IN THE COURT OF APPEAL OF NEW ZEALAND

CA462/2016
[2017] NZCA 270

BETWEEN	RICHARD FREDERICK EILENBERG Appellant
AND	LINDA ALEJANDRA GARCÍA LOURDES GUTIERREZ Respondent

Hearing:	5 April 2017 (further submissions received 21 and 27 April 2017)
Court:	Kós P, Harrison and Miller JJ
Counsel:	J A Farmer QC and J K Goodall for Appellant A P Holgate for Respondent
Judgment:	28 June 2017 at 2.15 pm

JUDGMENT OF THE COURT

A The application for leave to admit fresh evidence is declined.

B The appeal is dismissed.

C The appellant is ordered to pay the respondent costs for a standard appeal on a band B basis and usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

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Introduction

[1] New Zealand and Mexico are parties to the United Nations Convention for the Recovery Abroad of Maintenance (UNCRAM). Its purpose is to facilitate the cross-border recovery of maintenance through government agencies in contracting states.[1] Part 8 of the Family Proceedings Act 1980 (the FPA) was enacted by Parliament to incorporate New Zealand's UNCRAM obligations into domestic law. It allows a person living in a "Convention country" such as Mexico to recover spousal and child maintenance through the Family Court from a liable person living in New Zealand.

[2] The discrete question in this appeal is whether pt 8 operates as an exclusive statutory code for the recovery of foreign maintenance, excluding by implication the High Court's inherent jurisdiction at common law to enforce a money judgment for maintenance arrears made by a court in a Convention country.

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1 Convention for the Recovery Abroad of Maintenance 268 UNTS 3 (opened for signature 20 June 1956, entered into force 25 May 1957) [UNCRAM].

[3] The issue has emerged in this way. The respondent, Ms Lourdes, applied to the High Court at Auckland for a declaration that a judgment of the Superior Court of Justice for the Federal District of Mexico City for payment of maintenance arrears (the Mexican judgment) was enforceable against her former husband, the appellant Dr Eilenberg, who now lives in New Zealand. Dr Eilenberg does not challenge Gilbert J's dismissal of his primary defences to the application including that the Mexican judgment was time-barred, was not for a specified sum of money, and was unenforceable on the grounds of public policy, fraud and substantive unfairness.[2]

[4] Mr Farmer QC, who did not appear in the High Court, has now refined the grounds of Dr Eilenberg's challenge on appeal. Only Dr Eilenberg's defence of implied statutory exclusion, which Gilbert J also dismissed, remains for our determination. We note that this argument did not apparently enjoy the same prominence in the High Court as it now assumes on appeal.[3]

Background

[5] The number and nature of Dr Eilenberg's defences at first instance required Gilbert J to address fully the background facts.[4] Our summary of the relevant circumstances is drawn from his judgment.

[6] Dr Eilenberg is a New Zealander. His former wife, Ms Lourdes, is Mexican. They met in 1995 in Auckland where Dr Eilenberg practised dentistry. After marrying in Mexico in 1996 they returned to live in Auckland where their daughter was born in 2000.

[7] In 2003 the parties relocated to Cuernavaca, Mexico. In preparation they sold their house in Auckland, Dr Eilenberg's dental practice and other assets. Initially they lived with Ms Lourdes' parents, spending money to build an extension to the parents' home. Dr Eilenberg did not work while he was in Mexico.

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2 *Emajor v Emajor* [2016] NZHC 2022 [HC judgment].
3 See [111]–[117].
4 At [13]–[58].

The Mexican proceedings

[8] In mid 2005 the parties separated and later that year Dr Eilenberg returned to New Zealand to resume dentistry. A week prior to departure he filed proceedings in the Family Court in Mexico City. He sought various orders including divorce on various grounds, custody of their daughter, repayment of some monies held by Ms Lourdes and a half share in the family home in Cuernavaca.[5] In view of his intention to leave Mexico he granted a power of attorney to a lawyer and his brother-in-law to take all necessary steps on his behalf.[6] He was represented by counsel throughout the judicial process.

[9] Ms Lourdes opposed all of the orders sought by Dr Eilenberg and counterclaimed for dissolution of the marriage also on various grounds. She sought custody of their daughter as well as provisional and final maintenance to support the two of them.[7] Dr Eilenberg accepted liability to pay maintenance for his daughter if custody was granted to his wife but denied that he was liable to pay spousal support.[8]

[10] In August 2006 the Family Court granted Ms Lourdes provisional custody of the couple's daughter and ordered Dr Eilenberg to pay provisional child support for a sum equal to 25 per cent of his income.[9]

[11] In September 2006 Dr Eilenberg's lawyer filed a writ confirming his willingness to pay child support in whatever amount the Court considered appropriate to meet her needs.[10] By then Dr Eilenberg had been employed in an Albany dental practice since late October 2005. He remained there until March 2007. It would have been a simple matter for him to provide evidence of his earnings to the Family Court. He chose not to do so and instead made statements about his circumstances in the writ which Gilbert J found were "highly misleading".[11]

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5 At [26]–[27].
6 At [28].
7 At [30].
8 At [31].
9 At [33].
10 At [34].
11 At [36].

[12] The Family Court then summoned both parties to appear at a hearing to be held in October 2006 and to respond personally to "interrogatives".[12] Dr Eilenberg was warned that if he did not appear without just cause he would be deemed to have "confessed". While Dr Eilenberg decided not to attend, Ms Lourdes did so. Meanwhile Ms Lourdes had appealed to the Superior Court against the provisional orders made in August by the Family Court. Her appeal was allowed and Dr Eilenberg was ordered to pay increased child support.[13] Further hearings followed in the Family Court between December 2006 and March 2007. Again Dr Eilenberg did not attend in person.

[13] In sum Dr Eilenberg's application for divorce failed but Ms Lourdes' succeeded. Final orders were made in the Family Court in April 2007 and upheld on appeal by the Superior Court on 20 June 2007. Dr Eilenberg was obliged to pay 35 per cent of his annual income to Ms Lourdes as child and spousal maintenance (25 per cent being for the daughter's benefit) or MXN 7,000 per month, whichever was the greater.[14]

[14] Dr Eilenberg's obligation to provide child support arose under arts 287 and 303 of the Civil Code for Mexico City, which by art 285 survives his loss of paternal authority.[15] His obligation to pay spousal maintenance arose under art 288 as a result of his failed claim for divorce and Ms Lourdes' successful counterclaim.[16] By art 311 Dr Eilenberg's income and assets were relevant to the amounts payable, with the means of the liable party to be balanced against the recipient's needs.[17] He did not provide the Family Court with any evidence to displace the presumption that his wife and child were in need of financial support.[18] As Gilbert J noted, the judgment requiring him to pay spousal and child support was an inevitable consequence.[19] In failing to provide evidence of his financial circumstances,

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12 At [39].
13 At [49].
14 At [55]–[60].
15 At [84] and [86].
16 At [85].
17 At [86].
18 At [87].
19 At [91].

Dr Eilenberg left the Mexican courts with no option but to calculate his liability on a percentage of his notional income.[20]

Subsequent events

[15] Between May 2007 and November 2008 Dr Eilenberg paid Ms Lourdes maintenance at the minimum monthly rate of MXN 7,000 (a total of NZD 11,250) calculated without reference to his annual income.[21] He then fell into default. However, in response to an approach by the Inland Revenue Department (the IRD) in August 2012 Dr Eilenberg resumed maintenance payments for his daughter only, backdated to 1 April 2012. Gilbert J accepted Dr Eilenberg's evidence that he had made child-support payments totalling NZD 49,291.70 as at 31 March 2016 in accordance with assessments by the IRD.[22]

[16] Gilbert J accepted that Dr Eilenberg's circumstances have changed following his remarriage in December 2008.[23] He now has two stepdaughters to support. Dr Eilenberg understands Ms Lourdes' financial circumstances may also have changed in the light of an inheritance. Subject to the result of Ms Lourdes' application in the courts of New Zealand, Dr Eilenberg intends to apply immediately in the Mexican courts for a variation of the orders contained in the judgment.

[17] In February 2016 Ms Lourdes filed her proceeding in the High Court. She sought to recover arrears payable in accordance with the Mexican judgment, which totalled about NZD 262,000 as at 31 March 2014. This was a net figure, allowing Dr Eilenberg a credit for child-support payments made to the IRD since 2012. Gilbert J declared that (a) the judgment was enforceable in New Zealand against Dr Eilenberg; and (b) Ms Lourdes was entitled to judgment for accrued arrears in an amount to be fixed payable from 21 August 2007.[24] The result reflects Gilbert J's unchallenged finding that Ms Lourdes' right of enforcement was limited

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20 At [92].
21 At [61].
22 At [61].
23 At [63].
24 At [125]–[126].

to arrears, applying the settled principle that a foreign judgment must be final and conclusive for a specified sum.[25]

[18] We add that Dr Eilenberg has applied under r 45 of the Court of Appeal (Civil) Rules 2005 for leave to admit fresh evidence in the form of an affidavit by Jose Mateos, Dr Eilenberg's attorney in Mexico. Mr Mateos' affidavit provided information on steps taken by Dr Eilenberg in the Mexican courts subsequent to Gilbert J's judgment to fix an end date for his maintenance liability and have its quantum reassessed. That evidence is not material to our determination of Dr Eilenberg's appeal and we decline leave.

Legislative framework

[19] The legislative framework requires detailed consideration. UNCRAM was concluded in 1956 by 24 signatories including Mexico; New Zealand later acceded in February 1986 and Mexico ratified in July 1992. As noted, its purpose is to facilitate the recovery of maintenance through government agencies in contracting states. Part 8 incorporates the machinery necessary to achieve that purpose into New Zealand law.

The Convention for the Recovery Abroad of Maintenance

[20] UNCRAM was designed to overcome the serious legal and practical difficulties arising from prosecuting or enforcing claims for maintenance abroad by providing a mechanism for transmitting information internationally through official agencies.[26] A contracting party is obliged to "designate one or more judicial or administrative authorities" to act in its territory as "Transmitting Agencies" and "designate a public or private body" to act in its territory as "Receiving Agency".[27] The process requires the Transmitting Agency in the claimant's country to send an application to the Receiving Agency in the respondent's jurisdiction. The Receiving Agency then assumes responsibility for taking the appropriate steps to recover the maintenance and where necessary to institute and prosecute an action for it.

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25 At [118]–[123] applying *Beatty v Beatty* [1924] 1 KB 807 (CA).
26 UNCRAM, above n 1, preamble.
27 Article 2.

[21] An application is to be determined by the law of the respondent's state, including its rules of private international law, thereby conferring exclusive jurisdiction on that state.[28] UNCRAM confirms, among other things, that "remedies provided for in this Convention are in addition to, and not in substitution for, any remedies available under municipal or international law".[29]

Part 8 of the Family Proceedings Act 1980

[22] Part 8 was introduced to Parliament in 1978. Its purpose was to enable the Government to become a party to UNCRAM and to "assist New Zealand residents in obtaining maintenance from persons residing outside the country".[30] While the Domestic Proceedings Act 1968 enabled registration and enforcement in New Zealand of maintenance orders from Commonwealth countries and others designated by Order in Council, the new regime contained "significant differences".[31] Many changes were made to the Bill following receipt of "an unprecedented number of submissions" but without substantial amendments to the overseas maintenance provisions.[32] Indeed, there was little discussion of pt 8 in the parliamentary debates, and certainly no indication that it was intended to become the exclusive mechanism for the enforcement of maintenance arrears arising from a foreign judgment.

[23] The FPA took effect from 1 October 1981 but pt 8 did not come into force until New Zealand's accession to UNCRAM. Part 8 provides discrete avenues for applicants to recover maintenance based on their place of residence. Applicants based in a "Commonwealth country"[33] or "designated country"[34] can register a maintenance order made in those countries for enforcement in New Zealand by a District Court Judge subject to powers of variation, confirmation and discharge.[35]

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28 Article 6.3. See also *KJS v DAS [Maintenance]* [2007] NZFLR 939 (FC) at [8].

29 Article 1.2.

30 (6 October 1978) 421 NZPD 4283.

31 Family Proceedings Bill 1978 (112-1) (explanatory note) at xx–xxi.

32 (6 December 1979) 427 NZPD 4543–4544.

33 This includes the Republic of Ireland, members of the Commonwealth, the Cook Islands, Niue and Tokelau: Family Proceedings Act 1980, s 2, meaning of "Commonwealth country".

34 This includes countries specified by a Gazette notice given by the Minister of Justice under s 135: s 2, meaning of "designated country". It is currently limited to the Republic of South Africa, the State of California in the United States, and the Chinese Special Administrative Regions of Hong Kong and Macau.

35 Sections 135–143.

[24] Applicants based in a "Convention country"[36] such as Mexico must follow a different path. They cannot register orders obtained abroad. Their claims for spousal or child maintenance must be determined under New Zealand law.[37] This more complex procedure applies for transmitting information:

(a) The process is triggered when the Secretary — the chief executive of the Ministry of Justice[38] — receives from "the responsible authority in a Convention country" an application from a person who "claims to be entitled to recover maintenance" from a person residing in New Zealand.[39] All applications are administered through the Central Authority of the Ministry of Justice in Wellington.

(b) Part 8 is silent on the contents of an application except for the requirement of "all relevant accompanying documents".[40] Under UNCRAM "all relevant documents" includes, where necessary, a power of attorney authorising the Receiving Agency to act on behalf of the claimant and photographs of the parties.[41] The Transmitting Agency must take all reasonable steps to ensure that the requirements of the law of the Receiving Agency are complied with; and the application must include the particulars of the claimant and any legal representative, particulars of the respondent and "the grounds upon which the claim is based and of the relief sought, and any other relevant information such as [their] financial and family circumstances".[42] On the claimant's request, the Transmitting Agency must also transmit copies of "any order, final or provisional, … obtained by the claimant for the payment of maintenance in a competent tribunal".[43] These documents to be provided by the Transmitting Agency under UNCRAM are apparently the relevant

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36 Any party to UNCRAM excluding Australia: s 2, meaning of "Convention country".

37 Section 145A. Applications for maintenance of any person other than a child of the respondent are determined as a domestic application under pt 6, whereas applications for any child are determined in accordance with ss 145B–145I under pt 8.

38 Section 2, meaning of "Secretary".

39 Section 145.

40 Section 145.

41 UNCRAM, above n 1, art 3.3.

42 Article 3.4.

43 Article 5.1.

documents to be contained in an application under pt 8. The FPA also refers to the issue of proof relating to "a document purporting to be signed by a Judge, District Court Judge, or officer of the court in a … Convention country".[44]

(c) On receipt from the responsible authority (that is, the Transmitting Agency under UNCRAM), the Secretary sends the application to the Registrar of the District Court nearest to where the respondent resides for determination by its Family Court division.[45] In several cases the Family Court seems to have processed direct applications to the Ministry or the Registrar rather than on the Ministry's referral upon receipt from the responsible authority in the applicant's home jurisdiction.[46]

[25] Once within the Family Court's jurisdiction, the application for spousal maintenance is treated as being under pt 6 of the FPA and is determined under the "clean break" principle when applying ss 64 and 64A.[47] While recognising the obligation to maintain the other spouse after dissolution of marriage, the Family Court seeks to sever the financial relationship where appropriate and promote the self-sufficiency and responsibility of the maintained party within a reasonable time. The entitlement is accordingly limited to "a periodical sum towards … future maintenance" or "a lump sum" for arrears or future maintenance.[48] Orders can be subsequently varied, discharged or suspended and arrears remitted.[49] There is no power to fix maintenance as a percentage or share of income.

[26] The entitlement to child maintenance is limited in the same way, to be fixed according to the relevant circumstances affecting the welfare of the child and other factors such as the reasonable needs of the parents and income-earning capacity.[50]

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44 Family Proceedings Act, s 151(1).
45 Section 145.
46 See for example *M v Secretary for Justice* [2007] NZFLR 939 (FC); *MVDMS v FJS* FC Tauranga FAM-2009-070-578, 12 April 2010; *LH v PJH* [2012] NZFC 2986; and *Delany v Mulloy* [2016] NZFC 243.
47 See *Slater v Slater* [1983] NZLR 166 (CA) at 173–174.
48 Family Proceedings Act, s 69(1).
49 Section 99.
50 Section 145C(2).

Applications are determined according to the obligation of each parent under New Zealand law to maintain a child until the age of 16 or up to 20 years if the child pursues further education and the Family Court so directs.[51] The maintenance order once made is sent to the IRD to administer and enforce in accordance with the Child Support Act 1991.[52]

[27] As Mr Farmer submits, the effect of these provisions is that the Family Court deals with liability de novo where a resident of a Convention country applies to recover maintenance. While the Family Court might take account of a maintenance order made by a court of competent jurisdiction in a Convention country, it is not bound by its terms.[53]

Enforcement of foreign judgments

[28] Mr Farmer accepts that the Mexican judgment would be enforceable here were it not for pt 8. His proposition is that the statutory pathway provided by UNCRAM and pt 8 is the sole means by which a Mexican applicant is entitled to recover maintenance from a New Zealand resident through the Family Court and according to domestic law. Mr Farmer's ouster submission cannot be sensibly addressed, however, without identifying the principles governing enforcement of a foreign judgment. Indeed, as we shall explain and emphasise, those principles are largely determinative of Dr Eilenberg's appeal.

Procedures, prerequisites and exceptions

[29] When Ms Lourdes applied to the High Court two statutory routes were available for enforcing a foreign judgment in New Zealand. One was under s 56 of the Judicature Act 1908 if the judgment was for a monetary sum and "obtained in any court of Her Majesty's dominions".[54] The other was pursuant to the Reciprocal

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51 Section 145C(1).

52 Section 101(2).

53 Article 5.2 of UNCRAM provides that orders obtained in a competent tribunal of any contracting party "may be transmitted in substitution for or in addition to" the relevant documents to be contained in an application.

54 This provision has been repealed and replaced by s 172 of the Senior Courts Act 2016, which contains no material differences.

Enforcement of Judgments Act 1934 if the relevant jurisdiction has been designated by an Order in Council. Neither applies to Mexico.

[30] Because this statutory machinery was unavailable to her, Ms Lourdes had to pursue an action on the judgment at common law. This third and residual route falls within the inherent jurisdiction of the High Court to enforce foreign judgments. The decisions of Tipping J in *Kemp v Kemp* and of this Court in *Reeves v OneWorld Challenge LLC* confirm the three prerequisites to the High Court exercising its jurisdiction to enforce a foreign judgment: (a) the foreign court must have had jurisdiction to give judgment; (b) the judgment must be for a definite sum of money; and (c) the judgment must be final and conclusive.[55] Those authorities also recognise the three settled exceptions to this rule, where: (a) the judgment was obtained by fraud; (b) enforcement of the judgment would be contrary to public policy; or (c) the proceedings in which the judgment was obtained were contrary to natural justice.

[31] A foreign judgment is not otherwise impeachable or examinable on its merits whether for error of fact or of law; and the burden lies on the party seeking to impeach it.[56] This statement reflects the "general principle of private international law" identified by Tipping J in *Kemp v Kemp* that:[57]

> … a judgment in personam of a foreign Court of competent jurisdiction, which is *final and conclusive on the merits* in the final country, is to be regarded as *final and conclusive in New Zealand* as between the same parties and their privies and as regards any issue which the judgment or order settles.
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> (Our emphasis.)

The basis for enforcement at common law

[32] Both the origin of and rationale for that general principle assume importance in this case. The power to enforce foreign judgments was located originally in the

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55 *Kemp v Kemp* [1996] 2 NZLR 454 (HC) at 458 approved in *Reeves v OneWorld Challenge LLC* [2006] 2 NZLR 184 (CA) at [36]–[37] and *Michael Wilson & Partners Ltd v Sinclair* [2016] NZCA 376, [2016] NZAR 1186 at [20] and [26].

56 *Kemp v Kemp*, above n 55, at 458.

57 At 458.

doctrine of the comity of nations.[58] However, two decisions in the mid-nineteenth century signalled a conceptual shift from the doctrine of comity to that of obligations.[59] In *Russell v Smyth* Baron Parke held that foreign judgments create obligations enforceable in England by an action of debt analogous to those arising from a contract made abroad.[60] In *Schibsby v Westenholz* Blackburn J found to similar effect that a foreign judgment "imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts in this country are bound to enforce".[61]

[33] In *Adams v Cape Industries Plc* Scott J approved *Schibsby*'s statement of principle that part of the rationale for enforcing an obligation incurred abroad is the presumption that the defendant was bound by and also enjoyed the protection of the laws of the foreign country at the time of judgment.[62] Scott J held that the obligation to pay is underpinned by the foreign court's territorial jurisdiction over the judgment debtor or, where in personam money judgments are concerned, the debtor's voluntary submission to jurisdiction.[63] An element of consent is clearly present if the debtor commenced the foreign proceedings, as Dr Eilenberg did by filing for divorce in Mexico. In upholding Scott J's reasons, the Court of Appeal held that "[b]y going to a foreign place [a person] invests himself by tacit consent with the rights and obligations stemming from the local laws as administered by the local Court".[64] The Supreme Court of the United Kingdom recently affirmed these principles in *Rubin v Eurofinance SA*.[65]

[34] However, as Scott J said in *Adams*, the "overriding consideration" is whether a foreign judgment created an "obligation to pay" which "under English law" the debtor is bound to discharge.[66] The Court of Appeal held similarly that the settled

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58 Lord Collins of Mapesbury (ed) *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at [14-007].

59 This Court's statement in *Chen v Lin* [2016] NZCA 113 at [18] that the jurisdiction is based on the principle of comity is contrary to settled authority.

60 *Russell v Smyth* (1842) 9 M & W 810 at 818–819.

61 *Schibsby v Westenholz* (1870) LR 6 QB 155 at 159.

62 *Adams v Cape Industries Plc* [1990] 2 WLR 657 (Scott J and CA) at 709 approving *Schibsby v Westenholz*, above n 61, at 161.

63 At 679–680.

64 At 770.

65 *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 at [6]–[8].

66 *Adams v Cape Industries Plc*, above n 622, at 680.

jurisdictional factors help simply to explain why a person who goes abroad thereby "incurs a duty to abide in England by a foreign judgment".[67] In *Owens Bank Ltd v Bracco* the Court expanded on this point:[68]

> [I]n order for the foreign judgment to be enforced in this country, it is essential that the foreign court should have had jurisdiction over the defendant, not in the sense of the foreign law but *according to the rules of our law* … and the defences which may be pleaded by the defendant in an action upon a foreign judgment, such as that the judgment was obtained by fraud, are themselves *creatures exclusively of English law*.
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> (Our emphasis.)

In short, the right to enforce a foreign judgment in the domestic courts is "a right created and defined by English law and not by foreign law".[69]

[35] In *Rubin* the United Kingdom Supreme Court affirmed the doctrine of obligations as the "theoretical and historical basis for the enforcement of foreign judgments at common law".[70] The doctrine provides analytical clarity as to the nature of Ms Lourdes' claim for maintenance arrears. It is perhaps trite to observe that a foreign judgment does not have domestic force of law unless and until it is transformed by the judicial or statutory machinery into a debt recoverable in New Zealand.[71] Nevertheless, its existence creates a substantive right under domestic law in the creditor's favour to apply for enforcement of the debtor's obligation to pay the monies owed: enforcement of foreign judgments as debts due in this country is an important part of the High Court's inherent jurisdiction as a superior court of general and original jurisdiction. Subject to the settled exceptions, the approach developed by the common law recognises the transnational reality of private obligations which are thus enforceable against persons and property in New Zealand. We shall return to this decisive principle.

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67 At 770.

68 *Owens Bank Ltd v Bracco* [1992] 2 AC 443 (CA) at 457.

69 At 457.

70 *Rubin v Eurofinance SA,* above n 655, at [9]. See also Adrian Briggs "Recognition of Foreign Judgments: A Matter of Obligation" (2013) 129 LQR 87.

71 *Michael Wilson & Partners Ltd v Sinclair*, above n 555, at [33].

Exclusion by statute

[36] We accept that the High Court's inherent jurisdiction, and with it a creditor's right to enforcement, may nevertheless be altered or ousted by an Act of Parliament. Indeed, that is the effect of the Reciprocal Enforcement of Judgments Act and the Judicature Act insofar as they prescribe a procedure which certain creditors must follow to realise their substantive rights.[72]

[37] We agree with Mr Farmer that the question of whether the High Court has jurisdiction to enforce the Mexican judgment must be dictated by the terms of the relevant legislation. The question is answered by enquiring whether enforcement at common law is so inconsistent with the pt 8 regime that it could not survive or whether the two could not consistently coexist.[73] We agree with Mr Farmer also that the focus is not on whether the statute uses exclusionary language but is instead on the statutory purpose to the extent of its alleged inconsistency with the High Court's inherent jurisdiction and Ms Lourdes' right to enforce the Mexican judgment.

[38] Mr Farmer accepts that pt 8 does not expressly exclude the enforcement jurisdiction of the High Court. The question of whether pt 8 impliedly excludes that jurisdiction was raised before this Court in *Ross v Ross*.[74] Mrs Ross sought to enforce against her former husband in New Zealand a judgment for maintenance arrears from the Supreme Court of New York. Her husband argued that pt 8 excluded the High Court's jurisdiction. The obvious answer was that pt 8 was unavailable because the United States was not a Commonwealth, designated or Convention country under the FPA. This Court left open, however, the question which has arisen here.

[39] In dismissing Dr Eilenberg's challenge Gilbert J accepted that pt 8 entitles a resident of a Convention country such as Mexico to *obtain* orders for future and past maintenance against a liable party residing in New Zealand.[75] However, pt 8 does

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72 See *Hunt v BP Exploration Company (Libya) Ltd* [1980] 1 NZLR 104 (SC) applying *Hunt v BP Exploration Co (Libya) Ltd* (1980) 28 ALR 145 (HCA); and *Michael Wilson & Partners Ltd v Sinclair*, above n 555, at [31].

73 *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646 (CA) at [52].

74 *Ross v Ross* [2010] NZCA 447, [2011] NZFLR 440 at [25].

75 HC judgment, above n 2, at [115].

not provide a mechanism to *enforce* orders for past maintenance made in Convention countries, unlike Commonwealth or designated countries. Enforcement is only available by resorting to the Court's inherent jurisdiction and suing on a foreign judgment as a debt. Gilbert J also found that the Mexican judgment gave rise to an issue estoppel because it was by nature final and made by a court of competent jurisdiction.[76]

[40] Apart from the decision in *Ross v Ross*, we were not referred to any authority in New Zealand or elsewhere on whether pt 8 or its overseas equivalent impliedly excludes the enforcement jurisdiction. The general interpretive principle arose for consideration in *Zaoui v Attorney-General.*[77] The question was whether statutory powers of detention impliedly excluded the High Court's inherent power to grant bail. We note the important distinction between the inherent jurisdiction of the High Court, connoting an original jurisdiction not derived from any source other than the common law, and its inherent powers which are necessary for the due administration of justice in the light of its statutory and common-law jurisdiction.[78] In any event the Supreme Court confirmed that the High Court's procedural powers or substantive jurisdiction can be "clearly excluded" by statute "expressly or by necessary implication".[79]

Argument on appeal

The effect of pt 8

[41] Mr Farmer describes the purpose of pt 8 as being to provide a comprehensive scheme to enable persons from Convention countries to claim and enforce maintenance. That right, he says, is available only (a) in the Family Court of New Zealand where maintenance can be fully supervised by, for example, remitting arrears and ordering variations; and (b) under New Zealand law, with maintenance being determined in accordance with the FPA and the Child Support Act. Essentially he submits that pt 8 prescribes the forum and the applicable law. Therefore recognition of a right to enforce Ms Lourdes' judgment through the High Court's

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76 At [116].
77 *Zaoui v Attorney-General* [2005] 1 NZLR 557 (SC).
78 At [35]. See also *Watson v Clarke* [1990] 1 NZLR 715 (HC) at 720.
79 At [36] and [53].

inherent jurisdiction would be fundamentally inconsistent with pt 8, particularly where the maintenance order is based on a percentage of income which is not available as a measure of liability in New Zealand.

[42] Mr Farmer further submits that enforcement would usurp the statutory role of the Minister of Justice in being able to designate countries whose orders can be registered or enforced under pt 8.[80] There are, he says, fundamental differences between giving effect to foreign maintenance orders under pt 8 and enforcing them through the inherent jurisdiction. There is a risk of direct conflict or contravention and thus far greater scope to frustrate the statutory purpose.[81] He submits that Parliament deliberately chose not to establish a system of registration for Convention countries under pt 8 as it did for maintenance orders obtained in Commonwealth and designated countries; and that Gilbert J's judgment turns pt 8 on its head by elevating Mexico to a status beyond that enjoyed by Commonwealth and designated countries. Permitting enforcement of the Mexican judgment under the inherent jurisdiction would undermine the hierarchy of the statutory scheme.

[43] Mr Farmer emphasises these four elements of the legislative scheme:

(a) The Family Court has exclusive jurisdiction over all proceedings under the FPA and Child Support Act, including domestic and overseas spousal and child maintenance orders.[82]

(b) Under the Family Court Act 1980, Parliament determined and limited the High Court's jurisdiction to deal with issues from the Family Court.[83] The High Court's function is of an appellate nature and it must not disturb the legislative allocation of the originating jurisdiction.[84]

(c) In New Zealand child maintenance is fixed by reference to specific measures under the Child Support Act, administered and enforced by

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80 Family Proceedings Act, s 135.
81 *Michael Wilson & Partners Ltd v Sinclair*, above n 555, at [38].
82 Family Proceedings Act, s 4.
83 Family Court Act 1980, ss 11 and 13–14.
84 *Carrington v Carrington* [2014] NZFLR 571 (HC) at [103].

the IRD applying a formula which the debtor can challenge in the Family Court.[85]

(d) In New Zealand spousal maintenance is determined under pt 6 of the FPA, which represented a fundamental change in the policy underlying that obligation and clearly differs from the percentage-based approach to maintenance in Mexico.

[44] In Mr Farmer's submission pt 8 is not just procedural in nature. To the contrary, it creates substantive rights which enable maintenance debtors to have orders varied, rescinded or suspended in New Zealand, arrears remitted and orders in Convention countries for maintenance to be reassessed under New Zealand law. Parliament has thereby foreclosed any inquiry into the application of foreign law to the question of spousal maintenance.[86] Dr Eilenberg's substantive rights and safeguards would be lost if enforcement of the maintenance arrears were permitted in the High Court.

Common-law authorities

[45] Mr Farmer relies on three authorities to support his submission of inconsistency between pt 8 and the inherent jurisdiction. In the first, *Etri Fans Ltd v NMB*, the English Court of Appeal held that the provisions of the Arbitration Act 1975 (UK) limited its inherent power to grant a stay of an arbitration award.[87] This result necessarily followed from what was called "detailed and precise Parliamentary intervention" which limited the availability of the Court's powers to rare circumstances.[88] Woolf LJ observed that the Court's jurisdiction was of a residual nature "confined to dealing with cases not contemplated by the statutory provisions".[89] In the second, *Re HIH Casualty and General Insurance Ltd*, the House of Lords found that the Insolvency Act 1986 (UK) conferred a power to remit assets back from England to New South Wales for distribution to creditors there

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85 Child Support Act 1991, pt 7.
86 *Laws of New Zealand* Conflict of Laws: Choice of Law (online ed) at [60].
87 *Etri Fans Ltd v NMB* [1987] 1 WLR 1110 (CA).
88 At 1114.
89 At 1114.

under Australia's federal insolvency legislation.[90] While the question was strictly obiter, it was argued that the Court retained a power of the same effect. The House of Lords was divided on the issue, but Mr Farmer notes Lord Neuberger's dismissal of this proposition on the ground it would "involve the inherent jurisdiction almost thwarting the statutory purpose".[91]

[46] Mr Farmer's third authority is *Carrington v Carrington*.[92] Mrs Carrington sought a declaratory judgment on the validity of her estranged husband's will. She alleged that family members had unduly influenced him to change it along with an enduring power of attorney when he lacked mental capacity. Mrs Carrington relied on the Court's inherent "parens patriae" jurisdiction, which is an ancient power to make decisions affecting the welfare of children or persons of unsound mind.[93] Katz J struck out the proceeding on the ground that the Family Court was the proper jurisdiction to determine the issue.[94] In particular she found that the protections afforded by the Protection of Personal and Property Rights Act 1988 impliedly excluded the High Court's declaratory jurisdiction. Emphasis was given to the principles that (a) where relevant legislation prescribes a specific procedural process there is a general presumption that it should be followed; and (b) when specific rights are created by statutes, the courts will generally require parties to use the special statutory procedures provided for those rights. Katz J held that the parens patriae jurisdiction only survived to the extent that it did not conflict with the statutory provisions as a "safety net" where the legislation did not provide an adequate remedy.[95]

[47] We do not read these decisions as supporting Mr Farmer's submission that invoking the High Court's jurisdiction in the present case would thwart the statutory purpose of pt 8; or that a legislative scheme specifically established for the recovery of maintenance would be undermined by enforcing a foreign judgment for that same liability. It is axiomatic that the inherent jurisdiction of the Court is of a residual nature, subsisting to provide a remedy where no other relief is available. All three

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90 *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852.
91 At [76].
92 *Carrington v Carrington*, above n 84.
93 At [10]–[19].
94 At [104]–[105].
95 At [103].

cases applied orthodox principles in discrete contexts to find there was no scope to invoke that residual power. That was because the subject matter — the regulation of legal rights and obligations in the particular circumstances — was governed by express statutory provisions. By contrast, the detailed provisions under pt 8 do not purport to regulate the parties' rights and obligations in the circumstances applying to Ms Lourdes' application.

[48] Mr Farmer's authorities take us no further than the interpretive principle confirmed in *Zaoui* and the question left open by this Court in *Ross v Ross*. They do not assist in determining whether pt 8 provides an exclusive code for determining and enforcing the liability of a person resident in New Zealand to pay spousal or child maintenance to a person in a Convention country, impliedly ousting the High Court's inherent jurisdiction to enforce arrears arising from a maintenance judgment made in that country.

Decision

Right to enforce judgment

[49] Our analysis starts with the conceptual foundation for the High Court's inherent jurisdiction to enforce a foreign money judgment as creating an enforceable obligation in the nature of a debt.[96] The creditor is required to issue fresh proceedings in New Zealand to obtain an order. A declaration of enforceability must follow together with entitlement to judgment in New Zealand if, as in this case, the High Court is satisfied that the judgment cannot be impugned on the settled exceptions of fraud, public policy or breach of natural justice. It cannot otherwise be impeached or examinable on its merits and is regarded as final and conclusive here as between the parties on any issue which the judgment settles.

[50] The authorities confirm Ms Lourdes' substantive right under the common law of New Zealand to enforcement of the Mexican judgment. In our view it is significant that the only recognised statutory refinements to the High Court's inherent jurisdiction are of a purely procedural nature. The Reciprocal Enforcement of Judgments Act and the Judicature Act provide simpler and more effective routes

[96] See [28]–[35] of the judgment.

for enforcing judgments of countries which are either members of the Commonwealth or have been designated by an Order in Council. The substantive right to enforce the foreign judgment is unaffected by the procedures provided by Parliament.

[51] It is of no moment that Dr Eilenberg's obligation to pay monies owed to Ms Lourdes arose from unpaid maintenance. His liability might equally have arisen from damages awarded after a contractual dispute or a tortious action. It is decisive that New Zealand law entitles Ms Lourdes to enforce "a single indivisible judgment for a sum of money"[97] in circumstances where Dr Eilenberg voluntarily submitted to the jurisdiction of the Mexican Courts. He in fact initiated the proceedings there. Our law recognises the Mexican judgment as final and conclusive on the issue of Ms Lourdes' rights and Dr Eilenberg's liability to pay maintenance arrears; and our courts will not lightly deprive a person of an existing substantive right unless that is Parliament's clear intention.

Effect of statutory provisions

[52] In our judgment neither UNCRAM nor pt 8 is intended to deprive a maintenance creditor of his or her right to enforce a judgment for arrears under his or her domestic law against a liable debtor residing in another jurisdiction. UNCRAM and its adoption through pt 8 is of a procedural and supplementary nature. The Convention's stated purpose was, we repeat, to facilitate the recovery of maintenance through government agencies in contracting states. In conformity with that purpose pt 8 provides a regime for overseas persons to recover maintenance through the Family Court from New Zealand residents. Mr Farmer himself recognised that its purpose was of an enabling nature.

[53] UNCRAM expressly recognised the preservation of settled rights arising under the private international law of New Zealand: its remedies are "in addition to, and not in substitution for, any remedies available under municipal or international law".[98] Mr Farmer accepts that this statement shows the negotiating parties to UNCRAM, which did not include New Zealand, did not intend the regime to be

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97 *Kemp v Kemp*, above n 55, at 459.
98 UNCRAM, above n 1, art 1.2.

exhaustive. However, he says, the question is not what those other countries intended but rather what Parliament intended when enacting pt 8; and in any event the statement does nothing more than recognise the sovereign right of states to permit alternative avenues for recovery if they wish.

[54] We disagree. Accession to UNCRAM was the principled rationale for implementing pt 8. As contracting parties New Zealand and Mexico accepted and sought to adopt its purpose and terms into domestic law. It is artificial to construe pt 8 in isolation from its founding international instrument. New Zealand law proceeds on the well-settled presumption that domestic legislation will be interpreted, as far as its wording allows, in a manner consistent with international obligations.[99] We are satisfied that the purpose of UNCRAM was to create an alternative pathway for a person in Ms Lourdes' position to obtain payment of maintenance. In the absence of an express legislative intent, and if pt 8 does not depend for its efficacy on excluding the High Court's jurisdiction, the FPA should not be interpreted in a way which ousts existing modes of enforcing unpaid maintenance. That interpretation would be contrary to UNCRAM's express preservation of settled rights of enforcement including those arising under the principles of private international law.

[55] UNCRAM is underpinned by two factors: (a) the urgency of solving the humanitarian problem resulting from the situation of persons in financial need who are dependent for their maintenance on persons abroad; and (b) the serious legal and practical difficulties caused by the prosecution or enforcement abroad of claims for maintenance.[100] Its negotiating parties recognised that the rules of private international law may not have been suitable or efficient for that purpose. They were supplemented, but not ousted, by a multilateral framework of official exchanges of information.

[56] In our judgment pt 8 cannot be elevated to a unitary code mandating that residents in a Convention country pursue a maintenance debtor living in

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99 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] applied in *New Zealand Air Line Pilots' Association Industrial Union of Workers Inc v Director of Civil Aviation* [2017] NZCA 27 at [56].

100 UNCRAM, above n 1, preamble.

New Zealand through its machinery and excluding a party's recognised right to enforce payment of monies owing for arrears under an order of a Convention country. Its objective was to facilitate or augment existing rights — not to displace them — in cases where the remedies of private international law might not provide an adequate or efficient means of recovery. It would be anomalous if pt 8 were construed in a way which permits a New Zealand resident to defeat a final adjudication on his liability to pay maintenance by a court in a Convention country following a proceeding to which he was a party.

[57] We add that none of the four elements of the legislative scheme emphasised by Mr Farmer influences this analysis.[101] All factors relate to the Family Court's exclusive jurisdiction to determine maintenance proceedings initiated in New Zealand under domestic legislation, which is not at issue here. Whether considered separately or together, they do not give rise to any implication that the power at common law to enforce a foreign judgment for maintenance arrears is excluded by pt 8. Moreover, an absurdity would arise if the inherent jurisdiction was foreclosed and the responsible authority in a Convention country was unreliable or inefficient in sending applications on to the Ministry of Justice. In that event the substantive rights of the judgment creditor would be effectively extinguished.

Maintenance rights and obligations

[58] We do not accept Mr Farmer's argument that pt 8 creates countervailing substantive rights in Dr Eilenberg's favour of which he would be deprived by enforcement of the Mexican judgment. Part 8 does not vest an absolute right on a maintenance debtor to determination of his or her liability according to New Zealand law. His or her rights are of a defensive nature only and are strictly contingent on an application to the Family Court after bilateral processing by the responsible agencies. UNCRAM's requirement that all questions arising in any action must be determined by the law of the respondent likewise depends on the prior filing of an application abroad. On the other hand, as we have emphasised, Ms Lourdes' right to enforcement already exists under the common law of this country. If there is to be a contest of rights, Ms Lourdes must prevail.

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[101] See [43] of this judgment.

[59] It is trite that Dr Eilenberg has throughout enjoyed substantive rights affecting his liability to pay maintenance. As the Mexican judgment confirms, those rights have been determined according to the law of Mexico not of New Zealand. A maintenance debtor has the right to initiate proceedings in a Convention country for the purpose of resolving his maintenance liability. In the Mexican courts Dr Eilenberg always accepted a liability to pay maintenance according to Mexican law for his daughter; but within a year of the Mexican judgment he defaulted, without applying to vary or set aside the order, and failed to meet his obligations for some four years. Dr Eilenberg challenged his wife's right to maintenance. He elected not to give evidence at the relevant hearings despite being reminded of his right to do so. And he has advised the High Court that he intends to apply immediately for a variation of the orders contained in the Mexican judgment in the light of changed circumstances. That judgment represents a final adjudication of Dr Eilenberg's rights and obligations to pay maintenance according to the law of Mexico.

[60] We are not persuaded by Mr Farmer's submission that enforcement of the Mexican judgment would ignore the hierarchy of categories under pt 8. His premise equates enforcement at common law with registration powers under the FPA. Part 8 is a simplified, streamlined mechanism for recognition of a maintenance order made in a Commonwealth or designated country, providing a less expensive and possibly more effective means than would otherwise be available for enforcing in New Zealand a maintenance order obtained in a foreign court.

[61] A person seeking to enforce a judgment obtained in a Convention country must follow the more expensive and problematic path of instructing counsel in New Zealand with the associated risk of a challenge to enforcement on the settled exceptions, as occurred here. Enforcement at common law does not provide any ongoing rights to maintenance. Liability is crystallised by the judgment debt, which is why Gilbert J found that Ms Lourdes was only entitled to recover arrears. Enforcement of a judgment from a Convention country for unpaid maintenance cannot be treated as elevating its status to the level of registration according to pt 8.

[62] Neither the statutory nor the common-law procedure will be perfect in the eyes of the creditor. Once a claim enters the Family Court's jurisdiction it is vulnerable to variation, discharge or suspension.[102] On the other hand, enforcement of arrears under the inherent jurisdiction is subject to the settled exceptions of fraud, public policy or breach of natural justice.[103] The flexibility of the available procedures allows the courts to provide adequate protection for the debtor, as this case exemplifies. It was common ground before Gilbert J that the amount for which judgment was entered should allow Dr Eilenberg a credit for all child-support payments made to the IRD since 2012. By this means the High Court was able to adjust fairly the rights and obligations of both parties. We are satisfied that this flexibility will ensure a just result in any different situation which might arise in the future.

[63] We add for completeness that Mr Farmer cited a number of decisions of the Family Court on the application of pt 8. However, none of those decisions addressed the issue which has arisen here because the jurisdiction to enforce a foreign judgment is exercisable only by the High Court. It is unnecessary for us to discuss those cases further.

Public policy

[64] Mr Farmer advanced a subsidiary submission if his argument for implied exclusion failed. He submits that the High Court should have declined to exercise its jurisdiction for the reasons already advanced together with the additional ground that the maintenance orders made by the Mexican courts are contrary to New Zealand law and policy. Mr Farmer points to the fact that New Zealand law does not permit maintenance orders as a percentage of income and places limits on the duration of spousal maintenance (based on the clean break principle) as well as the age of entitlement to child maintenance. Here the Mexican Courts made "no judicial assessment"[104] of maintenance. The Mexican courts effectively made the percentage orders by default in the absence of evidence as to income. Additionally, child maintenance has since 2012 been levied on Dr Eilenberg and paid through IRD as

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102 See [25] of this judgment.
103 See [30]–[31] of this judgment.
104 See *Adams v Cape Industries Plc*, above n 622, at 717–719 per Scott J.

assessed under the Child Support Act. Ms Lourdes now seeks to improve her position by relying on Mexican law as enforced by the High Court.

[65] We do not accept this submission. In *Holt v Thomas*, a Canadian case on which Mr Farmer relies, O'Leary J was prepared to hold that the enforcement of an Arizona judgment for arrears of child maintenance would be contrary to public policy.[105] That was because, under the law of Alberta, arrears of maintenance in excess of one year could not be enforced except in special circumstances. But the Judge decided enforcement cannot be contrary to public policy where the debtor has consented to the judgment.[106]

[66] Likewise, Dr Eilenberg consented to the jurisdiction of the Mexican courts and the laws of Mexico by filing for divorce. His maintenance was assessed as a percentage of his income because of his default in providing evidence as to his earnings. He is entitled to apply in Mexico for variation of the orders. And it is always open to him in New Zealand to apply to vary his liability for his daughter's maintenance under the Child Support Act to take into account any amount which represents double counting according to the Mexican judgment, effectively to set off against his ongoing liability.

[67] In our judgment these circumstances do not approach the recognised threshold in New Zealand for refusing to enforce a foreign judgment on the ground of public policy: enforcement of maintenance arrears owed by an absconding debtor would not "shock the conscience" of a reasonable New Zealander due simply to technical differences in the assessment of liability.[107]

[68] For these reasons we are not satisfied that Gilbert J erred in granting a declaration of enforcement and entering judgment in Ms Lourdes' favour.

Result

[69] The appeal is dismissed.

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105 *Holt v Thomas* (1987) 39 DLR (4th) 117 (QB).
106 At 128.
107 *Reeves v OneWorld Challenge LLC*, above n 555, at [67]. See also *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 at [67].

[70] The appellant is ordered to pay the respondent costs for a standard appeal on a band B basis together with usual disbursements.

Postscript

[71] The High Court judgment was originally published using the parties' correct names.[108] Sometime after delivery Gilbert J agreed to a request from the parties to adopt pseudonyms in the ultimate judgment. He agreed to this course because the parties had a daughter of minor age and their dispute was of a family nature.[109] Dr Eilenberg has sought to maintain suppression in this Court. However, the parties' daughter has reached the age of 16 years and lives in Mexico; we are not satisfied that any of the factors relied on by Dr Eilenberg displaces the presumption of open justice.[110] We accordingly lift any subsisting suppression and deliver this judgment without anonymity.

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108 *Gutierrez v Eilenberg* [2016] NZHC 1897.
109 HC judgment, above n 2, at [128]–[129].
110 *McIntosh v Fisk* [2015] NZCA 247, [2015] NZAR 1189.