IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI Ō AOTEAROA

SC 127/2024

BETWEEN	**KEA INVESTMENTS LTD** **Appellant**
AND	**KENNETH DAVID WIKELEY** **First Respondent**
AND	**WIKELEY FAMILY TRUSTEE LTD (in interim liquidation)** **Second Respondent**
AND	**ERIC JOHN WATSON** **Third Respondent**
AND	**WIKELEY INC.** **Fourth Respondent**
AND	**USA ASSET HOLDINGS INC** **Fifth Respondent**

SUBMISSIONS OF COUNSEL TO ASSIST THE COURT

DATED 1 October 2025

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MAY IT PLEASE THE COURT

Summary

1. The question on appeal is a narrow one: was the Court of Appeal correct to discharge the permanent anti-suit and anti-enforcement injunctions awarded to the appellant (**Kea**) in the High Court?

2. This question must be answered in the affirmative.

3. Before discharging the injunctions, the Court of Appeal conducted a careful analysis of the core principles relating to anti-suit and anti-enforcement injunctions and applied them to the facts of this case. The Court of Appeal's reasoning is consistent with international jurisprudence and strikes a balance between respecting international comity and Kea's concern to protect itself against further fraud.

4. Requiring Kea to pursue normal appeal routes to have the default judgment against Kea (**Default Judgment**) [1] overturned in the Kentucky courts before resorting to permanent, worldwide anti-enforcement injunctions is appropriate. The Court did not foreclose the possibility of injunctions in the future but displayed the judicial restraint required when considering extraordinary, extraterritorial relief. The Court's analysis is careful, considered and balanced.

5. It is submitted that the appeal should be dismissed.

[1] Order for Default Judgment dated 31 January 2022. (301.0439)

Anti-suit and Anti-enforcement injunctions

6. Anti-suit injunctions, and more particularly anti-enforcement injunctions, are considered extraordinary remedies, to be imposed in rare cases after careful consideration. Their extraterritorial effect renders them "*a remarkable thing*"[2] in the judicial arsenal and a "*heavy fetter on the exercise of constitutional rights of access to the courts so prized and jealously defended*" within domestic jurisdictions.[3]

7. In reading Kea's analysis of anti-suit injunctions at [49]-[51] of its submissions, one might form the impression that anti-suit and anti-enforcement injunctions operate just like any other injunction in equity. This is not so.

8. In many jurisdictions, the power to issue anti-suit and anti-enforcement injunctions that have extraterritorial effect is not recognised.[4] Traditionally, the English courts have been the most willing to grant anti-suit injunctions.[5] However, even in the English courts, they are rare and primarily used for so-called "contract-based" injunctions to restrain proceedings in breach of an arbitration or exclusive jurisdiction clause.

9. While cases that address contract-based anti-suit and anti-enforcement injunctions are helpful in their discussion of general principles, the approach of the courts (particularly to comity) is often more restrained when considering "non-contract-based" injunctions (i.e., those that do not concern arbitration or exclusive jurisdiction clauses). Care needs to be taken when applying contract-based cases to this dispute, which does not involve

[2] Andrew Dickinson "Taming Anti-Suit Injunctions" in Andrew Dickinson and Edwin Peel (eds) A Conflict of Laws Companion: Essays in Honour of Adrian Briggs (Oxford University Press, Oxford, 2021) 77, at 78. (A0897)
[3] Dickinson, n.2 at 78.
[4] Gary Born, International Commercial Arbitration (3 ed, Wolters Kluwer, 2021), p.1400.
[5] Ibid., pp.1393-1397.

proceedings in breach of an arbitration of exclusive jurisdiction clause. This was recognised by the Court of Appeal in its judgment.[6]

10. There is also a distinction to be made between cases involving anti-suit injunctions (usually issued to restrain proceedings prior to judgment) and those involving anti-enforcement injunctions or a hybrid of the two, as is the case here. While Kea seeks to have both anti-suit and anti-enforcement injunctions reinstated, the anti-suit injunctions aid (or are ancillary to) the anti-enforcement injunction.[7] It is submitted that the threshold for granting an anti-enforcement injunction is the correct one to apply in the present case.

Exceptional nature of the remedy – anti-enforcement injunctions

11. Anti-enforcement injunctions are exceptionally rare, even more so than anti-suit injunctions.[8] They are an extraordinary remedy and courts have consistently emphasised that the power to grant anti-enforcement injunctions is to be exercised with great caution, given the risks of interfering with the processes of foreign courts.

12. In *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd,* the Singapore Court of Appeal provided insight into the principles and requirements for granting anti-enforcement injunctions. The Court emphasised the need for exceptional circumstances beyond the usual requirements for anti-suit injunctions, highlighting the importance of comity and the potential impact on foreign legal systems. Moreover, the Court held that simply demonstrating vexatious conduct or oppression was insufficient:[9]

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[6] See discussion at CA Judgment, n.158.
[7] See *Google v. ANO TV-Novosti and Others* [2025] EWHC 94 at [2].
[8] See *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, at [118]. (A0372)
[9] *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] SGCA 10, at [98]-[99]. (A0730)

> "The authorities have uniformly expressed the need to exercise great caution in granting anti-enforcement injunctions – even more so as compared to anti-suit injunctions restraining ongoing court proceedings – because of the way they interfere with foreign proceedings. ... For these reasons, it would not be sufficient to simply demonstrate (a) a breach of a legal right; or (b) vexatious or oppressive conduct in an anti-enforcement injunction case. ... That is not to say that anti-enforcement injunctions can never be granted. There have to be exceptional circumstances that warrant the injunction."

13. In *Sun Travels*, a party that lost an arbitration litigated the same issues before the Maldivian courts and received a judgment in their favour. The Singapore High Court granted an anti-enforcement injunction, but it was set aside by the Court of Appeal after expressing concern about interference in the foreign legal system.[10]

14. In *Masri v Consolidated Contractors*, Collins LJ observed that:[11]

> "… it will be a rare case in which an injunction will be granted by the English court to prevent reliance abroad on, or compliance with, a foreign judgment, or an injunction which will indirectly have that effect. But there is no general principle that even in such a case no injunction will be granted … the power will only be exercised in exceptional circumstances."

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[10] *Sun Travels*, above n.9, at [97]. The case ultimately turned on delay in seeking the injunction, which is not at issue here.

[11] *Masri v Consolidated Contractors Int (UK) Ltd and others (No 3)* [2008] EWCA Civ 625, [2009] QB 503, at [94]. (A0527)

15. His Honour acknowledged that fraud could constitute exceptional circumstances, meaning that an anti-enforcement injunction could be available in the current case.

16. In *Ecobank Transnational v Tanoh,* Christopher Clarke LJ noted that the number of cases in which anti-enforcement injunctions have been granted in the past are few and far between.[12] He highlighted that, in addition to comity, there are further considerations underpinning the need for caution. These include that an anti-enforcement injunction: (i) precludes foreign courts of their prerogative to consider whether the judgment in question should be recognised or enforced; and (ii) indirectly interferes with the execution of the judgment in the country of the court which pronounced the judgment and where one can expect the judgment to be obeyed.[13]

17. Kea relies on *Commercial Bank of Dubai PSC v Al Sari* [2025] EWHC 1810 as an example of the English courts granting an anti-enforcement injunction because the foreign judgments were obtained by fraud. However, in that case, the party seeking the anti-enforcement injunction (the Bank) had exhausted its appeal options before the Sharjah Court of Appeal and the Federal Supreme Court before seeking anti-enforcement injunctions from the English courts.[14] This case aligns with the Court of Appeal's reasoning that anti-enforcement injunctions should be a last resort, considered after proper appeal routes have already been explored. In the *Commercial Bank of Dubai* case, the courts issuing the relevant judgment had an opportunity to consider the fraud allegations and to rule on the impact of those allegations on the relevant judgment. The Kentucky courts have not been given that opportunity in

[12] *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, at [118]. (A0372)
[13] Ibid., at [136].
[14] *Commercial Bank of Dubai PSC v Al Sari* [2025] EWHC 1810 at [3], [120]-[121]. (A0257)

relation to the Default Judgment, with the initial set aside application occurring before the New Zealand Court findings.

18. Further, the case confirms that if Kea's attempts to have the Default Judgment overturned in Kentucky are unsuccessful, it will not be precluded from seeking anti-enforcement measures in New Zealand (just as the Bank did in that case). In other words, the findings of the Kentucky courts will not have preclusive effect in relation to the anti-enforcement injunction.[15]

19. While anti-enforcement injunctions are rare, there is no dispute that a New Zealand court can issue such an injunction.[16] It is also not disputed that fraud is a circumstance which may warrant the issuing of anti-suit or anti-enforcement injunctions. Whether or not such an injunction should be issued will always be fact specific. It requires careful analysis of the principles and their application to the particular facts before the Court.

Court of Appeal's Approach

20. The Court of Appeal's approach to consideration of the anti-suit and anti- enforcement injunctions followed the principles set out above.

21. The Court correctly identified that an initial requirement for granting such injunctions was to establish personal jurisdiction over the defendant.[17] The Court also correctly noted that establishing jurisdiction was not sufficient and that consideration must then be given to whether the Court's discretion to grant an injunction should be exercised. The Court weighed various factors, including comity; impact on public policy; finality of the judgment; the risk of oppression for Kea and the existence of the underlying fraud.

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[15] Ibid., at [137]-[144].
[16] See Kea Submissions, [72].
[17] CA Judgment, at [174].

22. No criticism can be made of the approach of the Court of Appeal or the principles it applied. It is submitted that the Court of Appeal engaged in a thorough review of the relevant principles and facts. Its analysis was cogent, measured and gave proper deference to the competing interests. Injunctions are, however, ultimately discretionary and different courts may weigh the same factors and considerations in different ways.

Comity

23. Comity is a foundational concept in international law. As confirmed by the renowned French jurist and arbitrator, Professor Emmanuel Gaillard:[18]

> "Comity is an important and omnipresent factor in parallel litigation and assumes even more significance in international proceedings. It is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation ... The primary reason for giving effect to the rulings of foreign tribunals is that such recognition factors international cooperation and encourages reciprocity. Thus, comity promotes predictability and stability in legal expectations, two critical components of successful international commercial enterprises."

24. Professor Gaillard acknowledges that "*comity limits the availability of anti-suit injunctions*."[19]

25. The Court of Appeal's approach is grounded in the principle of comity. As the Court observed, this principle is the "*mortar*" that holds the international legal system together and has replaced

[18] Emmauel Gaillard "Coordination or Chaos: Do the Principles of Comity, Lis Pendens, and Res Judicata Apply to International Arbitration?" The American Review of International Arbitration Vol. 29 No. 3, 205 at p.215 (quoting *URS Corp. v. Lebanese Co. for Dev. & Reconstr. of Beirut Cent.* Dist. SAL., 512 F. Supp. 2d 199 (D. Del. 2007), at 210).
[19] Ibid at 206.

"*judicial chauvinism*" so that "*the normal assumption is that* [a domestic] *court has no superiority over a foreign court in deciding what justice between the parties requires.*"[20]

26. As noted by Andrew Dickinson:[21]

> "The existence of the anti-suit injunction, and much of the current judicial practice, sit uneasily with assurances that we live in an era in which judicial comity has replaced judicial chauvinism."

27. In relation to anti-suit and anti-enforcement injunctions, this approach is grounded in a long line of authority and courts have consistently emphasised the need for restraint and deference to foreign courts in this context.

28. To start, the Court of Appeal correctly observed that, while purporting to restrain a person from pursuing a remedy in a foreign court (rather than the foreign court itself), anti-suit and anti-enforcement injunctions do in fact interfere with the process of justice in the foreign court.[22] It is clear that anti-suit and anti-enforcement injunctions "*ha*[ve] *a dramatic impact upon the foreign court's control of its own procedure*."[23] This is well-established in the jurisprudence.[24]

29. Because of this potential impact, careful consideration of comity principles is required – particularly where the injunction is intended to prevent enforcement of a judgment which is considered valid in its "home" forum. In *Karaha Bodas Co. v. Pertamina*, the U.S. Court of Appeals for the Fifth Circuit reversed an injunction that would

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[20] CA Judgment, [164]-[166]. See Dickinson above n.2 at 78-79, where he says that anti-suit injunctions are "*scented with the 'innate superiority' professed by English courts in the 19th century*".
[21] Dickinson above n.2 at p.79.
[22] *British Airways Board v Laker Airways Limited* [1985] AC 58, at 95 (A0218); *Airbus Industrie G.I.E. v Patel* [1999] 1 AC 119, at 138-140. (A0057)
[23] Adrian Briggs *Civil Jurisdiction and Judgments* (7 ed, Rutledge, 2021), p.606. (A0834)
[24] See *Sun Travels,* above n.9, at [69]. (A0730)

have prohibited an Indonesian state-owned company from pursuing proceedings in Indonesia to vacate a Swiss arbitral award. The Court reasoned:[25]

> "The doctrine of comity contains a rule of 'local restraint' which guides courts reasonably to restrict the extraterritorial application of sovereign power..."
>
> "An injunction here is likely to have the practical effect of showing a lack of mutual respect for the judicial proceedings of other sovereign nations and to demonstrate an assertion of authority not contemplated by the New York Convention."
>
> "Given the absence of a practical, positive effect that any injunction could have, more weighty considerations of comity dictate that the better course for U.S. courts to follow is to avoid the appearance of reaching out to interfere with the judicial proceedings in another country and to avoid stepping too far outside its limited role under the Convention."

30. As observed by Michael Schneider, there is a danger that anti-suit injunctions are seen to express:[26]

> "… the opinion of the enjoining court that it has the right not only to decide on its own jurisdiction but also on the jurisdiction of another court or tribunal. The enjoining court appears to believe that it knows better or has a superior right (for instance on the basis of a choice of forum clause) and that the court of the principal action

[25] *Karaha Bodas Company, LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and PLN*, Judgment of United States Court of Appeals for the Fifth Circuit, 18 June 2003, at pp 28, 33 and 35.

[26] Michael E. Schneider "Court Actions in Defence Against Anti-Suit Injunctions" in International Arbitration Institute (IAI) Series No. 2 - Anti-Suit Injunctions in International Arbitration, No. 2, 2005, p. 41-42.

> cannot be trusted or does not have the legal means to reach the correct conclusion."

31. In the recent case of *Google v. ANO TV-Novosti*,[27] the English High Court held that:[28]

> "…comity is a two-way street, requiring mutual respect between courts in different states. This need for mutual respect means that comity requires a recognition of the territorial limits of each court's enforcement jurisdiction, in accordance with generally accepted principles of customary international law ... [citing Lord Bingham's statement in *Societe Eram Shipping Co* that it is "*inconsistent with the comity owed to the Hong Kong court to purport to interfere with assets subject to its local jurisdiction*" …]"

32. When considering the injunctions, the Court of Appeal properly weighed these concerns. The Court was conscious that extraterritorial injunctions should be used as a last resort and should not prevent the Kentucky courts from properly dealing with a Kentucky judgment.[29] This is particularly so given that the Default Judgment is still considered valid in its home jurisdiction, and the Kentucky courts have not yet had the opportunity to consider the New Zealand judgments.

33. It is submitted that the Court of Appeal's approach is entirely consistent with the *Pertamina* and *Google* cases and the Schneider commentary. It held that the Court should be "*extremely cautious*" before imposing an injunction and determine if there is "*a*

[27] *Google v. ANO TV-Novosti and Others* [2025] EWHC 94.
[28] Ibid., at [75], quoting from *SAS Institute v World Programming* [2020] EWCA Civ 599.
[29] The Court cited Dickinson, n.2 at 104.

sufficiently real risk justice will not be done by the foreign court" to warrant imposing an injunction.[30]

34. The Court's analysis strikes the proper balance between comity and Kea's concerns, in the context where remedies are still available in the foreign forum. If those remedies (appeals) can be exercised to set aside the Default Judgment, the objective will have been achieved without the need for the New Zealand courts to intrude on a foreign jurisdiction. As noted by Adrian Briggs, "*modern rules have to balance judicial awareness of the need for self-restraint with the fundamental principle that where there is a wrong there should be a remedy*."[31] Part of that balance will inevitably include assessing whether other (less drastic) remedies are available – such as appeals. Although Kea protests having to participate in proceedings before the Kentucky courts, the inconvenience to Kea must be weighed against the risks of interfering with the Kentucky courts' proper processes.

35. Finally, it is submitted that the Court should be cautious in accepting arguments that anti-enforcement injunctions aid or enhance comity.[32] Professor Gaillard observed:[33]

> "… when legal systems specifically empower courts to resolve questions of overlapping jurisdiction using comity—which mostly occurs in common law systems, they may weaken respect for foreign legal orders. When placed in the hands of an interventionist judge, a flexible principle like comity can be used to expand a court's discretion to act extraterritorially rather than limit it. As such, the flexibility of comity as a principle of judicial decision-making makes it somewhat of an "Orwellian"

[30] CA Judgment, [176].
[31] Briggs, above n.23 at p.606.
[32] Kea Submissions, [83] and [107].
[33] Gaillard, above n.18, at 206.

> concept, working to undermine the very interests for which it stands."

Foreign Court's actions may be relevant

36. In *Barclays Bank v Homan*, Glidewell LJ said in relation to anti-suit injunctions that "*the jurisdiction is to be exercised rarely, and with proper recognition of comity, i.e. of the respect owed to the foreign court*."[34] The Court upheld Hoffmann J (as he then was) and endorsed his reasoning that interference through an injunction might be justified if it appeared, from the jurisprudence of the foreign court, that the foreign court was likely to act in a manner contrary to accepted principles of international law.

37. Contrary to Kea's submission that such an approach is incorrect, the Court of Appeal identified a similar approach taken in a number of other cases and said that:[35]

> "… cogent evidence will be required that the foreign court has acted or is likely to act in excess of its jurisdiction under international law, in violation of the requirements of natural justice otherwise in a manner manifestly incompatible with New Zealand's fundamental policies, or that its proceedings are likely significantly and irreversibly to interfere with the administration of justice in New Zealand."

38. This speaks against Kea's submission that a focus on the foreign court, rather than the actions of the defendants, exacerbates comity concerns.[36]

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[34] *Barclays Bank plc v Homan* [1993] BCLC 680 at p.701.
[35] CA Judgment, [176], footnotes omitted.
[36] Kea Submissions, [78].

Non-contractual cases

39. As noted above, there is a difference in the way that anti-suit and anti-enforcement injunctions are dealt with by the courts when there is no arbitration clause or exclusive jurisdiction clause at issue.

40. The most pertinent cases were discussed and applied in the Court of Appeal's judgment, as follows:[37]

(a) In *E.D. & F Man (Sugar) Ltd v Yani Haryanto,*[38] the English Court of Appeal upheld a refusal to grant an anti-enforcement order relating to an Indonesian judgment that found the underlying contract and settlement agreement to be illegal and void (contrary to a finding by the English Court). The Claimant sought an anti-enforcement injunction against the Indonesian judgment. The Court emphasised that such relief was exceptional and must be exercised with great caution. It declined to do so despite the actions of Mr Haryanto being unconscionable, as it considered that other relief was sufficient to protect the applicant. The Court emphasised the importance of comity, stating that injunctive relief with extraterritorial effect is "*inconsistent with normal relations between friendly sovereign states, and... subversive of the best interests of the international trade system*".[39] The Court of Appeal agreed with the High Court that it would be "*an affront to the Indonesian courts and an illegitimate interference (albeit indirectly) with the processes of courts worldwide*" to grant an injunction to prevent reliance on the Indonesian judgment.[40] It would be for the foreign courts concerned to choose whether to recognise the judgments of the English or Indonesian courts.

[37] CA Judgment, [180]-[181].
[38] *E.D. & F Man (Sugar) Ltd v Yani Haryanto* [1991] 1 Lloyd's Rep 161.
[39] Ibid., at p.18 (quoting first instance decision).
[40] Ibid., at p.29.

The Court of Appeal confirmed that respect must be given to decisions of foreign courts properly given within their jurisdiction.[41]

(b) In *Mamidoil-Jetoil v Okta,* the English High Court declined to grant an anti-enforcement injunction, warning against indirect interference with foreign judicial processes and emphasising the importance of comity and judicial restraint.[42] The Court endorsed the approach in *E.D. & F Man* (above) that the use of injunctions should be exercised with great caution and only where necessary. The Court considered that it was up to each court to decide how to treat a foreign judgment in its jurisdiction and, for this reason, the Court would not grant an injunction restraining the defendants from relying on injunctions issued in a foreign court that prevented them from paying damages due under an English judgment.[43]

41. It is submitted that the Court of Appeal correctly identified that, in cases of non-contractual anti-suit and anti-enforcement injunctions, comity concerns are heightened. Where an arbitration clause exists, the public policy in favour of party autonomy reduces comity concerns.[44] Similarly, an injunction to enforce an exclusive jurisdiction clause is "*not regarded as a breach of comity, because it merely requires a party to honour his contract.*"[45] This is not the case with non-contractual injunctions.

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[41] Ibid., at p.29.
[42] *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2002] EWHC 2210 (Comm), [2004] 1 Lloyd's Rep 1, at [205].
[43] Ibid., at [201].
[44] *OT Africa Line Limited v Magic Sportswear Corporation* [2005] EWCA Civ 710, at [49]-[50].
[45] *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725 at [50]. (A0338)

Exhaustion of appeals

42. The Court of Appeal's decision to discharge the injunctions was based in large part on Kea's failure to date to pursue its full appeal rights in the Kentucky courts.

43. While exhaustion of local remedies may not be an express requirement of anti-enforcement injunctions, it is notable that such appeals are usually exhausted by applicants prior to seeking anti-enforcement injunctions. As observed by Adrian Briggs, seeking a remedy from the foreign court itself is the most direct approach, if it is available.[46] Exhausting local remedies before asking another court to enjoin proceedings assists in striking an appropriate balance between comity and justice.[47] It helps to alleviate the concern that anti-enforcement injunctions have the capacity to interfere with foreign courts administering justice in their own territory.

44. There are several cases in the record that support this position:

    (a) As noted by the Court of Appeal, in *Société Nationale Industrielle Aérospatiale v Lee Kui Jak*, an anti-suit injunction was applied for in Brunei only after all avenues of appeal against the Texas Court's assumption of jurisdiction had been exhausted.[48]

    (b) This was also the case in *Google v. ANO TV-Novosti*, where Google had instigated multiple appeals against the various Russian judgments at issue (including in the Supreme Court) before applying for anti-enforcement injunctions. The Court observed that "*the Claimants challenged the Russian courts*

[46] Briggs, above n.23, at p.605 (A0834)
[47] Ibid., at 606.
[48] *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 781 (PC), referenced at CA Judgment, [185]. (A0671)

at all stages of the proceedings in all three cases in which they appeared."[49]

(c) In *Sun Travels*, the High Court's original injunctions (which were overturned) were deliberately designed not to impede the appeals process in the foreign forum against the foreign judgment that was ongoing at the time.[50]

(d) In *Amchem Products Inc v Workers Compensation Board*, the rulings of the Texas Court were appealed (and denied). Only thereafter did Amchem seek injunctive relief from the Canadian courts.[51] The Canadian Supreme Court stated:[52]

> "In order to resort to this special remedy consonant with the principles of comity, it is preferable that the decision of the foreign court not be pre-empted until a proceeding has been launched in that court and the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings and failed.
>
> If the foreign court stays or dismisses the action there, the problem is solved. If not, the domestic court must proceed to entertain the application for an injunction …"

(e) Relying on *Amchem*, in *Nithinan Boonyawattanapisut v. True Axion Interactive*,[53] the Supreme Court of British Columbia noted the aggressive nature of the anti-suit injunction remedy and that it was preferable that a party apply to the

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[49] *Google*, above n.7, at [111].
[50] *Sun Travels*, above n.8, at [43]-[45].
[51] *Amchem Products Inc v Workers Compensation Board* [1993] 1 SCR 897 (A0081)
[52] Ibid., at p.931.
[53] *Nithinan Boonyawattanapisut v. True Axion Interactive Co., Ltd*. [2024] BCSC 45.

foreign court for assistance first.[54] The Court stopped short of deeming this to be a mandatory requirement.

45. These cases emphasise the importance of allowing the Kentucky courts to deal with the Default Judgment before the New Zealand courts enjoin enforcement. The Court of Appeal's decision properly defers to the Kentucky courts, giving them an opportunity to set aside the Default Judgment before New Zealand considers imposing worldwide injunctions prohibiting its enforcement.[55]

46. Against this background, Kea's submission that it "*is unrealistic and unjust as well as unprincipled*" to require it to appeal the Default Judgment before granting anti-enforcement injunctions cannot be sustained.[56]

Jurisdiction

47. While Kea may be correct that the New Zealand courts are the natural forum to address the fraud issues, it cannot be denied that the Kentucky courts are the proper forum to address the validity of the Default Judgment.

48. The Court of Appeal rightly distinguishes this case from those cases where there was a contractual jurisdiction clause in favour of the injuncting forum.[57]

49. Kea says that unconscionability is exacerbated because it has no connection with the relevant forum (Kentucky).[58] This argument runs into difficulty given that there is a Kentucky judgment against Kea, which does (rightly or wrongly) give it a connection with the Kentucky jurisdiction. The Court should be careful not to conflate jurisdiction under the Coal Agreement with the Kentucky courts'

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[54] Ibid., at [23] and [32]-[33].
[55] CA Judgment, [186].
[56] Kea Submissions, [108].
[57] CA Judgment, [187] distinguishing *Ellerman Lines Ltd v Read* and *Bank St Petersburg OJSC v Arkhangelsky.*
[58] Kea Submissions, [60].

jurisdiction to deal with the Default Judgment. Consistent with the approach in *E.D. & F Man*, the Kentucky court should be able to address that Judgment without interference, even where unconscionable behaviour exists.

50. For the New Zealand court to impose a worldwide anti-enforcement injunction against the Default Judgment before Kea has been through the proper process for having the Judgment overturned in Kentucky would run contrary to the cases discussed above. The Court of Appeal was correct to require Kea to pursue its remedies in the Kentucky courts before seeking such injunctions in New Zealand.

51. Relatedly, Kea's suggestion that jurisdictional concerns do not arise in this case because there is no legitimate claim under the Coal Agreement may have been relevant if injunctions had been applied for prior to judgment being issued.[59] The considerations change once a judgment has been issued, which is why anti-enforcement injunctions engage different considerations than anti-suit injunctions.

52. The Court of Appeal's reticence to confirm the injunctions does not arise from the underlying Coal Agreement, but from enjoining the enforcement of a judgment that – at least for now – remains legitimate in the eyes of the Kentucky courts. Allowing those courts to consider the appeal issues before granting injunctions that interfere with their processes is consistent with comity and the extraordinary nature of the requested remedy. As stated in *Sun Travels*, "*an anti-enforcement injunction would be an indirect interference with the execution of the judgment in the country of the court which pronounced the judgment and where one can expect the judgment to be obeyed*."[60] To take this step without (at least)

[59] Kea Submissions, [79].
[60] *Sun Travels*, above n.9, at [97].

waiting for appeals to be exhausted should raise considerable concerns for this Court and is not consistent with the extraordinary nature of the remedy being requested.

53. Similarly, requiring Kea to seek recourse against the Default Judgment in the forum that issued the Judgment cannot be seen as vexatious or oppressive. Such a finding risks an affront to the Kentucky courts. Kentucky is the natural forum to deal with the Default Judgment, and the Kentucky courts should be given the opportunity to do so. This is consistent with the cases cited above, where appeals have been exhausted before the extraordinary remedy of an anti-enforcement injunction has been sought.

54. The fact that Kentucky's procedures for seeking to have the Default Judgment set aside are different to those in New Zealand is not relevant.[61] Kentucky (as with all US states) is an established, respected jurisdiction, and there is no reason for the New Zealand courts to prevent it from appropriately dealing with its own judgment. Requiring Kea to pursue appeals in Kentucky does not offend against the jurisdiction of the New Zealand courts.[62] Indeed, enjoining enforcement of the Default Judgment without Kentucky remedies having been pursued risks the very "*judicial chauvinism*" that comity was designed to prevent.

55. The Court of Appeal properly recognised this at [171], noting that "*it is not for a New Zealand court to arrogate to itself the decision how a foreign court should determine the matter.*" This was also the position taken by Males LJ in *SAS Institute v World Programming,* where he said:[63]

[61] In *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA), at 96 (A0805), Millet LJ referred to the need to avoid casting doubt on the adequacy of the foreign court processes. See also *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2002] EWHC 2210 (Comm), [2003] 1 Lloyd's Rep 1 at [204] (relied on by the Court of Appeal).
[62] Masri [2008] EWCA Civ 625; [2008] 1 CLC 887 at [86] (per Lawrence Collins LJ)
[63] *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599, at [103] (A0635).

> "When an anti-suit injunction is sought on grounds which do not involve a breach of contract, comity, telling against interference with the process of a foreign court, will always require careful consideration. The mere fact that things are done differently elsewhere does not begin to justify an injunction. …"

56. The Court of Appeal also took account of the fact that the New Zealand courts may have treated Kea's initial challenge to the Default Judgment differently, given that the reason for Kea's failure to file a statement of defence in the original proceeding had been explained by the negligence of its agent. The Court of Appeal noted that any natural justice issues that might arise from a public policy perspective could be properly addressed if the Default Judgment were final, with all appeal rights exhausted.[64] The view that the Kentucky courts may take on these issues (especially following the High Court judgments) is unknown and should not be second guessed.[65] The fact that "*Kea's prospects on appeal are uncertain*" is not a reason to grant an anti-enforcement injunction.[66]

Unconscionability

57. Kea takes issue with the Court of Appeal expressing caution about the role of unconscionability in this context.[67] The Court of Appeal relied on commentary by Professor Dickson expressing concern at the role of unconscionability in a polytheistic society.[68]

58. The Court of Appeal balanced the underlying fraud with the notions of comity discussed above. It is difficult to justify a finding that requiring a party to exhaust local remedies is vexatious or oppressive, without clear evidence that there is no prospect the

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[64] CA Judgment, [182]-[183].
[65] The Order Denying Motion to Alter, Amend, Vacate was issued before the High Court proceedings were commenced.
[66] Kea's Submission, [110].
[67] Kea Submissions, [52].
[68] CA Judgment, [189].

judgment will be overturned. That is not the case here, and the Court of Appeal rightly expressed concern that any suggestion that Kentucky proceedings (or requiring appeal) is vexatious or oppressive could "*look patronising from the perspective of the United States."*[69]

59. As discussed above, in the case of *ED & F Man,* [70] the English Court of Appeal refused to grant anti-enforcement injunctions even though it acknowledged that Mr Haryanto's actions were "unconscionable". The Court considered that comity requirements and respect for Indonesian jurisdiction outweighed any unconscionability aspect.

60. As the Court of Appeal recorded, despite the unconscionability, the English Court in *ED & F Man* found:[71]

> "(a) Injunctive relief was not necessary to protect Man in England in light of the other relief granted in Man's favour.
>
> (b) It would be wrong to grant an injunction designed to take effect in Indonesia — that "would interfere or purport to interfere with the judgment of a court of competent jurisdiction inside that country".
>
> (c) It would be inappropriate to grant an injunction preventing reliance on the Indonesian judgment in other countries, in light of the "special features" of the case (including that the Indonesian judgment already existed; it was issued in proceedings started by Man and was unsuccessfully appealed by Man; and that the Indonesian court was a court of competent jurisdiction)."

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[69] CA Judgment, [191].
[70] *ED & F Man,* above n.38, p.18.
[71] CA Judgment, [180].

Interests of Justice

61. Kea states that the interests of justice require the Court to balance comity considerations with the rights of its citizens under the protection of its laws. In making this submission, Kea relies on *Morguard Investments Ltd v De Savoye,* a Canadian case about the enforcement of Alberta judgments in British Columbia.[72] However, in that case, just like many of the cases referred to above, the underlying judgment had been appealed prior to seeking the assistance of the Court. It was also a case that concerned the enforcement of a "foreign" judgment within that jurisdiction, rather than a worldwide anti-enforcement injunction.

62. While Kea suggests that comity considerations play a lesser role where underlying fraud is at issue, the authorities cited for the proposition do not concern anti-enforcement injunctions or do not support the proposition.[73] Kea cites Dicey, which states at the relevant passage:[74]

> "Comity is frequently invoked to justify the caution which is required in the exercise of the power to grant injunctions to restrain proceedings in foreign courts. Both in the Commonwealth and in the United States the courts have been sensitive to the charge that to grant an anti-suit injunction may be contrary to considerations of comity. It used to be emphasised that an anti-suit injunction was directed to the party and not to the foreign court, but it is now recognised that that is not a realistic view. In cases not involving the enforcement of a jurisdiction clause or an arbitration agreement, comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating

[72] Kea Submissions, [91].
[73] See Kea Submissions, [84]-[90].
[74] *Dicey, Morris & Collins on the Conflict of Laws* (16th ed., online ed.), at [7-013].

> under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter; and the stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention."

63. If anything, this passage supports the approach of the Court of Appeal.

64. As noted above, the bar for granting an anti-enforcement injunction is higher than an anti-suit injunction. Particular emphasis is placed on comity, given the inevitable interference with a foreign judgment. While Kea submits that the Kentucky proceedings lack legitimacy, the Default Judgment is a valid judgment in the eyes of the Kentucky courts (for now), which should not be overlooked. It is submitted that the importance placed on comity by the Court of Appeal was appropriate in the circumstances.

65. Kea's suggestion that the Queensland courts and the United States Bankruptcy Court have not expressed concern at the injunctions is limited in its relevance.[75] The judgment to which the injunctions pertain is not their judgment. While comity considerations might well include that such courts should be able to make their own decisions as to whether to enforce the Default Judgment, this is a more minor consideration. More important is the view of the Kentucky courts – it is their judgment that is being impugned by the injunctions. As mentioned above, the Default Judgment remains – at least in Kentucky – a legitimate and (presumably) enforceable judgment.

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[75] Kea Submissions, [97]-[98].

66. Countermeasures are not illusory, including in the form of injunctions to counter those issued by (in this case) the New Zealand courts. In *Amchem Products*, the Court described the underlying background saying:[76]

> "In November, 1989, the asbestos companies successfully applied in the Supreme Court of British Columbia for anti-suit injunctions against the appellants, in order to prevent the continuation of the Texas actions. The injunctions were upheld on appeal. The Texas court in turn issued an "anti-anti-suit" injunction, with a limited period of currency, prohibiting the seeking of such injunctions in British Columbia."

67. Michael Schneider observes that a "*court asked to react against anti-suit injunctions may take different types of action: it may refuse notification of the foreign injunction; it may take defensive action interfering with the proceedings before the enjoining court; or it may adopt a position of judicial restraint*."[77]

68. While there has been no indication to date that the Kentucky courts would engage in countermeasures, it is an unknown and an appropriate consideration when determining whether to exercise discretion.

Factors to balance

69. It is submitted that the Court of Appeal properly identified the legal principles and applied them to the relevant facts at issue in this case, including:

    (a) The underlying fraud and its effect on the Coal Agreement.

[76] *Amchem Products Inc*, above n.51, at 899.
[77] Schneider, above n. 26, at 42. The Article provides a range of examples where defensive actions have been taken by the foreign court in response to an injunction.

(b) Kea has not exhausted its appeals in Kentucky and has compelling due process arguments that it could make on appeal that may lead to the Default Judgment being overturned.[78]

(c) With interim liquidators now appointed to WFTL and recognition of the liquidators by the United States Federal Bankruptcy Court, no enforcement action is anticipated pending resolution of the appeal in Kentucky. The Court had evidence before it that the BVI courts will look to the New Zealand court's finding on the conspiracy claim and will recognise such judgment.[79] It is therefore highly unlikely that any attempt to enforce the Default Judgment will occur before the Kentucky appeals process can run its course.[80]

(d) There is no jurisdiction or arbitration clause in favour of New Zealand in this case (the only jurisdiction clause being the one in the Coal Agreement).[81]

(e) Due deference to the Kentucky courts, despite some differences in procedure between the Kentucky courts and the New Zealand courts (discussed above).

(f) The various interests of justice discussed above.

70. The fact that the Default Judgment did not, by its nature, involve a case that was fully litigated on its merits may also be a factor taken into account by the Court. Equally, the fact that the High Court's findings of fraud were based on a formal proof procedure, rather than a proceeding with all parties fully participating, may be a factor considered when weighing comity. This is particularly so if a formal

[78] CA Judgment, [185].
[79] CA Judgment, n.176.
[80] It is noted that the interim liquidators (as they have done already) are able to apply for Court directions if they so require.
[81] CA Judgment, n.158.

proof procedure is not used in Kentucky. However, these factors are not decisive.

71. In conclusion, the Court of Appeal's decision to discharge the permanent anti-suit and anti-enforcement injunctions reflects a principled and measured application of established legal doctrine. The Court's approach is firmly grounded in the exceptional nature of the remedies sought, the imperative of international comity, and the need to respect the processes and jurisdiction of foreign courts, particularly where the underlying judgment remains valid in its home forum and appeal rights have not been exhausted. To grant such extraordinary relief in the absence of compelling evidence that justice cannot be achieved in the Kentucky courts would risk undermining the principles of restraint and mutual respect that underpin the international legal order. The Court of Appeal's careful balancing of these factors ensures that the interests of justice are served without overreaching the proper limits of New Zealand's judicial authority. For these reasons, it is respectfully submitted that the appeal should be dismissed.

Dated the 1st day of October 2025

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Anna Kirk

Counsel Assisting the Court

Certification under Supreme Court Submissions Practice Note, 5 July 2023:

Counsel certifies that, having made appropriate inquiries to ascertain whether these submissions contain any suppressed information, to the best of their knowledge, the submission is suitable for publication.