The jurisdictional hurdles of s 26 of the Trans-Tasman Proceedings Act 2010 (Cth), in the context of interim anti-enforcement relief in aid of New Zealand proceedings

The New Zealand High Court recently granted a permanent anti-enforcement injunction in relation to a default judgment from Kentucky in *Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 3260. The plaintiff, a British Virgin Islands company, claimed that the defendants had committed a tortious conspiracy against it because the Kentucky default judgment was based on fabricated claims intended to defraud it. The defendants were a New Zealand company, Wikeley Family Trustee Ltd (WFTL), and persons associated with the company.

In an undefended judgment, the High Court granted the injunction, awarded damages for the costs incurred in the foreign proceedings (referring to cases such as *Union Discount Co Ltd v Zoller* [2001] EWCA Civ 1755, [2002] 1 WLR 1517 by analogy), and issued a declaration that the Kentucky judgment would not be recognised or enforceable in New Zealand. As noted previously on this blog (see here), the case is an interesting example of "the fraud exception to the principles of comity" (*Kea Investments Ltd v Wikeley (No 2)* [2023] QSC 215 at [192]).

In this post, I want to focus on the trans-Tasman element of the case – and, in particular, the interpretation of s 26(1)(b) of the Australian Trans-Tasman Proceedings Act 2010. One of the defendants was Mr Wikeley, a Queensland resident, who apparently sought to evade or contravene the New Zealand Court's interim orders by purporting to assign the Kentucky judgment from WTFL to a new (Kentucky) company. The New Zealand Court responded by placing WFTL under the control of a provisional liquidator. However, because Mr Wikeley was located in Queensland, the Court had limited powers to make its restraining orders effective against him.

Kea therefore applied to the Supreme Court of Queensland under s 25 of the Trans-Tasman Proceedings Act 2010. Under this section, a party to a New Zealand proceeding may apply to the Australian courts for interim relief in support of the New Zealand proceeding. More specifically, the Australian court may give interim relief if "the court considers it appropriate" to do so (s 26(1)(a)). The court must be satisfied that, "if a proceeding similar to the New Zealand proceeding had been commenced in the court", it would have had power to give – and would have given – the interim relief in that similar proceeding (s 26(1)(b)(i) and (ii)). The equivalent provisions in the New Zealand Act are ss 31 and 32.

Following an ex parte hearing, the Queensland Court granted the application and made an order restraining Mr Wikeley from leaving Australia (*Kea Investments Ltd v Wikeley* [2023] QSC 79). The Court accepted that the assistance sought was "consistent with the beneficial nature of the Act" (at [32]). It was also satisfied that it would have had power to grant the relief if Kea had commenced a similar proceeding in Queensland, and that it would have granted the relief, satisfying s 26(1)(b)(i) and (ii) (at [39]-[60]). This decision was largely confirmed in *Kea Investments Ltd v Wikeley (No 2)* [2023] QSC 215.

The case provides a good example of the value of ss 25 and 26 (and its New Zealand equivalents): the power to provide prompt and effective support of the other country's proceedings, in circumstances where the court asked to grant the support will not – and should not – be taking jurisdiction over the merits. However, the jurisdictional requirements for granting interim relief under these provisions appear to be causing some confusion.

- In its first decision, the Queensland Court noted that it had "reservations" about "transposing relevant facts, including the respondents' connections with the jurisdiction to a Queensland setting" when determining whether it would have given relief in the hypothetical similar proceeding (at [43]-[44]). The Court's preference seemed to be to assess the question of jurisdiction on the basis of the facts as they were. Either way, it was clear that the Court would have had jurisdiction (at [44]). The Court "plainly" had jurisdiction over Mr Wikeley, due to his presence in Queensland. Moreover, Mr Wikeley's conduct to avoid or contravene the New Zealand orders took place in Queensland, with the result that Queensland would have been "an appropriate forum if a similar proceeding had been brought in this court" (at [45]).

- In its second decision, the Court considered that it also had to be satisfied that the Australian court would have been the clearly appropriate forum for the hypothetical similar proceeding (at [85]). It rejected a submission from Kea that the question of appropriate forum did not arise in the context of ss 25 and 26 (at [84]). The Court was satisfied that it had personal jurisdiction over Mr Wikeley, that it had subject-matter jurisdiction over the issues raised by Kea's proceeding by virtue of the steps taken by Mr Wikeley in Australia to obtain or enforce the Kentucky judgment, and that it was not – or would not have been – a clearly inappropriate forum.

It is not clear why the supporting court should ask itself whether it could – and would – have exercised jurisdiction over the substantive proceeding, especially where this question is determined without transposing the relevant geographical facts. The whole point of the power to provide interim relief in support of the foreign proceeding is that the supporting forum may not be the right place to determine the proceeding, albeit that it is a place where (interim) orders can be made effective.

This does not necessarily mean that the relevant geographical connections ought to be transposed. When followed strictly, this approach could render ss 25 and 26 unavailable in circumstances where they would be most useful because the original court does not have the jurisdiction to make the necessary orders. Here, the New Zealand Court did not have enforcement jurisdiction over Mr Wikeley, in the sense that it could not make an order preventing him from leaving Australia or an order for his arrest.

In most cases, a straightforward interpretation of s 26(1)(b) is that it is concerned with the court's jurisdiction in a hypothetical domestic case (see Reid Mortensen "A trans-Tasman judicial area: civil jurisdiction and judgments in the single economic market" (2010) 16 Canterbury Law Review 61 at 71). In other words, the question of jurisdiction (in an international sense) is determined mainly on the basis whether the court considers "it appropriate to give the interim relief in support of the [substantive] proceeding" (s 26(1)(a)). But in the context of anti-suit or anti-enforcement injunctions, it is impossible to shoehorn the cross-border implications of the relief into a hypothetical proceeding that is purely domestic. The case is inherently international. This may explain the Queensland Court's decision to play it safe by asking, effectively, whether Kea could have brought the

proceeding in Queensland. Ultimately, the Court thought that it would have been inappropriate for the Australian court "to simply replicate injunctive orders granted by a New Zealand court in order to secure compliance with the New Zealand orders" (at [260]).

It is likely that future courts will continue to grapple with this issue. The legislative history of s 26 suggests that the section was not intended to be weighed down by jurisdictional considerations, and that Cooper J's approach may have been unduly restrictive. The original version of the section provided, in subs (2), that an Australian court may refuse to give the interim relief if it considered that it had no jurisdiction, apart from s 26, in relation to the subject matter of the New Zealand proceeding and for that reason it would be inexpedient to give the interim relief (see [84]). The Explanatory Memorandum to the Trans-Tasman Proceedings Amendment and Other Measures Bill 2011 (Cth), which repealed subs (2), noted that "[a]n unintended consequence of subsection 26(2) may be to give greater significance to issues of jurisdiction and expediency than is necessary, resulting in applicants for interim relief facing an unintended additional hurdle" (at [21]). The proper place to consider "issues of jurisdiction and expediency" was when assessing whether it was appropriate to grant relief under s 26(1)(a). Section 26(2) was borrowed from s 25(2) of the Civil Jurisdiction and Judgments Act 1982 (UK), which apparently responded "to the jurisdictional conditions of the Brussels I Regulation" (see Mortensen, cited above, at 71).

In the context of freezing injunctions, an explicit rationale for granting interim relief in aid of foreign proceedings has been that the relief preserves the assisting court's ability to enforce the foreign court's final judgment (see *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24, [2023] AC 389). This is consistent with the function of freezing injunctions more generally, which are designed to facilitate the enforcement of a judgment for the payment of a sum of money by preventing the dissipation of assets against which the judgment could potentially be enforced. Interim anti-suit injunctions are not, of course, the same as freezing injunctions. But there may be value here, too, in looking ahead to the enforcement stage. Under the TPPA, any final judgment from the New Zealand court was likely to be registrable in Australia, including a judgment for a final injunction. In a way, it might be ironic, therefore, if the jurisdictional requirements of s 26 somehow prevented the Australian court from preserving its ability to give meaningful relief at the enforcement stage.