accordance with this judgment, excluding those that accrued prior to 21 August 2007. If there is any dispute about the quantification of this sum, memoranda should be filed and I will determine it.

[127] Costs are reserved. If this issue cannot be resolved, sequential memoranda should be filed in the usual way.

M A Gilbert J

ADDENDUM

[128] The original version of this judgment, using the parties' correct names, was delivered on 16 August 2016 to the parties and their counsel with a prohibition on further publication pending receipt of submissions as to whether any part of the judgment should be redacted, or pseudonyms used, to protect personal and private information contained in the judgment.

[129] The parties have now advised that they seek protection of this information by using pseudonyms in place of their real names. I am satisfied that this is appropriate given that this is essentially a family dispute and the couple have a minor daughter who is referred to in this judgment. I have accordingly made the necessary amendments to this form of the judgment which may now be published in full.