IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-2086
[2023] NZHC 466

BETWEEN	KEA INVESTMENTS LIMITED Plaintiff
AND	WIKELEY FAMILY TRUSTEE LIMITED First Defendant
	KENNETH DAVID WIKELEY Second Defendant
	ERIC JOHN WATSON Third Defendant

Hearing:	12 December 2022
Appearances:	JBM Smith KC, M C Harris, JLW Wass and S T Coupe for the Plaintiff C P Browne and A G Holden for the First and Second Defendants No appearance by or for the Third Defendant
Judgment:	10 March 2023

JUDGMENT OF GAULT J

This judgment was delivered by me on 10 March 2023 at 2:00 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr JBM Smith KC, Barrister, Wellington
Mr JLW Wass, Barrister, Auckland
Mr M C Harris and Mr S T Couple (plaintiff's instructing solicitor), Gilbert Walker, Auckland
Mr C P Browne and Mr A G Holden, Wilson Harle, Auckland

[1] Following interim orders initially made without notice on 4 November 2022,[1] varied and extended by consent on 11 November 2022,[2] the plaintiff (Kea) applies for further interim orders and the first and second defendants (Wikeley Family Trustee Limited (WFTL) and Mr Wikeley; together the Wikeley defendants) apply to dismiss or stay the proceeding on jurisdiction and forum grounds. The third defendant (Mr Watson) has not entered an appearance.

[2] The parties, factual background and further alleged fraud were summarised in my judgment of 4 November 2022 and can simply be repeated with minor updating.

Parties

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

[4] WFTL is a New Zealand company incorporated by Mr Wikeley on 23 July 2021. Mr Wikeley is a company director and businessman residing in Queensland, Australia. He is the sole director and shareholder of WFTL.

[5] Mr Watson is a New Zealand citizen and businessman. His place of residence is currently unknown to Kea.

Factual background

[6] In 2011-2012, Mr Watson sought to persuade Sir Owen Glenn to make investments with him. Investments followed but the relationship broke down around 2013, which led to disputes.

[7] On 31 July 2018, the English High Court ruled that Kea and Sir Owen Glenn had been fraudulently induced to participate in an investment called Project Spartan at

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1 *Kea Investments Ltd v Wikeley Family Trustee Ltd* [2022] NZHC 2881.

2 *Kea Investments Ltd v Wikeley Family Trustee Ltd* HC Auckland CIV-2022-404-2086, 11 November 2022 (Minute of Gault J). The first and second defendants consented to the interim orders without prejudice to their protest and application to discharge the orders and dismiss the proceeding. At the conclusion of the hearing the interim orders were similarly extended by consent pending judgment, with a direction as to the terms of the interim orders that may be sealed made on 16 December 2022: (*Kea Investments Ltd v Wikeley Family Trustee Ltd* HC Auckland CIV-2022-404-2086, 16 December 2022 (Minute of Gault J).

a cost of £129 million.[3] The architect of the fraud was Mr Watson. Nugee J was "completely satisfied" that Mr Watson had "resorted to deliberate deception".[4] The Judge also found that Mr Dickson, Kea's director at the relevant time, had breached his fiduciary duties to Kea.[5] Mr Watson was subsequently committed to prison for contempt for his failure to comply with disclosure orders following the English judgment.[6] Kea is still trying to enforce the judgment against Mr Watson.

Further alleged fraud

Statutory demand in BVI and Kentucky proceedings

[8] On 29 June 2022, Kea and its English solicitor received a letter from a BVI-based law firm attaching a statutory demand seeking to enforce against Kea a judgment debt of USD136,290,994 (including interest and court/service costs). The statutory demand indicated that WFTL, as trustee of the Wikeley Family Trust (a New Zealand trust), had obtained a default judgment against Kea from a Court in Kentucky, USA dated 31 January 2022 for alleged breach of a purported "Coal Funding and JV Investment Agreement" said to have been executed in 2012 (Coal Agreement). This June 2022 letter was the first Kea had heard of both the Coal Agreement and the Kentucky Court proceeding. The Coal Agreement was not provided to Kea with the statutory demand; it was provided on 7 July 2022. Kea considers the Coal Agreement, and the claims made under it, are fabrications constructed by Mr Wikeley and Mr Watson to defraud Kea.

[9] Following enquiries with Kea's registered agent in BVI, Kea learned that the First Amended Complaint in the Kentucky proceeding had been delivered to the offices of Kea's registered agent in BVI. However, Kea's registered agent did not pass the complaint on to Kea.

[10] On 12 July 2022, Kea applied to set aside the statutory demand in the BVI. That application was listed for 5 December 2022.[7]

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3 *Glenn v Watson* [2018] EWHC 2016 (Ch), culminating at [528].
4 At [54].
5 Culminating at [429]-[431] and [492].
6 *Kea Investments Ltd v Watson* [2020] EWHC 2599 (Ch) (finding of contempt) and *Kea Investments Ltd v Watson* [2020] EWHC 2796 (Ch) (committal).
7 This was subsequently adjourned.

[11] As Kea had not been aware of WFTL's claim in Kentucky, Kea did not take the required steps to defend it.[8] The Kentucky Court entered default judgment against Kea on 31 January 2022 for USD123,750,000 plus interest and costs. The judgment was entered without any hearing and therefore without any examination by the Court of the merits of WFTL's claim.

[12] Kea instructed Kentucky lawyers to apply to set aside the default judgment. That motion to set aside the default judgment was filed on 21 July 2022. It was heard on 7 October 2022 and denied on 18 October 2022 on the ground that Kea had been properly served. The Court held that, because Kea had failed to take steps following service at its registered office, the Court did not have to, and would not, consider whether there was a meritorious defence or whether the plaintiff would suffer detriment if the judgment was set aside.

[13] On 21 October 2022, Kea issued a motion to amend, alter or vary (MAAV) the denial of its application. This was heard on 28 October 2022 and the Court indicated that it would deny the motion. As at the date this proceeding was commenced, that order had not been entered. Kea intends to issue and serve an appeal against the order of 7 October 2022 and the dismissal of the MAAV as soon as possible.[9] However, any appeal will take time and Kea is concerned there is a substantial risk that the Kentucky Court of Appeal will take the same approach as the first instance Judge and not consider the merits.

[14] On 10 October 2022, WFTL served notice on Kea that it intended to serve (reissued) Kentucky subpoenas on some 11 banks in Kentucky and New York, and a New Jersey subpoena on a bank in New Jersey, effectively seeking details of all dollar transactions carried out by Kea since 1 January 2012. Kea is taking steps in relation to such subpoenas and a hearing was scheduled in Kentucky on Friday 4 November 2022 in which it will seek to pause subpoenas and interrogatories, but Kea is concerned that, as the Kentucky Court has refused to set aside the default judgment and consider the fraud issue, it will not entertain further argument along those lines.[10]

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8 The complaint was filed on 19 August 2021. An amended complaint was filed on 3 December 2021.

9 Kea filed a notice of appeal on 9 November 2022.

10 That hearing took place soon after this Court's orders of 4 November 2022.

Coal Agreement

[15] The Coal Agreement purports to be an agreement between Mr Wikeley as trustee for the Wikeley Family Trust New Zealand and Kea represented by Mr Dickson. It is dated 23 October 2012 and witnessed by Mr Watson. It purports to commit Kea to provide capital to fund coal investments presented by Mr Wikeley. Kea considers the document is a forgery or at least unenforceable, essentially on the grounds that:

(a) In the nine years between the purported agreement and the Kentucky proceeding, WFTL had made no demand on or complaint to Kea in relation to funds payable under the agreement; there was no pre-action correspondence.

(b) Kea has no records relating to the Coal Agreement. No such documents were provided in 2013 when Mr Dickson was ordered by the Nevis Court to provide all of Kea's records. Nor is an interest under the Coal Agreement mentioned in the list of assets provided under the Nevis Court order.

(c) Neither Sir Owen Glenn, nor Mr Munro of the Nevis professional trustee, nor any of Kea's current directors, had any knowledge of the Coal Agreement prior to receipt of the statutory demand.

(d) The Coal Agreement is irregular, oddly formatted and not professionally drafted.

(e) The Coal Agreement makes no commercial sense. It involves the payment of very significant sums of money to the Wikeley Trust in return for very little.

(f) Mr Wikeley incorporated WFTL in New Zealand on 23 July 2021, shortly before commencing the Kentucky proceeding.

(g) On the date that Mr Watson ostensibly witnessed the signatures of both Mr Wikeley and Mr Dickson, Mr Dickson was in Paris. Mr Wikeley's subsequent evidence in Kentucky conflicts with WFTL's own complaint and the document itself.

(h) There is no mention of the Coal Agreement in the detailed meeting pack for the meeting in Paris on 23 October 2012 (when Mr Wikeley now claims it was signed by Mr Dickson), or in any of the emails setting up that meeting with Mr Dickson.

(i) WFTL has not produced any document showing or evidencing any requests for drawdowns under the agreement, or any documents evidencing that it was entered into or performed, other than the purported agreement itself.

(j) WFTL's Kentucky lawyer has refused to say whether he or his client has the original of the agreement.

(k) Mr Watson appears to be supporting WFTL in its Kentucky litigation. WFTL has produced documents from the Spartan litigation trial bundle in evidence in Kentucky despite the fact that neither it nor Mr Wikeley were involved in that litigation.

(l) Mr Wikeley, Mr Watson and Mr Dickson have all been subject to adverse findings by the English or New Zealand Courts.

(m) Mr Watson is connected with Mr Rizwan Hussain (mentioned next).

Related interference with Kea

[16] As well as the default judgment, Kea refers to other steps taken against it subsequently by Mr Hussain, said to be a known fraudster acting in concert with Mr Watson. Kea says that the pair met while in prison – Mr Hussain was imprisoned for contempt of court at the same time as Mr Watson in late 2020, and at the same

prison. Kea refers to judgments in the English High Court where Mr Hussain has been involved in fraudulent schemes to take over companies to which he is a stranger.[11]

[17] Kea says that by letters of 7-8 August 2022, Mr Hussain, using a pseudonym, attempted to take control of Kea by purportedly removing all of Kea's genuine directors and replacing them with so-called 'protective directors'. These protective directors purported to take control of Kea and to settle the Kentucky proceeding for USD100 million. Kea says the fraudulent communications issued by the pseudonym in the name of Kea included a notice to the Kentucky Court claiming that Kea had settled WFTL's claim. On 8-9 August 2022, lawyers for the Wikeley Family Trust notified the Kentucky Court that the case had been settled and sought to vacate the hearing of Kea's motion to set aside the default judgment. Kea says this was an attempt to replace a default judgment which was being attacked by Kea with a debt due under a settlement agreement, so as to further the conspirators' attempts to wind up or extort money.

[18] Kea also says that Mr Hussain was the driver behind four English proceedings commenced in July/August 2022 – one proceeding by Blue Side Services SA against Kea and three proceedings purportedly brought by Kea and some of the protective directors against, among others, Sir Owen Glenn and the English and BVI solicitors/counsel who have been representing Sir Owen Glenn and Kea in the Spartan litigation.[12]

[19] On 12 September 2022, the English High Court found the attempted hijacking of Kea to be a legal absurdity. It struck out these four proceedings and held that Mr Hussain should be subject to a General Civil Restraint Order. The Judge also accepted that Kea had good grounds for thinking that Mr Watson and Mr Hussain were acting in concert in those proceedings, and awarded costs against Mr Watson. These were abusive proceedings conducted for the benefit of Mr Watson.

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

12 *Blue Side Services SA v Kea Investments Ltd* [2022] EWHC 2449 (Comm).

[20] Then, on 15 September 2022, WFTL offered to settle its default judgment for USD10 million, expressly on the basis that it expected this is the amount for which Kea's registered agent in BVI would be insured for malpractice.[13] The offer was set to expire before the hearing of Kea's motion to set aside. Kea says this offer was another step in the fraud (and that the communication is therefore not privileged).[14]

[21] Kea says that companies associated with Mr Hussain and Mr Watson have also falsely asserted that they are a secured creditor of Kea and that certain valuable interests owned by Kea in other entities have been assigned to the companies associated with Mr Hussain, thereby giving WFTL a pretext for paying some or all of any amounts it may obtain from Kea to Mr Watson.

Conspiracy

[22] Kea says it now appears that these developments are related, and that Mr Wikeley and Mr Watson, together with Mr Hussain, have conspired to defraud Kea through the instrument of the forged Coal Agreement and the default judgment. Mr Watson has a long association with Mr Wikeley. He was imprisoned with Mr Hussain. Kea says Mr Watson is involved in the fabrication and/or fraudulent use of the Coal Agreement, in that:

(a) he is held out as having obtained the signature of Kea's then director, Mr Dickson;

(b) the purported Coal Agreement bears his signature as witness to its execution;

(c) Mr Wikeley claims that Mr Watson acted as Kea's agent in receiving alleged requests for funds under the Coal Agreement said to have given rise to part of Kea's liability;

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13 Kea does not allege that WFTL's Kentucky lawyers, who made the offer on behalf of WFTL, were acting dishonestly.

14 As indicated below, at this interlocutory stage I leave to one side the settlement offer to Kea since its admissibility has not yet been determined.

(d) in the Kentucky litigation Mr Wikeley produced documents from the trial bundle in the Spartan litigation which could only have come from Mr Watson; and

(e) the existence of the Kentucky proceeding can only have come to the knowledge of Mr Hussain through Mr Watson, to allow the purported settlement of the Kentucky proceeding.

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

[24] Kea says the immediate vehicle for this fraud is WFTL, which has obtained the default judgment. As mentioned, WFTL is a New Zealand company incorporated a month before commencing the Kentucky proceeding.

Procedural update

[25] Kea's initial (without notice) application dated 31 October 2022 indicated that in addition to the orders sought without notice, on the return date Kea would seek orders that:

(a) WFTL withdraw the Kentucky Proceedings and consent to the discharge of the default judgment;

(b) WFTL withdraw its statutory demand in the BVI;

(c) without limiting order (a), WFTL withdraw any subpoenas, discovery applications, or interrogatories issued in reliance on the default judgment;

(d) the respondents pay Kea's costs on a solicitor-client basis; and

(e) such other relief as the Court thinks fit.

[26] On 10 November 2022, the Wikeley defendants filed an appearance under protest to jurisdiction under r 5.49 of the High Court Rules 2016 on the ground that New Zealand is not the appropriate forum to hear the proceeding and as set out in their interlocutory application of the same date.[15]

[27] On 23 November 2022, the Wikeley defendants, under protest to jurisdiction, applied for orders:[16]

(a) dismissing Kea's claim on the grounds that the Court has no jurisdiction to hear or determine them (r 5.49);

(b) that the orders of 4 November 2022 be rescinded on the basis that the Court had no jurisdiction to make them, or alternatively on the basis that other forums [are] more appropriate to consider and make such orders (r 7.49 and the Court's inherent jurisdiction);

(c) that Kea's claims be dismissed on the basis that other forums are more appropriate and on the ground that their commencement is an abuse of process and likely to cause prejudice and delay (r 15.1);

(d) that Kea's claims be dismissed in the Court's inherent jurisdiction to dismiss or stay proceedings on the basis of *forum non conveniens*; and

(e) costs.

[28] On 5 December 2022, Kea filed an amended statement of claim removing the third cause of action (abuse of process of the Kentucky Court). Kea's remaining claims are tortious conspiracy (first cause of action) and a claim for a declaration that

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15 On 9 December 2022, the Wikeley defendants filed an amended appearance under protest to jurisdiction under r 5.49 on jurisdiction and appropriate forum grounds.

16 This application amended the Wikeley defendants' application dated 10 November 2022.

the Kentucky default judgment is not recognised or enforceable in New Zealand under private international law because it was procured by fraud (second cause of action).

Issues

[29] The parties advance materially different approaches to the issues, procedurally and substantively. Given this, and since the hearing traversed both the Wikeley defendants' applications and Kea's application for continued and further interim orders, the issues raised in the parties' detailed submissions may be examined as follows:

(a) The correct approach to jurisdiction and the relevance of the merits.

(b) Whether the Court can reliably assess the merits at this stage in relation to four contested matters:

(i) whether the Coal Agreement with its jurisdiction clause is a forgery;

(ii) whether the Coal Agreement is liable to be set aside for fraud or breach of fiduciary duty;

(iii) whether the jurisdiction clause provides for exclusive jurisdiction; and

(iv) whether the jurisdiction clause applies to Kea's claims.

(c) The proper forum for Kea's claims.

(d) Whether the current interim orders should continue.

(e) Whether the further interim orders sought are appropriate.

Correct approach to jurisdiction and relevance of the merits

[30] As indicated, procedurally and substantively, the parties advance materially different approaches. Mr Browne, for the Wikeley defendants, relied on r 5.49 of the High Court Rules to contest both the Court's jurisdiction (on the basis of the jurisdiction clause in the Coal Agreement) and the proper forum. Mr Smith KC, for Kea, submitted that the Wikeley defendants cannot protest the jurisdiction under r 5.49 as the Court has jurisdiction over them as of right. He submitted that their only option is to apply for a stay or dismissal of the proceeding under r 15.1 or the Court's inherent jurisdiction.

[31] I accept that, procedurally, r 5.49 applies to challenges to jurisdiction over the person joined, the subject-matter, the relief sought or on proper forum grounds.[17] Even so, such different challenges should not be conflated. The latter in particular involves the Court declining to assume jurisdiction rather than not having it. A challenge to jurisdiction on the basis that the subject-matter is covered by a contractual choice of jurisdiction may similarly involve the Court declining to assume jurisdiction rather than not having it. However, that is not to downplay the importance of a contractual choice of jurisdiction. As the Court of Appeal said in *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd*, it is settled law that exceptional circumstances are required to deny such a contractual provision its operative effect.[18]

[32] The first question is whether the Court has jurisdiction over the person(s) joined, here the protesting Wikeley defendants. I consider the Court does have such jurisdiction over the Wikeley defendants for the following reasons:

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[17] *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 at [25]-[27].

[18] *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd* [1997] 1 NZLR 186 (CA) at 190. Although the Court said that prima facie the New Zealand Courts lack jurisdiction to entertain the proceeding because the parties have so agreed, it also said it is settled law that the Court nevertheless has a discretion to exercise jurisdiction if it otherwise exists. In the context of an overseas defendant served out of the jurisdiction, the Court was weighing the choice of jurisdiction clause against other factors in a *forum conveniens* analysis rather than addressing jurisdiction over a person served in New Zealand.

(a) WFTL is a New Zealand company incorporated by Mr Wikeley on 23 July 2021, with its registered office in Auckland. WFTL was served with this proceeding at its registered address for service in New Zealand under the Companies Act 1993.

(b) Mr Wikeley is the sole director and shareholder of WFTL.[19] According to the New Zealand Companies Office Register, he resides in Queensland, Australia. He was served at his place of residence in Queensland, Australia under s 13 of the Trans-Tasman Proceedings Act 2010. Subpart 4 of Part 6 of the High Court Rules 2016, relating to service out of New Zealand, does not apply to such service in Australia.[20]

[33] The next question relates to the issue of contractual choice of jurisdiction. Here too, the parties advance materially different approaches. Mr Browne submitted that determining the correct court to determine Kea's allegations of forgery and fraud is a necessary first step. In doing so, he submitted the Court may not determine the fraud or forgery allegations itself as part of the jurisdictional and forum consideration. He submitted the merits of Kea's case say nothing about what is the appropriate Court to hear its case. He submitted that engaging with the merits more than necessary would submit the Wikeley defendants to the jurisdiction, and that assessment of the issues is only relevant to whether there is a "plausible (albeit contested) evidential basis" for the Coal Agreement and its jurisdiction clause being genuine, relying on *Four Seasons Holding Inc v Brownlie*.[21]

[34] Mr Smith accepted the test in *Four Seasons Holding Inc v Brownlie* but submitted that the Wikeley defendants cannot rely on the alleged jurisdiction clause as a basis for staying this proceeding despite failing to rebut the evidence of fraud which demonstrates the Coal Agreement is not a valid agreement at all.

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19 Mr Wikeley has a long business history in New Zealand as indicated in a previous case in this Court: *Jacomb v Wikeley* [2013] NZHC 707 at [5].

20 Rule 6.36. Subpart 4 of Part 6 only applied to Mr Watson. He could be served out of New Zealand without leave under r 6.27. In the event, he could not be personally served and was served by email following an order for substituted service. He has taken no steps in the proceeding.

21 *Four Seasons Holding Inc v Brownlie* [2017] UKSC 80 at [7].

[35] *Four Seasons Holding Inc v Brownlie* concerned a claim in England against the holding company of the Four Seasons hotel group, incorporated in British Columbia, in relation to a road accident in Egypt. The holding company contested jurisdiction on the basis that the jurisdictional gateways for service of proceedings out of the jurisdiction did not apply on three grounds. First, the plaintiff had not established that the contract with the hotel was made in England, but that wherever it was made, it was not made with the defendant as its subsidiaries provided certain central services to hotels of the Four Seasons chain but neither owned nor operated them. Secondly, the damage was not sustained in England. Thirdly, there was not a reasonable prospect of success.

[36] In relation to the evidential standard applicable to jurisdictional facts, Lord Sumption (with whom Lord Hughes agreed) referred to the leading earlier cases,[22] and said:

> [7] An attempt to clarify the practical implications of these principles was made by the Court of Appeal in *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547. Waller LJ, delivering the leading judgment observed at p 555:
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> > 'Good arguable case' reflects … that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, ie of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction.
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> When the case reached the House of Lords, Waller LJ's analysis was approved in general terms by Lord Steyn, with whom Lord Cooke and Lord Hope agreed, but without full argument: …[2002] AC 1, 13. The passage quoted has, however, been specifically approved twice by the Judicial Committee of the Privy Council: *Bols Distilleries (trading as Bols Royal Distilleries) v Superior Yacht Services Ltd* [2007] 1 WLR 12, para 28, and *Altimo Holdings, loc cit*. In my opinion it is a serviceable test, provided that it is correctly understood. The reference to "a much better argument on the material available" is not a reversion to the civil burden of proof which the House of Lords had rejected in *Vitkovice*. What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good

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[22] *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80 at [5]-[6], referring particularly to *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869 and *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438.

> arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.

[37] On the information available, Lord Sumption concluded that there was no realistic prospect that the plaintiff would establish that she contracted with the holding company or that the holding company would be vicariously liable for the negligence of the driver. The claim did not satisfy the specific factual requirements of the gateways and *a fortiori* did not satisfy the general requirement that there should be a reasonable prospect of success.[23]

[38] Lady Hale (forming the majority) said:[24]

> As we agree that this action cannot continue against the current defendant, everything which we say about jurisdiction is *obiter dicta* and should be treated with appropriate caution. For what it is worth, I agree (1) that the correct test is "a good arguable case" and glosses should be avoided; I do not read Lord Sumption's explication in para 7 as glossing the test; …

[39] Mr Browne submitted there is a "good arguable case" standard for jurisdictional facts but, in circumstances where no reliable assessment can be made on the evidence because of the stage of the proceeding, the gateway is met by the person asserting a fact if there is a "plausible (albeit contested) evidential basis for it". He submitted this case falls within category (iii) of Lord Sumption's formulation as the nature of the allegations of fraud and forgery is such that they cannot be determined conclusively at the interlocutory stage.

[40] Mr Wass, for Kea, submitted that *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* is a useful illustration.[25] In that case, Rix J discharged an *ex parte* anti-suit injunction preventing a party's joinder to California proceedings. In doing so, Rix J held that the applicant could not rely on the exclusive English jurisdiction clause, which was otherwise apt to cover the claims in the Californian proceedings, because an allegation of fraud in the US proceedings embraced all the terms of the contract and in particular the jurisdiction clause.[26]

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23 *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80 at [15].
24 At [33].
25 *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] C.L.C. 600.
26 At 616-617.

[41] In relation to the approach, I make three points. First, in the case of contested jurisdictional facts, the Court must decide whether on the material available at the interlocutory stage it can make a reliable assessment. Even if it can, that does not mean determining the issue conclusively.

[42] Secondly, in any event, the onus is on the claimant. If the Court cannot make a reliable assessment on the material available at the interlocutory stage, a plausible (albeit contested) evidential basis for the application of a relevant jurisdictional gateway will be sufficient for showing a good arguable case. The test is not whether the defendant has a "plausible (albeit contested) evidential basis" for its position, in this case that there is a genuine exclusive jurisdiction clause.

[43] Thirdly, whether the Coal Agreement with its jurisdiction clause is a valid agreement or a forgery (and the other three contested matters identified above at [29](b)) are not contested jurisdictional facts. Kea served the Wikeley defendants without reference to any jurisdictional gateway in the High Court Rules. The (contested) choice of jurisdiction is relevant to the appropriate forum,[27] that is whether the Court should assume jurisdiction, rather than to any jurisdictional gateway necessary for the Court to have jurisdiction over the Wikeley defendants. That is consistent with the approach taken in other New Zealand cases involving jurisdiction clauses in contested agreements, *Baxter v RMC Group plc* and *Nelson Honey & Marketing (NZ) Ltd v William Jacks & Company (Singapore) Private Ltd*.[28] I refer to *Baxter* further below. *Nelson Honey* involved an issue as to whether there was a concluded agreement containing an exclusive jurisdiction clause, which the Court treated as relevant to forum rather than the prior question of the jurisdictional gateway. In that case, having considered the evidence, the Court reached the view that there was not a concluded agreement containing an exclusive jurisdiction clause.[29]

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27 *Wing Hung Printing Co Ltd v Satio Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [46].

28 *Baxter v RMC Group plc* [2003] 1 NZLR 304 at [248]-[252]; and *Nelson Honey & Marketing (NZ) Ltd v William Jacks & Company (Singapore) Private Ltd* [2015] NZHC 1215 at [37]-[43]; both in the context of *forum conveniens*.

29 *Nelson Honey & Marketing (NZ) Ltd v William Jacks & Company (Singapore) Private Ltd* [2015] NZHC 1215 at [43].

[44] I consider that at least in this case the challenge to jurisdiction on the basis that the subject-matter is covered by a contractual choice of jurisdiction more properly involves the Court being asked to decline to assume jurisdiction on forum grounds, rather than not having jurisdiction at all. Nevertheless, because the dispute is about the very existence of the Coal Agreement, and therefore of the jurisdiction clause, I proceed to apply by analogy the good arguable case approach in *Four Seasons Holding Inc v Brownlie.* In doing so, I address whether I can reliably make an assessment in relation to the contested matters before addressing the proper forum. I also acknowledge the different onus in relation to forum challenges (referred to below at [75]).

Assessment of the merits on the evidence available

[45] I turn to consider the evidence that is available at this interlocutory stage and whether I can reliably make an assessment in relation to the four contested matters.

[46] As a preliminary point, Mr Browne submitted that a pleading of fraud is not sufficiently particularised if the facts pleaded are consistent with innocence or negligence, citing *Three Rivers District Council v Governor and Company of the Bank of England (No 3)*.[30] Pleadings must be clear, especially so that defendants accused of fraud know what they have to answer, but I do not consider Kea's pleading is deficient in this sense. Kea's primary pleaded claim is clear and sufficiently particularised: "The Coal Agreement is a forgery. It was not signed by Mr Dickson in October 2012 on behalf of Kea." Kea is entitled to plead in the alternative and is entitled to seek to impugn the jurisdiction clause on alternative bases.[31] In response to Mr Browne's submission that the defendants are entitled to rely on Kea's own case, I observe that alternative allegations do not inherently undermine each other. While some of the particulars are really matters from which an inference may be drawn, the submission that some such particulars may be consistent with honest conduct does not make the pleading deficient.

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30 *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 (HL) at [183]-[190].

31 It is not suggested that the further alternative arguments by Kea based on lack of performance or demand under the Coal Agreement impugn the jurisdiction clause.

[47] In deciding whether on the material available at the interlocutory stage I can make a reliable assessment, I note that, as the Court of Appeal has said in the context of the "serious issue to be tried on the merits" requirement for leave to serve out of the jurisdiction:[32]

> the Court will not determine credibility issues where there are conflicting affidavits other than in exceptional cases where one version can be demonstrated by objective evidence to be untenable. In most cases where a protest to jurisdiction is being determined, discovery will not have taken place and the evidence is likely to be relatively limited.

[48] The Court of Appeal has also said that genuine conflicts of affidavit evidence should be reserved for trial,[33] but a court is not required:[34]

> to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

Forgery

[49] As already indicated, Kea's evidence is that the context for its conspiracy claim is that Kea and Sir Owen Glenn have spent eight years attempting to obtain recourse against Mr Watson for the Project Spartan fraud, which ultimately led to Mr Watson's committal for contempt. In July 2021, Mr Wikeley incorporated WFTL and appointed it trustee of the Wikeley Family Trust. This step shortly preceded his pursuit through WFTL of a claim under a Coal Agreement allegedly signed in 2012. The first Kea knew of Mr Wikeley's claims was when it was served with a statutory demand based on a Kentucky default judgment for the sum of USD123,750,000 plus interest and costs. There was no pre-action correspondence.

[50] Kea's evidence is that it has no records of the Coal Agreement, its negotiation, its execution or any demands made under it.[35] None of Kea's directors since March

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32 *Wing Hung Printing Company Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [37].

33 *Green & McCahill Holdings Ltd v Ara Weiti Developments Ltd* [2022] NZCA 218 at [82] in relation to the reasonably arguable test for sustaining a caveat, citing *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL) at 407 in relation to the similar serious question to be tried test for an interim injunction.

34 At [83], quoting *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341.

35 At this interlocutory stage, I do not accept that Kea's evidence that it has no documents relating to the Coal Agreement is inadmissible on hearsay or relevance grounds.

2013 have any knowledge of any such agreement or any demands made under it.[36] Mr Dickson, the purported signatory to the Coal Agreement, made no mention of it and provided no documents relating to it in response to court orders in February 2013 which would have required him to mention it and provide such documents if the Coal Agreement existed at that time. Kea says the contemporaneous facts are inconsistent with it being a valid agreement.

[51] Kea says the evidence demonstrates that Mr Wikeley and Mr Watson worked together to procure and defend the default judgment and to implement a fraudulent scheme to harm Kea, to extract value to which they were not entitled, and to frustrate Kea's enforcement of the Spartan judgment against Mr Watson.

[52] As Kea attempted to have the Kentucky default judgment and the statutory demand set aside, Mr Wikeley and Mr Watson conspired with the known fraudster Mr Hussain to hijack Kea and substitute the default judgment with a bogus settlement.

[53] In response to Kea's conspiracy claim, Mr Wikeley has provided an affidavit. In that affidavit, he states that he understands there is a risk that the Wikeley defendants could be held to have submitted to the jurisdiction of this Court if his evidence is not restricted to evidence in support of the application to strike out or stay and extends to answering the claims brought by Kea, and accordingly that the content of his affidavit is limited to matters relevant to jurisdiction and forum. Despite that statement, his affidavit (briefly) addressed execution of the Coal Agreement. He states that he lived in Kentucky, in the Hilton Hotel in Lexington, between 2012 and 2015 and worked on many coal projects when based there. In the context of finding investment funding for coal mining projects, he states:

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

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[36] At this interlocutory stage, I do not accept that Kea's evidence of the lack of directors' knowledge is inadmissible on hearsay grounds.

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

[55] In relation to execution of the Coal Agreement, Mr Browne submitted there is no contrary evidence. He submitted that as Kea alleges that Mr Dickson did not sign the Coal Agreement, Kea is required to discharge its evidential burden by calling Mr Dickson to support the allegation. He also submitted that the case concerns credibility and the Court cannot resolve the credibility dispute on affidavits alone.

[56] I accept that Kea has not adduced direct evidence from Mr Dickson (Kea's sole director at the time) stating that the Coal Agreement is a forgery. Kea's evidence is that it has not sought an affidavit from Mr Dickson because it does not regard him as a witness who can be trusted to tell the truth, given his misconduct in relation to Project Spartan. Given the Spartan judgment, there appears to be merit in that explanation. Mr Dickson was not called to give evidence in the Spartan case. Mr Smith submitted that it is the Wikeley defendants who should have adduced evidence from Mr Dickson or at least explained they had tried to do so, and that I can infer that any truthful evidence from him would not have supported the Wikeley defendants.[37] I draw no adverse inference at this interlocutory stage. Mr Smith made a similar submission in relation to Mr Watson from whom there is also no affidavit. Mr Wikeley's affidavit states that he gave the agreement to Mr Watson "to arrange execution by Kea". Again, I draw no adverse inference at this interlocutory stage.

[57] Even so, Kea's evidence about the Coal Agreement (and its evidence linking Mr Watson and Mr Hussain with Mr Wikeley's actions in relation to the Kentucky default judgment[38]) leads to real doubt as to the genuineness of the Coal Agreement. Without in any way reversing the onus, the documents Mr Wikeley annexed to his

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37 *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA) at [153]-[155].

38 At this interlocutory stage, I leave to one side the settlement offer to Kea since its admissibility has not yet been determined.

brief affidavit provide little assistance in relation to the negotiation,[39] drafting, execution, commercial terms,[40] or performance of the Coal Agreement. The brevity and generality of his affidavit is not explicable on the basis that it was confined to avoid submitting to this Court's jurisdiction. His affidavit says nothing about contact with Mr Dickson. Even accepting that WFTL's US lawyer may have erroneously pleaded that Mr Wikeley presented the agreement to Mr Dickson on 23 October 2012, Mr Wikeley's affidavit does not address the timing discrepancy between:

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

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

[58] Nor does the evidence of Mr Branham and Mr Snyder about what they were told by Mr Wikeley carry weight in relation to whether the Coal Agreement is genuine, even if admissible at this interlocutory stage. Also, the Court does not have the original of the (alleged) agreement.

[59] However, insofar as Kea's case is that Mr Wikeley's evidence is to be disbelieved and the Coal Agreement is a forgery, I accept that on the information available at this interlocutory stage, I cannot make a reliable assessment. It would not be appropriate to reach a conclusion on such a credibility issue on affidavit evidence and before discovery. At this stage, I do not take into account evidence about Mr Wikeley's veracity.

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39 For example, the Background clauses refer to Mr Wikeley having provided Kea with "the financial models and analysis required to satisfy their due diligence over the past several months" and to Kea having done "a feasibility study".

40 At this stage, I do not place weight on Kea's evidence about the (lack of) commerciality of the Coal Agreement even though I do not accept that Mr Kelly's expert affidavit is inadmissible.

[60] In any event, as indicated, when assessing whether Kea has a good arguable case in circumstances where I cannot make a reliable assessment of whether the Coal Agreement is a forgery, the test is whether there is a plausible (albeit contested) evidential basis for the claimant's case in relation to the jurisdiction clause (by analogy with the application of the relevant jurisdictional gateway). It is not whether the defendants have a plausible (albeit contested) evidential basis for their position that the Coal Agreement was executed by Kea. I consider that Kea has at least a plausible evidential basis for its case that the Coal Agreement is a forgery and accordingly that there was no agreed choice of jurisdiction.

Liable to be set aside for fraud or breach of fiduciary duty

[61] In the alternative, Kea alleges that if Mr Dickson signed the Coal Agreement in 2012, it is nevertheless liable to be set aside for fraud or breach of fiduciary duty on the basis that Mr Dickson, Mr Wikeley and Mr Watson all knew that Mr Dickson signed without authority and in breach of his duties to Kea. Mr Smith submitted that, if Mr Dickson signed it, it was effected by fraud in that Mr Watson said to him 'sign it' and he did – that is, he signed as a 'puppet' for Mr Watson.

[62] Mr Browne relied on *Baxter v RMC Group plc*,[41] which involved contracts containing clauses in which the parties irrevocably submitted to the exclusive jurisdiction of the High Court of Justice in England in relation to any claims arising out of or in connection with the relevant contract. In response to an argument that the submission to jurisdiction clause was not relevant because the contracts were the product of alleged frauds, O'Regan J endorsed the Canadian decision of *Morrison v Society of Lloyds* which held that where an agreement was entered into by deceit, the existence of the claim in tort did not arise until the plaintiff suffered damage and so the choice of forum and choice of law clauses were not avoided.[42] That is consistent with the distinction between void and voidable – a contract induced by misrepresentation is voidable rather than automatically void.[43]

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41 *Baxter v RMC Group plc* [2003] 1 NZLR 304 at [248]-[252].

42 *Morrison v Society of Lloyds* [2000] I L Pr 92.

43 See for example in this jurisdiction clause context *Mackender v Feldia AG* [1967] 2 QB 590 at 598-599 per Lord Denning MR and at 602-604 per Diplock LJ, cited in *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] C.L.C. 600.

[63] Unlike *Baxter*, however, Kea's (alternative) claim is not that the Coal Agreement was induced by fraud but rather that it was effected by fraud in the sense alleged. That more arguably impugns the jurisdiction clause, as it did in *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd*.[44] I consider that Kea has a plausible evidential basis for its alternative case that the Coal Agreement, including the jurisdiction clause, is liable to be set aside for fraud or breach of fiduciary duty.

Jurisdiction clause

[64] I now turn to the scope and effect of the jurisdiction clause in the alleged Coal Agreement. As a preliminary point, I note that this is to be considered in relation to the current dispute and therefore that I am not assuming an outcome that the Coal Agreement is or is not a forgery or liable to be set aside.

[65] The relevant clause states:

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

[66] Two questions arise: first, whether the clause excludes the jurisdiction of the New Zealand Court; and secondly, whether it covers the claims brought by Kea. These are questions of contractual interpretation to be determined by applying the law of contract of the lex causae (that is, the law properly applicable to this dispute).[45] The clause states that the contract will be governed by "the laws in Lexington, Kentucky and any applicable Federal law". Questions of foreign law are questions of fact. Mr Browne submitted there is no evidence from either party on the general law of contract of these jurisdictions, so New Zealand objective interpretation rules apply by default; that is, the approach in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*.[46]

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44 *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] C.L.C. 600.

45 Maria Hook and Jack Wass, The Conflict of Laws in New Zealand (LexisNexis, Wellington, 2020) at 2.410.

46 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]-[63].

[67] On that basis, Mr Browne acknowledged that the phrase "the jurisdiction shall be the USA" refers to a basket of US State and Federal jurisdictions but submitted the plain meaning is unambiguous and exclusive, referring to the Courts of the USA (inclusive of Courts within it), and accordingly that New Zealand is excluded.

[68] Mr Wass relied on expert evidence from Professor Silberman, a professor of law at New York University School of Law, as to the proper interpretation of the clause (responding to the evidence of Professor Bermann from Columbia Law School). Professor Silberman said:

> … even if such a clause were interpreted as constituting the defendant's consent to the jurisdiction of a court in the United States, including in Kentucky, once suit is brought there, this clause would not be understood as conferring exclusive jurisdiction in Kentucky (or in any court in the United States). The Bermann Affidavit (paragraph 40) states that, "*if the parties selected the United States as the exclusive forum for adjudication of their contract-based disputes, as I assume they did here, they would by virtue of that fact alone have conferred exclusive specific jurisdiction over those disputes on the courts of the United States*." But given the language of the clause, Professor Bermann cannot assume that such a clause provides for exclusive specific jurisdiction in a U.S. court. Courts in the United States have consistently held that a forum-selection clause is only permissive (i.e., non-exclusive) unless it contains specific language of exclusion, see, e.g., *BAE Systems Technology Solution & Services, Inc. v. Republic of Korea's Defense Acquisition Program Administration*, 884 F. 3d 463, 472 (4th Cir. 2018). The present clause contains no such language excluding the jurisdiction of other courts.

[69] Mr Browne submitted that this evidence is not applicable because it is not consistent with the New Zealand law of contractual interpretation or conflict of laws. However, I consider that this part of Professor Silberman's evidence is addressing the proper interpretation of the jurisdiction clause as a matter of US law, which is relevant given the (alleged) choice of law clause. On that basis, it is unnecessary to apply New Zealand contract interpretation rules by default.

[70] Applying US law, on the evidence available at this interlocutory stage, I accept that I cannot make a reliable (factual) assessment as to whether the jurisdiction clause excludes the jurisdiction of the New Zealand Court. However, I consider that Professor Silberman's evidence provides at least a plausible evidential basis for Kea's case that the jurisdiction clause is permissive rather than exclusive.

[71] Even applying New Zealand contract interpretation rules, Mr Wass submitted the clause does not say "exclusive" and the reference to multiple courts is more consistent with the clause being permissive. That may be doubted given the reference to "*the* jurisdiction *shall* be the USA" (emphasis added) but the wording and the fact that there are multiple jurisdictions in the USA potentially create ambiguity and there is nothing available at this stage in the factual matrix to assist. This leads into the next issue of whether the clause covers Kea's claims.

[72] Mr Wass submitted the burden is on the defendants to show the clause covers the tort of conspiracy whereas Mr Browne submitted there is a presumption that an exclusive jurisdiction agreement is intended to apply to all disputes arising between the parties which are connected with the contract in which the agreement was contained, citing *Donohue v Armco Inc*.[47] I accept, as *Donohue* indicates, that where the dispute is between two contracting parties, one of which sues the other in a non-contractual forum, and the claims fall within the scope of the exclusive jurisdiction clause in their contract, strong reasons are required to displace the *prima facie* entitlement to enforce the contractual exclusive jurisdiction clause.[48] That reflects the settled law referred to in *Advanced Cardiovascular Systems* mentioned above.[49] However, the prior question is whether the claims fall within the scope of the exclusive jurisdiction clause. The reference to disputes which are "connected with" the contract derives from the particular exclusive jurisdiction clause in *Donohue,* which provided that "the parties hereby irrevocably submit themselves to the exclusive jurisdiction of the English Courts to settle any dispute which may arise out of or in connection with this Agreement".[50] Apart from being arguably permissive rather than exclusive, the clause in this case is much less explicit and less expansive in relation to the scope of disputes covered – it merely states that "the jurisdiction shall be the USA".

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47 *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749 at [60]-[61]; see also *The Pioneer Container* [1994] 2 AC 324 (PC).

48 At [24]-[25].

49 *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd* [1997] 1 NZLR 186 (CA) at 190-191.

50 *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749 at [7].

[73] As Mr Browne submitted, it is the substance rather than the form of the claim that must be covered by the clause. He submitted that the substance of Kea's claim in tort (conspiracy) is that the contract is invalid or unenforceable by reason of fraud or forgery, and is covered by the jurisdiction clause. He submitted the pre-emptive declaration claim is also covered because at its heart it is an attempt to determine the merits so as to prevent enforcement of the contract and obstruct the course of proceedings relating to the contract in the contractually designated jurisdiction.

[74] While I accept that Kea's forgery or effected by fraud arguments form an important part of its conspiracy claim, some of the alleged means are quite removed from the Coal Agreement itself. Moreover, other essential components of the conspiracy that are also unrelated to the Coal Agreement cannot be ignored. Conspiracy requires the existence of a combination of persons agreeing that at least one of them will use unlawful means to damage or use means that may be lawful in themselves but for the predominant purpose of injuring.[51] Further, it is not suggested the jurisdiction clause would be binding on the alleged conspirators who are not party to the Coal Agreement, Mr Wikeley and Mr Watson. Given this, and the non-expansive wording of the clause, I do not consider it covers Kea's fraudulent conspiracy claim. I also do not accept it covers Kea's declaration claim.

Forum non conveniens

[75] The approach to a challenge on *forum non conveniens* grounds was summarised by the Court of Appeal in *Schumacher v Summergrove Estates Ltd*:[52]

> [28] The second and third respondents having been validly served, they must point to some more appropriate forum of competent jurisdiction:[53]
>
> > a stay will only be granted on the ground of forum non conveniens where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the most appropriate forum for trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

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51 *Lonrho plc v Fayed* [1992] 1 AC 448 at 465-466, cited with approval in *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19 at [39]. In New Zealand, see *Wagner v Gill* [2014] NZCA 336, [2015] 3 NZLR 157 at [48]-[50].

52 *Schumacher v Summergrove Estates Ltd* [2014] NZCA 412, [2014] 3 NZLR 599 at [28]-[29].

53 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) at 476.

[29] New Zealand courts apply this principle in the following manner:[54]

(a) in general the burden of proof to persuade the court to exercise its discretion to grant a stay rests on the defendant not just to show that New Zealand is not the natural or appropriate forum for the trial but also to establish that there is another available forum which is clearly or distinctly more appropriate;

(b) if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial, the burden will shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial of the action should nevertheless take place in New Zealand;

(c) the natural forum will be the one with which the action has the most real and substantial connection, including factors affecting convenience or expense (such as availability of witnesses), the law governing the relevant transaction and the places where the parties respectively reside or carry on business; and

(d) special circumstances by reason of which justice may require a stay not to be granted will include consideration of factors such as the inability of the plaintiff to obtain justice in the foreign jurisdiction, advantages which the plaintiff may derive from involving the New Zealand jurisdiction and the application of any relevant limitation periods.

[76] Mr Browne submitted that the more appropriate forum need only be suggested, citing *Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd*.[55] However, the Court was referring to the burden shifting to the claimant in a case where permission is required to serve out of the jurisdiction.[56] The position in New Zealand is governed by r 6.29. Rule 6.29(1) provides that if service out of the jurisdiction occurs without leave and is protested, the plaintiff must establish a good arguable case that the claim falls within one or more of the limbs of r 6.27. However, that does not apply here since, as indicated, the Wikeley defendants were not served out of the jurisdiction in this sense. Rule 6.29(3) provides that when service of process has been validly effected within New Zealand, but New Zealand is not the appropriate forum for trial of the action, the defendant may apply for a stay, or for a dismissal of the proceeding under rule 15.1.

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54 *Exportrade Corp v Irie Blue NZ Ltd* [2013] NZCA 675, [2014] NZAR 495 at [39]; citing *Spiliada Maritime Corp v Cansulex Ltd* at 465 per Lord Templeman and at 484-486 per Lord Goff.

55 *Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2020] UKSC 37 at [94]-[96].

56 At [96].

[77] As Mr Browne submitted, I accept that the applicable principles are not concerned with the strength of the claim at least where service has been effected within New Zealand (or Australia).[57]

[78] Mr Browne submitted that Kentucky is the competent jurisdiction to determine the substantive dispute – whether the contract was forged or subject to fraud and therefore whether the default judgment should be set aside. He submitted the contract is utterly central to Kea's conspiracy claim and Kentucky is the competent jurisdiction even if the jurisdiction clause is permissive. He submitted that all connections with Kea's substantive case support Kentucky. He also submitted that BVI is a competent jurisdiction to determine whether the statutory demand should be set aside. In relation to Kea's declaration cause of action, he submitted this should await the outcome of the conspiracy claim in Kentucky.

[79] Mr Wass submitted there is no other forum that is available and with competent jurisdiction to hear Kea's claims, let alone any other single forum. He submitted the dispute in substance is whether the defendants are perpetuating a fraud.

[80] Having concluded that there is at least a plausible (albeit contested) evidential basis for Kea's case impugning the jurisdiction clause and also that the jurisdiction clause does not cover Kea's claims, I do not treat the jurisdiction clause as a factor weighing in favour of Kentucky.

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[57] *Connelly v RTZ Corporation* [1997] UKHL 1998, [1998] AC 854 at 871 per Lord Goff; *Hemi v Tyler* [2019] NZHC 1114 at [32].

[81] I do not consider that the applicable law weighs either way since no relevant issue on which foreign law would be required has been identified. It is therefore unnecessary to address in detail the parties' contrasting submissions on choice of law.[58]

[82] In this *forum conveniens* context too, I accept the question is one of substance, not form. However, I do not accept that the only (or even central, in the relevant sense) issue in dispute is whether the Coal Agreement is a forgery and as a result the default judgment should be set aside or not otherwise enforced. That is too narrow a characterisation. As indicated, Kea's conspiracy claim extends to other means of injuring Kea aside from the allegations about the Coal Agreement itself, and Kea seeks damages and/or an account as well as orders in relation to the Coal Agreement and default judgment. In substance, the dispute is whether the defendants are conspiring to injure Kea by fraudulent means; that is, perpetuating a fraud against Kea.

[83] On the available evidence, I do not consider the Kentucky Court is the appropriate forum for determination of Kea's claims against the defendants, for the following reasons. First, I doubt Kentucky is an available forum for Kea's claims. Professor Silberman's evidence indicates it is not. Indeed, the Kentucky Court does not appear to have any jurisdiction over the defendants Mr Wikeley and Mr Watson, who are not parties to WFTL's default judgment proceeding. Even in relation to WFTL, despite its default judgment against Kea, which indicates that WFTL has submitted to the Kentucky Court's jurisdiction for some purposes, there is disputed evidence as to whether the Kentucky Court has jurisdiction over WFTL in relation to

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[58] Mr Browne submitted that Kentucky law applies to the substance of Kea's claim since the choice of law clause applies, despite the challenge to the validity of the Coal Agreement, on the basis that the courts apply the law that would be the governing law if the contract is found to be valid (the putative proper law). I accept that is the approach in relation to the proper law of a contract at least where the dispute is as to whether the parties' negotiations resulted in a concluded contract. But the issue here is the governing law of Kea's claims and in particular its conspiracy claim. The choice of law clause only states that the "contract will be governed by the laws in Lexington, Kentucky and any applicable Federal law". In relation to Kea's tort (conspiracy) claim, while I accept that the acts in Kentucky were significant, I consider there is a good arguable case that New Zealand law governs Kea's conspiracy claim applying the Private International Law (Choice of Law in Tort) Act 2017 and in particular, as Kea submitted, applying the general rule in s 8 (on the basis that incorporation of WFTL as the vehicle to bring the fraudulent claim under the Coal Agreement and Mr Wikeley's appointment of WFTL as the trustee of the Wikeley Family Trust were the most significant elements of the tort) or, if necessary, the displacement principle in s 9.

Kea's claim that WFTL is party to a conspiracy to injure Kea by fraudulent means.[59] Even the evidence of Mr Regard, WFTL's Kentucky counsel, suggests only that Kea could counterclaim if the default judgment is set aside. Further, the Kentucky Court is not an available forum for Kea's second cause of action.

[84] Secondly, even if it is an available forum, Kentucky is not the most appropriate forum having regard to several factors. The New Zealand Court has a greater interest in regulating the conduct of WFTL, a New Zealand company acting as trustee of a New Zealand trust. The evidence indicates that the BVI Court will look to the New Zealand Court to make a conclusive finding on the conspiracy/fraud claim and will recognise such a judgment because this Court has jurisdiction over WFTL as of right. Kea's second cause of action will be pursued in New Zealand in any event and this Court will have to determine whether the defendants are perpetrating a fraud in that context.

[85] The location of the parties and witnesses does not favour Kentucky or BVI. Even if Mr Wikeley's principal place of business was in Kentucky during the (alleged) contract period, that is not a significant factor. WFTL did not exist then. They are not in Kentucky now. It may be that WFTL is the only party now based in New Zealand but, insofar as previous association is a factor, the natural person protagonists – Mr Wikeley, Mr Watson and Sir Owen Glenn – all have long associations with New Zealand. Nor are the likely principal witnesses – in particular Mr Wikeley who would need to give evidence in person – based in Kentucky or BVI. The role of the Kentucky lawyers (or Mr Branham) in the alleged conspiracy or factual matrix should not be overstated.

[86] In relation to the default judgment, I accept that Kea has taken steps in Kentucky to set aside the default judgment but, insofar as it is relevant, Kea has not submitted to the jurisdiction of the Kentucky Court. Also, reference to the risk of inconsistent judgments assumes that substantive proceedings will continue in both jurisdictions. That is not an appropriate assumption when addressing *forum conveniens* (as opposed to the need for ongoing interim anti-suit relief). Further, I do

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[59] Indeed, the evidence indicates doubt as to whether the Kentucky Court had jurisdiction over Kea albeit that is less relevant in the present context.

not accept that Kea has tactically delayed for the reasons stated in my earlier judgment.[60] Delay is not a factor weighing against New Zealand being the appropriate forum.

[87] Nor is it suggested the BVI Court is an appropriate forum for determination of Kea's claims against the defendants. The BVI Court does not have jurisdiction over the defendants in relation to Kea's conspiracy claim. The Wikeley defendants say that the BVI Court can determine whether WFTL's statutory demand ought to be set aside or withdrawn on the basis that Kea has a substantial and reasonable case that the default judgment was obtained fraudulently. Even so, that does not weigh against New Zealand being the appropriate forum to consider Kea's claims given the position in relation to Kentucky and BVI's likely recognition of a New Zealand judgment referred to above.

[88] I therefore conclude that New Zealand is the appropriate forum.

[89] Consequently, it is unnecessary to decide whether Kea's submissions concerning injustice would displace Kentucky as a more appropriate forum. However, I briefly record that, while the evidence indicates that the Kentucky Court can entertain a motion to set aside based on fraud and Professor Bermann said this includes consideration on appeal, the Kentucky Circuit Court has declined to do so,[61] and Kea's expert evidence indicates there is a real risk that the merits of the fraud allegation will not be addressed by the Kentucky Court. As Kea acknowledges, this is not a criticism of the Kentucky Court – it simply reflects the combination of the rules on the granting of default judgments and the constrained role of appellate review.

[90] For these reasons, I decline to dismiss or stay this proceeding on jurisdiction or *forum non conveniens* grounds. The protest to jurisdiction should be set aside.

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60 *Kea Investments Ltd v Wikeley Family Trustee Ltd* [2022] NZHC 2881 at [72]-[74]. See also below at [92]

61 See above at [12]. The Kentucky Circuit Court Order and Judgment states: "Because Plaintiff properly served Defendant the Court need not determine if there is meritorious defense raised by Defendant or if Defendant can make a showing of no prejudice to Plaintiff".

[91] Finally, although not specifically addressed in this way, an issue arises as to whether it is appropriate to stay the proceeding against WFTL or to extend time for WFTL's statement of defence, pending determination of Kea's appeal of the Kentucky Court's refusal to set aside the default judgment on the separate and narrower ground that WFTL should not be vexed with concurrent proceedings in respect of the same matter. My preliminary view is that the Kentucky appeal is not a concurrent proceeding is this sense given its limited scope, but I will reserve leave in relation to this issue. Subject to that (and possible appeal in relation to the protest), statements of defence should be filed. Counsel are to file a joint memorandum within seven days in relation to timetable orders.

Interim orders

[92] Having addressed the Wikeley defendants' applications, I consider that the current interim orders should continue pending further order of the Court. Kea has a good arguable case (and serious question to be tried) that the defendants are conspiring to defraud it. For the reasons set out in my earlier judgment, further steps by the defendants seeking to enforce the default judgment would be unconscionable, meeting the oppressive and vexatious requirement for interim anti-suit relief. Kea has adequately explained why it did not seek relief in New Zealand earlier. I also consider the balance of convenience and overall justice favour continuing interim relief against the defendants. It is consistent with comity considerations, as Professor Silberman and Mr Jones KC, a barrister practicing in England and Wales and in BVI who has also provided expert evidence in this proceeding, have now also indicated.

[93] Counsel agreed that it would be appropriate to hear from the parties in relation to the form of these interim orders. I agree that is appropriate at least having regard to the current position in Kentucky and BVI. The current interim orders are to continue in the meantime.

[94] Kea seeks further interim orders that:

(a) WFTL consent to the discharge of the default judgment and withdraw its Kentucky proceedings; and

(b) WFTL withdraw its statutory demand in BVI.

[95] Mr Smith acknowledged that an order requiring a judgment creditor to consent to the discharge of its judgment is not a common form of relief on an interim basis, but submitted that this is an extraordinary case where Kea can submit to the standard that would be necessary to obtain summary judgment that the defendants have conspired to commit fraud. He submitted that further relief is important because otherwise Kea is left trying to protect itself against the deployment of the default judgment in Kentucky and does not know where the defendants will strike next. Likewise, Kea should not be put to the cost of trying to have the statutory demand withdrawn.

[96] Mr Smith noted that Kea's expert evidence on Kentucky law makes it clear that WFTL is able to consent to the default judgment being set aside without prejudice to its right to bring the same claim at a later date. Likewise, Mr Jones KC expresses the opinion that the BVI Court will not consider the New Zealand Court's injunction to be exorbitant or inappropriately infringing on the jurisdiction of the BVI Court.

[97] Mr Smith also submitted the defendants have not identified any credible harm that would be suffered if default judgment is set aside that is not compensable in damages, and they have not given evidence that the existing undertaking as to damages is insufficient. By contrast, he submitted that Kea has demonstrated by cogent evidence the very real and irreparable harm that it has suffered, and will continue to suffer, if the fraud is not effectively restrained. In those circumstances, he submitted the balance of convenience is overwhelmingly in favour of relief, and justifies the extent of the further interim relief sought.

[98] I consider the further interim relief sought is a bridge too far, at least at this stage. Given my conclusions in relation to making a reliable assessment as to whether the defendants have conspired to commit fraud, it is premature to reach a conclusion akin to the summary judgment standard. Even accepting that WFTL could consent to the default judgment being set aside without prejudice to its right to re-file if the New Zealand proceeding is resolved in its favour, the further relief is unnecessary at

this stage to preserve Kea's position given the current interim orders. Also, given the anti-suit nature of the relief sought, comity is a real consideration.

Result

[99] The application to dismiss or stay the proceeding on jurisdiction or *forum non conveniens* grounds is dismissed. The protest to jurisdiction is set aside.

[100] Counsel are to file a joint memorandum within seven days in relation to timetable orders and the form of interim orders.

[101] The current interim orders are to continue pending further order of the Court.

[102] Kea's application for further interim orders (at [94] above) is dismissed.

[103] If costs on these applications cannot be agreed, I will receive brief memoranda (not exceeding four pages) within 28 days and determine costs on the papers.

Gault J