IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA681/2021
[2024] NZCA 5

BETWEEN	PEIXIAN HUANG First Appellant	
	HUAIJIAN HUANG Second Appellant	
	POY TONG WONG Third Appellant	
AND	JIEHAO HUANG Respondent	

Hearing:	30 June 2023
Court:	Collins, Goddard and Mallon JJ
Counsel:	R J Katz KC and H M McKee for Appellants R E Harrison KC and S Y Yang for Respondent
Judgment:	2 February 2024 at 3 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondent costs on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Mallon J)

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Introduction

[1] This appeal concerns a protest to jurisdiction upheld in the High Court and an application for ancillary orders declined by the High Court.[1] It arises in the context of a business in the People's Republic of China (the PRC) referred to as "the Heli Group", which is operated for and on behalf of members of the Huang family.[2] There is a dispute about which members of the Huang family currently own and control the Heli Group.

[2] Peixian Huang, HuaiJian Huang and Poy Tong Wong (the appellants) live in New Zealand, Canada and California respectively. They filed a statement of claim in the High Court relating to the proceeds of a New Zealand investment made on behalf of the Heli Group by JieHao Huang (the respondent). The respondent was educated in New Zealand and is a permanent resident, but now lives in the PRC. The proceedings were purportedly served on him in the PRC: as we explain below, that service was invalid.

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1 *Huang v Huang* [2021] NZHC 2902 [decision under appeal].

2 Huang and Wong are different translations of the same family name. We simply refer to the family as the Huang family.

[3] The appellants say that the respondent has not accounted to the beneficial owners of the Heli Group (as the appellants claim those beneficial owners to be) for the proceeds of the investment. Their amended statement of claim (the claim) seeks judgment in the sum of approximately $7.8 million together with an account of profits received by the respondent from his use of the proceeds.[3] Along with the claim, the appellants also seek a freezing order and ancillary orders over assets related to the investment.

[4] The respondent filed an appearance under protest to jurisdiction and, subsequently, an application to dismiss the proceeding on the ground that he had not been validly served or, alternatively, that the New Zealand courts were *forum non conveniens.* In the High Court Campbell J upheld the respondent's protest to jurisdiction on these grounds. The Judge also declined to make a freezing order and ancillary orders having dismissed the proceeding and also because he was not satisfied that there was a risk that the respondent would dissipate or dispose of the proceeds.

[5] The appellants now appeal. They say the Judge was wrong not to assume jurisdiction and not to continue the freezing order and not to make ancillary orders.

[6] For the reasons that follow, we dismiss the appeal.

The claim

[7] The Heli Group is not a registered entity in the PRC or elsewhere. It is the informal name used by the Huang family to describe the group of companies and partnerships that the family owns. The claim pleads that those with interests in the group describe themselves as "shareholders".

[8] The claim pleads that from 2003 the siblings of the Huang family had the following beneficial shares: the first appellant (Peixian Huang) a 3/11th share; the second appellant (HuaiJian Huang) a 3/11th share; the third appellant (Poy Tong Wong) a 1/11th share; ZhaoJian Huang a 3/11th share; and Cho Kin Wong a 1/11th share. It pleads that the shareholders and their ownership have remained unchanged

[3] All monetary figures in this judgment refer to New Zealand dollars.

since 2003 and that these shareholders also make up the "board" of the Heli Group and in that role oversee the overall operation and decision making of the Heli Group. These shareholders are referred to by the parties as the "first generation" of the family group.

[9] The claim pleads that the respondent (JieHao Huang), who is the son of ZhaoJian Huang, was appointed in 2008 as a general manager of one of the Heli Group entities and in 2015 assumed responsibility for the finances of three of the Heli Group entities. It pleads that, in return for these services, the respondent was paid a monthly sum as well as 30 per cent of ZhaoJian Huang's share of "dividends".[4]

[10] The claim pleads that in late 2015 Cho Kin Wong, on behalf of the Heli Group shareholders, contacted the respondent about an investment opportunity in two properties in Silverdale, New Zealand (the Silverdale investment). The respondent was to act as the local agent in that investment.[5] The purpose of the Silverdale investment was to subdivide two properties and construct residential properties for on-sale to purchasers. The shareholders agreed to invest $6 million in the Silverdale investment.

[11] The claim pleads that the respondent, along with 10 other investors, incorporated a company for the purposes of the Silverdale investment with a nominee trust holding 100 of the 110 shares in that company. It pleads that the respondent held a 30 per cent beneficial interest in the assets held on that trust on behalf of the Heli Group and its shareholders. It pleads that the investment properties were sold at a profit. It pleads that, as result of the investment, the respondent had or should have received $19,474,952.89 as its 30 per cent share of the sale proceeds payable to the nominee trustees. It pleads that the shareholders have received $7,214,521.01 of the sale proceeds and the respondent has neglected or failed to transfer the balance of $12,260,431.88 to the Heli Group shareholders, of which the appellants' share is $7,802,093.01.

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4 The evidence indicates that the "shareholders" in the Heli Group received profit distributions, referred to as "dividend" payments by the appellants.

5 At that time, the respondent lived in New Zealand.

[12] Five causes of action are pleaded: breach of a remedial constructive trust; an implied constructive trust; breach of an agency agreement and account for share of profits; constructive trust and tracing; and breach of a joint venture agreement.

Respondent's position

[13] The respondent filed affidavit evidence in support of his opposition to the application for freezing and ancillary orders and in support of his application to dismiss the proceeding. In that affidavit the respondent says that the Heli Group is a name used by the Huang family in internal communications but never in external communications. He says each trading entity is operated independently with the shares and partnerships held on trust for the "shareholders". He says the beneficial ownership changed in 2014 when the first generation — HuaiJian Huang, Peixian Huang and ZhaoJian Huang (his father) — decided to take a step back from the family business and let their respective successors (the second generation) take over their roles as well as their beneficial interests.

[14] The respondent says that he has reinvested approximately $2 million of the proceeds as authorised by the Heli Group and made distributions of a further $5.2 million of the proceeds to the beneficial owners of the Heli Group. The respondent's position reflects his position as to who operates and has the beneficial ownership of the Heli Group. The respondent says he holds a further (approximately) $6.6 million in proceeds from the investment that he has not distributed because of the competing claims to those funds and because he says he is owed a significant sum, far exceeding $6.6 million, by two of the beneficial owners of the Heli Group (as he says them to be) or by the Heli Group.

Service

[15] The claim (in its original form) was filed on 22 December 2020 together with a without notice application for freezing orders and ancillary orders. Jagose J in the High Court declined to determine the application on a without notice basis, directed that the claim and application (together with the Court's minute) be served on the

respondent as well on ZhaoJian Huang and Cho Kin Wong, and adjourned the application until after service.[6]

[16] The appellants arranged for Yong Gang Sun, a lawyer from Guangzhou, China, to serve the documents. Yong Gang Sun filed an affidavit of service advising that he served the documents on the respondent at a business address in Guangdong province by personal delivery on 23 December 2020 at 1.55 pm China Standard Time. The respondent accepted the documents, and acknowledged he was JieHao Huang.

[17] Rule 6.32 of the High Court Rules 2016 (the Rules) provides:

> **6.32 Service outside New Zealand**
>
> (1) An originating document permitted under these rules to be served outside New Zealand may be served by a method—
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> (a) specified in rule 6.1; or
>
> (b) permitted by the law of the country in which it is to be served; or
>
> (c) provided for in rules 6.33 and 6.34.
>
> (2) Subclause (1) is subject to subclauses (3) and (4).
>
> (3) When a convention relating to service of process is in force between New Zealand and the country where service is to be effected, service must be effected in accordance with a method provided for, or permitted by, that convention.
>
> (4) No service outside New Zealand is valid if effected contrary to the law of the country where service is effected.

[18] In the High Court on the protest to jurisdiction the respondent contended that service was not validly effected under r 6.32(4) because it was contrary to the laws of the PRC. In support of this submission, the respondent filed an affidavit from Dr Fang Chen, a lawyer of Guangdong province, China. Campbell J accepted Dr Chen was an expert on the law of the PRC.[7]

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6 *Huang v Huang* HC Auckland CIV-2020-404-2519, 23 December 2020 [Jagose J minute].
7 Decision under appeal, above n 1, at [51].

[19] As summarised in the High Court judgment:

> [54] Dr Chen said … that under the law of the PRC, extraterritorial proceedings can be served in the PRC only by one of four methods:
>
> (a) In accordance with the procedures set out in international treaties concluded or acceded to by China;
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> (b) Served by a court of the PRC at the request of a foreign court;
>
> (c) Served by a foreign embassy or consulate on their own citizens; or
>
> (d) Served by a court of the PRC on PRC citizens or legal person and third-country or stateless persons in the PRC through diplomatic request.
>
> [55] Dr Chen explained that, given the PRC and New Zealand do not have an agreement on mutual judicial assistance for civil and commercial matters, and as New Zealand is not a party to the Hague Service Convention, the present proceeding could only be served by a court of the PRC after having received a request from a New Zealand court or through diplomatic channels. He concluded that, as the proceeding was not served on JieHao Huang in that manner, service "has been effected contrary to PRC law".

[20] The correctness of this evidence was not challenged by the expert evidence filed in the High Court by the appellants. Indeed the appellants' expert accepted it "largely represents the law in the PRC". The Judge accordingly concluded that this meant that service of the originating documents had been effected contrary to the law of the PRC and that consequently, pursuant to r 6.32(4) of the Rules, that service was not valid. This finding is not challenged on appeal. Rather, the challenge is to the steps that the Judge then ought to have taken.

[21] In the High Court the respondent submitted that invalid service meant that the Court lacked jurisdiction to hear and determine the proceeding and this meant that the proceeding should be dismissed under r 5.49 of the Rules. Rule 5.49 provides:

> **5.49 Appearance and objection to jurisdiction**
>
> (1) A defendant who objects to the jurisdiction of the court to hear and determine the proceeding may, within the time allowed for filing a statement of defence and instead of so doing, file and serve an appearance stating the defendant's objection and the grounds for it.
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> ...

> (3) A defendant who has filed an appearance may apply to the court to dismiss the proceeding on the ground that the court has no jurisdiction to hear and determine it.
>
> …
>
> (5) At any time after an appearance has been filed, the plaintiff may apply to the court by interlocutory application to set aside the appearance.
>
> (6) The court hearing an application under subclause (3) or (5) must,—
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> (a) if it is satisfied that it has no jurisdiction to hear and determine the proceeding, dismiss the proceeding; and
>
> (b) if it does not dismiss the proceeding under paragraph (a), set aside the appearance.
>
> (7) To the extent that an application under this rule relates to service of process effected outside New Zealand under rule 6.27 or 6.28, it must be determined under rule 6.29.
>
> ….
>
> (8) The court, in exercising its powers under this rule, may do so on any terms and conditions the court thinks just and, in particular, on setting aside the appearance it may extend the time within which the defendant may file and serve a statement of defence and may give any directions that appear necessary regarding any further steps in the proceeding.
>
> …

[22] The Judge considered that r 5.49(7) applied only where the proceeding had been validly served.[8] This meant that he was required to dismiss the proceeding under r 5.49(6) subject to the power under 5.49(8) to do so on terms that were just.[9] The Judge went on to consider whether, if service had been validly effected, the Court would have assumed jurisdiction under r 6.29 (which provides the court with the power to assume jurisdiction and is discussed below).[10] He did so because the lack of jurisdiction as a result of invalid service potentially could be cured by effecting valid service.[11] The Judge concluded that, even if service had been validly effected, the Court would not have assumed jurisdiction under r 6.29. [12] The Judge therefore dismissed the proceeding.

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8 At [44].
9 At [44] and [72]–[73].
10 See [30]–[64] below.
11 Decision on appeal, above n 1, at [73].
12 At [112].

[23] The appellants' submissions on this aspect of the appeal are a little unclear. On the one hand they say that the Judge was required by r 5.49(7) to consider r 6.29. However, the Judge did in fact consider r 6.29 albeit because of r 5.49(8) rather than r 5.49(7). The route to r 6.29 is, however, of no consequence if r 6.29 was in fact considered by the Judge, as it was. They also say that the Judge failed to address the saving mechanism in r 5.49(8). However, the Judge did in fact consider the saving mechanism and that was why he went on to consider r 6.29. We therefore apprehend that the appellants' real complaint is that they say the Judge reached the wrong conclusion under r 6.29.

[24] The respondent submits that the Judge erred in applying r 5.49(8) because that rule does not apply to r 5.49(6). He says that is because r 5.49(6) provides that the court "must" dismiss the proceeding if it is satisfied that it has no jurisdiction. We reject this submission. It ignores the wording of r 5.49(8) that applies when the court is "exercising powers under this [r 5.49] rule". The dismissal power under r 5.49(6) is a power under the rule.

[25] As this Court said in *Commerce Commission v Viagogo AG*, the objection to jurisdiction contemplated in the Rules is an objection to the "jurisdiction of the court to hear and determine the proceeding on the merits".[13] That depends on valid service in accordance with the Rules.[14] However, the "court plainly has jurisdiction to entertain the proceedings and make orders for the purpose of determining the objection to jurisdiction" and can make a range of orders ancillary to that, such as case management orders.[15] It can also grant interim relief, including freezing orders, without service having yet been effected.[16]

[26] Consistent with this, we consider that the court's jurisdiction under r 5.49(8) extends to, for example, adjourning the hearing of the protest to jurisdiction to enable valid service to be effected, or to make an order that the dismissal will take effect on a particular date unless valid service has been effected by that date. We consider that the Judge was correct to consider that a dismissal should not be ordered under r 5.49(6)

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13 *Commerce Commission v Viagogo AG* [2019] NZCA 472, [2019] 3 NZLR 559 at [79].
14 At [52].
15 At [79].
16 At [80].

if invalid service could be rectified and if the court would then assume jurisdiction under r 6.29 when valid service had been effected.

[27] The respondent makes the further submission on this appeal that r 5.72(2) now prevents valid service from being effected. Rule 5.72 provides:[17]

> **5.72 Prompt service required**
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> (1) The statement of claim and notice of proceeding must be served—
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> (a) as soon as practicable after they are filed; or
>
> (b) when directions as to service are sought, as soon as practicable after the directions have been given.
>
> (2) Unless service is effected within 12 months after the day on which the statement of claim and notice of proceeding are filed *or within such further time as the court may allow*, the proceeding must be treated as having been discontinued by the plaintiff against any defendant or other person directed to be served who has not been served.

[28] We disagree that this rule is disqualifying. The proceeding was dismissed in the High Court. The parties agreed to a holding arrangement in respect of the freezing order pending the appeal.[18] It would not have been appropriate for the appellants to have effected service of the dismissed proceeding pending the outcome of the appeal. Rule 5.73 permits the court to extend the period referred to in r 5.72. We consider in these circumstances that, if we were to allow the appeal, the court would likely exercise that power to allow a further period of time for service to be effected.[19]

[29] We therefore now turn to whether the Judge correctly determined that the court would not assume jurisdiction under r 6.29.

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17 Emphasis added.

18 *Huang v Huang* HC Auckland CIV-2020-404-2519, 3 November 2021.

19 Rule 5.73(1) of the High Court Rules 2016 permits a plaintiff, before or after the expiration of the period referred to in r 5.72, to apply for an order extending the period. Rule 5.73(2) permits the Court to extend the period of service if it is satisfied that reasonable efforts have been made to effect service or for other good reason.

Jurisdiction

The Rules

[30] Rule 6.29 provides:

> **6.29 Court's discretion whether to assume jurisdiction**
>
> (1) If service of process has been effected out of New Zealand without leave, and the court's jurisdiction is protested under rule 5.49, the court must dismiss the proceeding unless the party effecting service establishes—
>
> (a) that there is—
>
> (i) a good arguable case that the claim falls wholly within 1 or more of the paragraphs of rule 6.27; and
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> (ii) the court should assume jurisdiction by reason of the matters set out in rule 6.28(5)(b) to (d); or
>
> (b) that, had the party applied for leave under rule 6.28,—
>
> (i) leave would have been granted; and
>
> (ii) it is in the interests of justice that the failure to apply for leave should be excused.
>
> (2) If service of process has been effected out of New Zealand under rule 6.28, and the court's jurisdiction is protested under rule 5.49, and it is claimed that leave was wrongly granted under rule 6.28, the court must dismiss the proceeding unless the party effecting service establishes that in the light of the evidence now before the court leave was correctly granted.
>
> …

[31] The approach to jurisdiction under r 6.29 therefore depends on whether service out of the jurisdiction has been effected without leave (under r 6.27) or with leave (under r 6.28). In this case, service was effected without leave.

[32] Rule 6.27 specifies the types of claims that may be served without leave. As potentially relevant here, it provides:

> **6.27 When allowed without leave**
>
> (1) This rule applies to a document that initiates a civil proceeding, or is a notice issued under subpart 4 of Part 4 (third, fourth and subsequent parties), which under these rules is required to be served but cannot

be served in New Zealand under these rules (an **originating document**).

(2) An originating document may be served out of New Zealand without leave in the following cases:

…

(b) when a contract sought to be enforced or rescinded, dissolved, annulled, cancelled, otherwise affected or interpreted in any proceeding, or for the breach of which damages or other relief is demanded in the proceeding—

(i) was made or entered into in New Zealand; or

(ii) was made by or through an agent trading or residing within New Zealand; or

(iii) was to be wholly or in part performed in New Zealand; or

(iv) was by its terms or by implication to be governed by New Zealand law:

(c) when there has been a breach in New Zealand of any contract, wherever made:

…

(f) when the proceeding relates to the carrying out or discharge of the trusts of any written instrument of which the person to be served is a trustee and which ought to be carried out or discharged according to the law of New Zealand:

…

(l) when a claim is made for restitution or for the remedy of constructive trust and the defendant's alleged liability arises out of acts committed within the jurisdiction:

…

[33] The respondent accepted in the High Court, and accepts in this Court, that under r 6.29(1)(a)(i) there is a good arguable case that the claim falls wholly within one or more of the paragraphs in r 6.27. This meant that under r 6.29(1)(a)(ii) the appellants were required to show the court should assume jurisdiction by reason of the matters set out in r 6.28(5)(b) to (d).

[34] Rule 6.28(5)(b) to (d) are three of the four criteria for when the court may grant leave to serve an originating document out of New Zealand when service without leave is not available under r 6.27.[20] The four criteria under r 6.28(5) are as follows:

> **6.28 When allowed with leave**
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> …
>
> (5) The court may grant an application for leave if the applicant establishes that—
>
> (a) the claim has a real and substantial connection with New Zealand; and
>
> (b) there is a serious issue to be tried on the merits; and
>
> (c) New Zealand is the appropriate forum for the trial; and
>
> (d) any other relevant circumstances support an assumption of jurisdiction.

Serious issue to be tried

[35] The approach to assessing r 6.28(5)(b) was set out by this Court in *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* as follows:[21]

> [37] Addressing the first of these issues (serious issue to be tried on the merits), the Court must be satisfied there is a serious legal issue to be tried and that there is a sufficiently strong factual basis to support the legal right asserted. In approaching these questions, 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.

[36] In the High Court the respondent accepted that serious factual disputes could not be resolved on an interlocutory basis and that there was a serious legal issue to be tried if the applicable law was New Zealand law.[22] He submitted, however, that the applicable law was PRC law and that this meant the appellants did not have standing to bring their claim because their claim was as beneficial owners based on a trust that

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20 High Court Rules, r 6.28(1).

21 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 (footnotes omitted).

22 Decision under appeal, above n 1, at [79].

was not recorded in writing.[23] He submitted it also meant that the appellants' claim, being equitable, was not tenable.[24]

[37] The Judge noted that there are cases where some issues are resolved by the law of one country and other issues are resolved by the law of another country.[25] He said it would be difficult to see how issues over the ownership of entities within the Heli Group, and whether payments were made on behalf of the first-generation owners or the Heli Group entities could be governed by any system of law other than PRC law.[26] By contrast, the Judge regarded the applicable law as to the obligations on the respondent when he received the money and whether he breached those obligations as not so obvious.[27]

[38] The Judge concluded:

> [85] It is not necessary (or appropriate, on an interlocutory application with so many factual disputes) to make definitive findings on the applicable law for these issues. I accept [the] submission that at this stage the [appellants] merely have to satisfy me there is a serious issue that New Zealand law is the applicable law for determining [the respondent's] obligations and whether he breached them. I find it is seriously arguable that New Zealand law is the applicable law for these issues, as they may be characterised as disputes over property rights.

[39] Because the Judge had found it was seriously arguable that New Zealand law applied to the obligations of the respondent when he received the money, this meant the tenability of equitable claims under the PRC law was not disqualifying under r 6.28(5)(b).

[40] As to whether the appellants lacked standing under PRC law, there was competing expert evidence. The respondent relied on expert evidence from Dr Chen that PRC law only recognises express written trusts (and no written trust was alleged) and does not recognise "unregistered shareholders" and that therefore the appellants do not have the necessary "direct interest" in the case. The appellants relied on expert

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23 At [79].
24 At [79].
25 At [82], citing *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 WLR 387 (CA) at 402–404 per Staughton LJ.
26 At [82].
27 At [83].

evidence from Dr Zhixiong Liao. Dr Liao accepted that a trust had to be in writing. However, his evidence was that a person with an unregistered shareholding could have a direct interest if the true nature of the relationship was a partnership, an agency, a joint venture or a long-term contractual relationship. His evidence was that these relationships did not have to be in writing to be recognised in PRC law.

[41] In the face of this competing evidence, the Judge said:

> [92] I am not in a position to resolve, on the affidavits alone, the conflicting opinions expressed by the experts on PRC law and on how it would apply to the circumstances of this case. There is at least a serious legal issue to be tried that under PRC law the plaintiffs would be entitled to sue, relying on one of the relationships to which Dr Liao referred. The facts pleaded arguably fit those relationships (under PRC law). The pleaded facts, not the labels the plaintiffs have used in their pleadings, are what matters.

[42] The Judge therefore concluded there was a serious issue to be tried on the merits.[28]

[43] While this conclusion appears favourable to the appellants, as we understand their submissions, they say that the Judge was wrong to consider the facts, events and circumstances surrounding the parties' relationships in the PRC because they are not relevant. They say that because they are not relevant the Judge was wrong to conduct a "mini trial" on the affidavit evidence about this. These submissions appear to relate more to whether the Judge was correct to find that the appropriate forum was the PRC rather than to whether there is a serious question to be tried on the merits — since the Judge held in favour of the appellants on this point. We therefore consider this point under that topic, to which we now turn.

Appropriate forum

[44] The Judge noted that the respondent accepts he invested the funds in the Silverdale investment on behalf of other persons and does not say the funds are his.[29] The Judge considered the key issue in the proceeding was on whose behalf within the Heli Group the respondent was investing.[30] The Judge considered this pointed to the

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28 At [94].
29 At [96].
30 At [96]–[97].

PRC being the most appropriate forum for determination of the key issue, and to New Zealand being an inappropriate forum.[31]

[45] This was because resolving this key issue would require an examination of events in the PRC, many of which took place before any investment in New Zealand.[32] The matters relevant to that examination were all connected with the PRC.[33] In the Judge's view, it would be much more convenient and less expensive to determine these matters in the PRC.[34] This was because the documents would be in Mandarin, most of the witnesses spoke only Mandarin, and an appreciation of Chinese family and business culture would be important to understanding what people said, wrote and did.[35] The applicable law for these issues would, in the Judge's view, be the PRC.[36]

[46] The Judge accepted that other issues in the proceeding were connected to New Zealand:

(a) One issue was the quantum of proceeds the respondent received from the Silverdale investment. But documentary evidence on these issues (likely to be from conveyancing files, bank records and financial statements) could be translated easily and would not require special appreciation of New Zealand culture or business practice.[37] The Judge was unpersuaded that the PRC courts would not have access to those documents in light of Dr Chen's evidence on this point.[38]

(b) As to whether the respondent was authorised to invest some of the proceeds of the Silverdale investment in a property and a business in New Zealand, this would turn on dealings between the respondent, the appellants and the second-generation owners.[39] Those dealings were

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31 At [100].
32 At [98].
33 At [99].
34 At [99].
35 At [99].
36 At [98]–[100].
37 At [101].
38 At [102].
39 At [103].

likely to have occurred mostly in the PRC and relevant documents relating to those dealings would likely be in Mandarin.[40]

(c) Similarly, whether payment of some of the proceeds supported either party on the key issue was disputed and would require a consideration of WeChat messages in Mandarin (with English translations differing in content as between the parties).[41] The Judge considered it would be easier for someone familiar with Mandarin, and the culture in which the messages were composed, to understand them.[42]

[47] The Judge accepted that there was a serious issue as to whether New Zealand law was the applicable law for determining the respondent's obligations in relation to the money that he received for investment in New Zealand, and whether those obligations were breached.[43] However, the Judge went on to say that he was of the view that it was likely that the applicable law for all issues was PRC law.[44] The Judge considered the most appropriate characterisation of the dispute was that it was about an agreement rather than property rights.[45] Further, the agreement was entered into in the context of the respondent having already been employed for several years as a general manager for one of the Heli Group companies and having become responsible for the finances of three entities in the group.[46] The Judge considered that there was no doubt that the respondent's duties to the Heli Group were governed by PRC law.[47] He considered that it would be very surprising if the parties intended the respondent's obligations under the new agreement (relating to the Silverdale investment) would be subject to a different system of law from that governing the broader Heli Group arrangements.[48]

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40 At [103].
41 At [104].
42 At [104].
43 At [83]–[85] and [105].
44 At [106].
45 At [105].
46 At [106].
47 At [106].
48 At [106].

[48] The Judge concluded that the relevant factors firmly pointed to the PRC as the appropriate forum.[49] The Judge was unpersuaded by a submission that the Court should nevertheless assume jurisdiction because requiring the appellants to litigate in the PRC would lead to injustice.[50] That submission was made partly because it was said that equitable causes of action were not recognised in the PRC. The Judge was not satisfied that legal remedies would be unavailable on the pleaded facts in the PRC.[51] It was also submitted that injustice would arise because the PRC courts lacked independence and were corrupt. The Judge regarded this submission as unsupported by any cogent evidence.[52] The PRC was accordingly the appropriate forum and the New Zealand courts should not assume jurisdiction over the dispute.

[49] The appellants challenge the Judge's decision on the appropriate forum in several ways. They say:

(a) first, the Judge was wrong to find that r 6.29(1)(b) could not be established and that, had the Judge considered whether leave would have been granted under r 6.28, the issue of appropriate forum would then fall away;

(b) secondly, the Judge's finding that the PRC was the appropriate forum was at odds with his earlier finding that New Zealand law was arguably applicable in relation to the respondent's obligations and whether they were breached;

(c) thirdly, the arrangements and entitlements of the first and second generations are irrelevant to the obligations in New Zealand and, even if they are not irrelevant, arrangements in the PRC governed by PRC law can be the subject of expert evidence in New Zealand; and

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49 At [107].
50 At [108].
51 At [109].
52 At [110].

(d) fourthly, the Judge was wrong to reject the appellants' claim that substantial injustice would arise if they were required to bring their claim in the PRC.

[50] First, we reject the submission that the Judge was wrong to find that r 6.29(1)(b) could not be established. The Judge explained in a footnote that, if the appellants could not establish under r 6.29(1)(a)(ii) that the Court should assume jurisdiction by reason of the matters set out in r 6.28(5)(b) to (d), then they would not be able to show, as required by r 6.29(1)(b), that they would have been granted leave under r 6.28 had they applied for it.[53]

[51] The appellants' submission appears to assume that, if the Judge considered r 6.29(1)(b), the only relevant criterion under r 6.28(5) would be r 6.28(5)(a). That is, it would only be necessary to consider whether the proceeding had a real and substantial connection to New Zealand. That, however, is not a correct interpretation of the Rules.

[52] Rule 6.29(1)(b) requires the court to consider whether, had the party applied for leave under r 6.28, it would have been granted. Under r 6.28(5) the applicant seeking leave is required to establish all four criteria of r 6.28(5)(a) to (d). While here the appellants may have been able to establish r 6.28(5)(a) (a real and substantial connection to New Zealand), the appellants would also need to establish that the criteria in r 6.28(5)(b) to (d) were met.[54] This meant that, if the appellants could not establish New Zealand was the appropriate forum for the trial (as required by r 6.28(c)), leave would not have been granted had it been applied for.

[53] We therefore agree with the Judge that, if the appellants could not establish under r 6.29(1)(a)(ii) that the Court should assume jurisdiction by reason of the matters set out in r 6.28(5)(b) to (d), then they also could not show under r 6.29(1)(b) that they would have been granted leave under r 6.28 had they applied for it.

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53 Decision under appeal, above n 1, at [76], n 11.

54 This follows from a plain reading of r 6.29 of the High Court Rules. See also *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, above n 21, at [48].

[54] Secondly, we reject the submission that the Judge's finding that the PRC was the appropriate forum was at odds with his earlier finding that New Zealand law was arguably applicable in relation to the respondent's obligations and whether they were breached.[55] The Judge's approach was to accept that it was seriously arguable that New Zealand law was applicable in so far as aspects of the dispute could be characterised as a dispute over property rights. However, that did not preclude him from going on to consider whether it was more likely that PRC law was the applicable law for all issues when considering whether New Zealand was the appropriate forum for the trial.

[55] As this Court discussed in *Wing Hung Printing*:[56]

> [45] In considering whether another forum is more appropriate, the Court looks for the forum with which the proceeding has the most real and substantial connection. Relevant factors include issues of convenience or expense, availability of witnesses, *the law governing the relevant transaction* and the places where the parties resided or carried on business.
>
> [46] We accept that other relevant considerations also bear on the issue of appropriate forum. These include the cautious approach already discussed to the subjection of foreigners to the jurisdiction of a New Zealand court; whether other related proceedings are pending elsewhere; whether the New Zealand court would provide the most effective relief or whether a foreign court is in a better position to do so; whether the overseas defendants will suffer an unfair disadvantage if a New Zealand court assumes jurisdiction; and any choice of jurisdiction previously agreed by the parties.

[56] It was therefore relevant for the Judge to consider whether PRC law was likely to be the governing law for all aspects of the claim. We agree with his view on this issue, for the reasons he gave.[57] The appellants' claim is premised on interests they claim to have in the Heli Group. The second appellant's (HuaiJian Huang's) affidavit evidence was that the Heli Group companies are based in China and are operated by the five families of the Huang family. His affidavit said that the respondent managed and held the Heli Group's stake in the Silverdale investment on behalf of the family. The source of the alleged obligations in relation to that investment are therefore the Heli Group arrangements in the PRC.

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55 Decision under appeal, above n 1, at [85] and [94].

56 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, above n 21 (emphasis added and footnote omitted).

57 See above at [47].

[57] Thirdly, it follows that we disagree with the submission that the arrangements and entitlements of the first and second generations are irrelevant to the obligations in New Zealand. As the appellants accepted in the High Court, "all that is relevant is who has a claim to the funds invested in the Silverdale Investment by JeiHao Huang, and in what proportions".[58] As the Judge said, resolving this key issue "would require examination of events that occurred in the PRC".[59] We agree with the Judge that the fact that documentation and WeChat conversations will largely be in Mandarin, that all the witnesses speak Mandarin or Cantonese, and that an appreciation of Chinese family and business culture will likely be important to the assessment of the legal obligations of the parties, all point to the PRC being the appropriate forum.[60]

[58] Finally, the appellants claim there will be injustice if they must litigate in the PRC because equitable claims are not recognised in PRC law and a tracing remedy in New Zealand would not be available. There is no dispute in the expert evidence about this. However, that does not mean injustice will arise. As the appellants' expert Dr Liao says, the true nature of the relationship between the family members may be a partnership, an agency, a joint venture, a cooperative business or a long-term contractual relationship and these relationships are recognised by in PRC law.

[59] Similarly, as noted earlier, the Judge considered that the most appropriate characterisation of the issue was a dispute about an agreement rather than a dispute about property rights.[61] We agree. The fact that the dispute is about an investment in property and that a tracing remedy may be sought does not alter the fact that the source of the respondent's obligations to the appellants, if any, relates to the arrangements in the PRC. It is not unjust for the appellants to pursue their alleged rights in the PRC in accordance with PRC law. The substance of the dispute can be heard in the PRC and, if established, there are remedies in that jurisdiction. To the extent that any judgment may need to be enforced against assets in New Zealand, a proceeding in New Zealand for that purpose may be necessary. While that may involve some inconvenience, we

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58 Decision under appeal, above n 1, at [97].
59 At [98].
60 The evidence indicates that the documentation is, for the most part, in Mandarin, but some relevant witnesses may speak Cantonese.
61 Decision under appeal, above n 1, at [105].

are satisfied that the other factors identified point strongly in favour of the PRC as the appropriate forum for the dispute.

[60] The other aspect of alleged injustice, in being required to pursue their claim in the PRC that the appellants pursue on this appeal, concerns discovery and disclosure processes. The appellants contend that the Judge did not explain why he was satisfied about the PRC processes when the PRC courts will not have jurisdiction over documents in New Zealand and those documents will contain all evidence necessary for tracing orders. However, the respondent's expert, Dr Chen, gave detailed and clear evidence about the PRC's investigation and evidence collection system. He explained that the parties can apply to the People's Court to investigate and collect evidence that they cannot collect on their own, the People's Court has the right to investigate and collect evidence from the relevant entities and individuals, and those entities and individuals cannot refuse to cooperate with the investigation. Further, to the extent that the appellants' concern is about documents necessary for a tracing remedy into assets located in New Zealand, if such a remedy is pursued in New Zealand following the appellants obtaining a money judgment in the PRC, that remedy would be sought in New Zealand proceedings. At that point the usual New Zealand rules governing discovery would apply.

[61] In summary, we agree with the Judge's conclusion that the PRC is the appropriate forum for the dispute. The PRC has the most real and substantial connection to the key issue (to whom are the respondent's obligations owed and in what proportions), the documentary evidence is likely to be in the PRC and largely in Mandarin, the relevant witnesses likely speak Mandarin or Cantonese, and the likely governing law is the PRC. The only connection to New Zealand is that the Silverdale investment allegedly made on behalf of the Heli Group (which is PRC-based) was in New Zealand. The respondent's expert evidence is that the PRC will have jurisdiction over the dispute (albeit that an equitable claim is not recognised). The appellants' expert evidence essentially agrees.

[62] These conclusions did not involve the Judge conducting an improper mini trial. It is necessary for the court to examine the factual basis for the claim asserted and

evidence relevant to identification of the appropriate forum.[62] The Judge was careful to avoid making findings of fact as to the nature of the relationship between the appellants and the respondent and as to whether the respondent's actions were or were not consistent with the appellants' claim. The Judge did not accept the expert evidence from Dr Liao in some respects — particularly his evidence as to the calibre of judges in the PRC and whether they act impartially. However, Dr Liao's evidence on this point was generalised and dated, and was strongly and cogently refuted by the respondent's expert evidence from Dr Chen. In any event, reliance on this aspect of Dr Liao's evidence was not directly pursued on appeal.

[63] There are no other circumstances that support an assumption of jurisdiction by a New Zealand court overriding the other factors that point strongly in favour of the PRC as the appropriate forum.[63]

Conclusion on jurisdiction

[64] We therefore conclude that the High Court was correct to dismiss the proceeding under r 6.29. For completeness, we note that by memorandum filed on 22 January 2024 the respondent informed the Court that subsequent to the hearing of this appeal the appellants have issued "identical proceedings" against the respondent in the Guangzhou Intermediate People's Court.

Freezing and ancillary orders

Jurisdiction

[65] Rule 32.2 of the Rules provides for a freezing order to be made to restrain a respondent from removing assets located in or outside New Zealand, or from disposing of them, or dealing with them or diminishing their value.[64] The requirements for a freezing order before obtaining a judgment are: a good arguable case on the substantive claim that is justiciable in the New Zealand courts (or in a court of another country where there is a sufficient prospect that that court will give a judgment in

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62 See, for example, *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, above n 21, at [37] and [129]–[142].

63 High Court Rules, r 6.28(5)(d).

64 Rule 32.2(2).

favour of the applicant that will be enforced in New Zealand); assets to which the order can apply; and a real risk that the respondent will dissipate or dispose of those assets.[65] The overall justice of the case is also to be weighed.[66]

[66] An application for a freezing order must be made by interlocutory application or originating application.[67] It is usually made by interlocutory application (where there is a proceeding in this jurisdiction) but may be made by originating application where there is a good arguable case on a cause of action that is justiciable in a court in another country, and the freezing order is sought in support of eventual enforcement in New Zealand of a judgment of that foreign court.[68]

[67] Rule 32.3 permits the court to make an order ancillary to a freezing order or a prospective freezing order if the court considers it just.[69] The purposes for which an ancillary order may be made include, as relevant, eliciting information relating to assets relevant to the freezing order or proposed order or determining whether the freezing order should be made.[70]

Appellants' application

[68] The appellants' application was made as an interlocutory application. A freezing order was sought in respect of specified New Zealand bank accounts in the name of the respondent. Ancillary orders were sought against the respondent and relevant banks (authorising them to provide the bank statements and bank account numbers of any accounts in the name of the respondent and the company vehicle for the Silverdale investment).[71]

[69] As noted earlier, Jagose J in the High Court declined to hear the application on a without notice basis.[72] The application came before Lang J in the High Court on

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65 *Shaw v Narain* [1992] 2 NZLR 544 (CA) at 548.
66 At 548.
67 High Court Rules, r 32.2(4).
68 JK Gorman and others *McGechan on Procedure* (looseleaf ed, Thomson Reuters) at [HR32.2.01].
69 High Court Rules, r 32.3(1).
70 Rule 32.3(2)(a) and (b).
71 Rule 32.4 confirms that the court may make a freezing order or an ancillary order against a respondent (such as a bank) who is not a party to a proceeding in which substantive relief is sought against the respondent.
72 See Jagose J minute, above n 6. The minute is discussed above at [15].

13 January 2021 with the respondent represented by counsel.[73] That day, Lang J made an interim freezing order against the respondent in relation to the bank accounts identified in the application.[74]

[70] The order restrained the respondent from dealing or disposing of the funds in those accounts until the substantive application for a freezing order could be heard.[75] The order permitted the respondent to have access to the funds in the accounts to meet his ordinary living expenses, to pay his legal costs in relation to this proceeding and to make payments in the ordinary course of his business including business expenses incurred in good faith.[76] The Judge gave leave to the respondent to apply to vary or discharge the orders.[77]

[71] The appellants' submissions filed in support of the without notice application explained that the ancillary orders were to ensure the freezing order could be properly policed and was effective in ascertaining the existence, value and whereabouts of the respondent's assets. In the interim freezing order decision, Lang J said he was "mak[ing] no further orders at [that] stage".[78]

[72] Whether the interim freezing orders should continue and, if so, whether the ancillary orders should be granted was considered by Campbell J when hearing the protest to jurisdiction.[79] Having dismissed the proceeding on that protest, the Judge said there was no basis on which the freezing order and ancillary orders could be made or continued.[80]

[73] The Judge went on to say that, even if he had not dismissed the proceeding, he would not have made or continued the orders.[81] This was because he was not satisfied that there was a danger that any judgment obtained by the appellants would be

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73 As discussed at [20] above, service was not effected in accordance with r 6.32(4) of the High Court Rules.
74 *Huang v Huang* [2021] NZHC 7.
75 At [12].
76 At [12].
77 At [12].
78 At [12].
79 Decision under appeal, above n 1, at [3].
80 At [113].
81 At [113].

unsatisfied because of a risk that the respondent would dissipate or dispose of assets. In reaching this conclusion the Judge referred to the following:

(a) Once the dispute was on foot, the respondent had retained almost all of the proceeds.[82] He appeared to have made only two payments — a payment to the second appellant of $328,014.07 and a payment of $700,000 to his own bank account in the PRC to fund his litigation costs (in that jurisdiction) — leaving him holding the balance of about $6.1 million.[83]

(b) Although the application for freezing orders was made on notice, the respondent did not take any steps to dissipate the funds before the interim order was made.[84]

(c) While some of the proceeds had been reinvested in a Massey property and an Auckland car dealership, these assets would be available to satisfy a judgment just as funds in the bank accounts would be and so this was not evidence of a risk of dissipation giving rise to a danger that any judgment would be unsatisfied.[85]

Appeal

[74] On appeal, in relation to whether the freezing orders or ancillary orders could be made or continued once the Judge had dismissed the proceeding, the appellants refer to a decision of the Privy Council in *Convoy Collateral Ltd v Broad Idea International Ltd.*[86] In that decision the Privy Council noted that a freezing order can be obtained even if the applicant has no cause of action or substantive claim against the respondent in the local jurisdiction.[87] But, as the Privy Council explained, the purpose of a freezing order is to preserve the prospect of enforcement in the local jurisdiction of a judgment obtained against a defendant in that jurisdiction or in some

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82 At [118].
83 At [117].
84 At [119].
85 At [119].
86 *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24, [2023] AC 389.
87 At [82] and [93]–[95] per Lord Leggatt, Lord Briggs, Lord Sales and Lord Hamblen.

other country.[88] So there must be substantive proceedings that have been brought or will be brought somewhere, which may result in a substantive judgment that may be enforced in the local jurisdiction.

[75] The position is essentially the same in New Zealand under Pt 32 of the Rules. A freezing order can be obtained in support of substantive proceedings outside New Zealand: there need not be substantive proceedings before a New Zealand court. And a freezing order can be obtained in New Zealand against a respondent who is not a defendant in any substantive proceedings in New Zealand or elsewhere, for example where that respondent holds assets against which enforcement may ultimately be sought in New Zealand. But what is essential is actual or potential proceedings in New Zealand, or actual or potential proceedings before the courts of another country that may ultimately be enforced in New Zealand. In this case, the New Zealand courts do not have jurisdiction to hear the substantive claims against the respondent. The New Zealand proceedings have been dismissed. The appellants did not seek a freezing order in support of proceedings in another country that might result in a judgment that would be enforceable in New Zealand. They cannot sustain a freezing order in New Zealand in the absence of any relevant substantive proceeding,[89] in New Zealand or elsewhere.

[76] The appellants also say that there was ample evidence before the High Court to find a real risk of dissipation. We have examined the matters relied upon by the appellants for this submission and are not satisfied they show this risk. Like Campbell J, we are not satisfied there is a risk that any judgment sum would not be met for the reasons he gave.[90]

[77] The appellants also contend that the ancillary orders should have been made at this stage. However, as matters stood, the New Zealand proceeding had been dismissed. The presence of funds in New Zealand was not therefore relevant. The position might be different if the appellants proceed with their claim in the PRC, obtain a judgment against the respondent and seek to enforce it against assets in New Zealand.

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88 At [84]–[89], [95], [99] and [101]–[102].
89 Or a judgment in their favour.
90 See above at [73].

It might also be different if they apply for a freezing order in New Zealand in support of their proceedings in the PRC, and that application satisfies the criteria set out in pt 32 of the Rules. We express no view on the prospect of success of any such applications.

Result

[78] The appeal is dismissed.

[79] The appellants must pay the respondent costs for a standard appeal on a band A basis together with usual disbursements.

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