The New Zealand Supreme Court's judgment in Kea Investments Ltd v Wikeley on anti-enforcement relief

In *Kea Investments Ltd v Wikeley* [2026] NZSC 97, the New Zealand Supreme Court recently delivered its reasons for reinstating world-wide anti-enforcement orders in relation to a fraudulently obtained default judgment from Kentucky. The judgment, given by Kós J, contains a useful analysis of the principles on anti-suit and anti-enforcement injunctions and offers guidance on the interrelationship between fraud and comity.

The background to the case is set out in previous posts (here, here and here). In summary, Kea Investments Ltd (Kea), a British Virgin Islands company, alleged that the default judgment obtained by Wikeley Family Trustee Ltd (WFTL), a New Zealand company, was based on fabricated claims intended to defraud Kea. The New Zealand High Court found that the defendants had perpetrated a tortious conspiracy. The Court of Appeal upheld the findings of fraud but allowed an appeal against the grant of the injunction, concluding that an injunction could only be granted as a step of last resort, which required Kea to pursue its right of appeal against the Kentucky judgment.

It was not in issue before the Supreme Court that the claim in the Kentucky court formed part of a conspiracy to defraud Kea (at [102]). It was also not in issue that New Zealand was the proper jurisdiction to deal with the claim of fraud (at [102]). In these circumstances, the Court found that comity did not stand in the way of anti-enforcement relief.

Relevant principles

The Court considered that the *in personam* nature of anti-suit and anti-enforcement injunctions remains "fundamental", even though "the jurisdictional conflict" that arises "may indirectly impinge on the freedoms of the foreign jurisdiction" (at [105]). The Court also confirmed that the grant of such an injunction "tends to depend on there being something wrongful", which could be "unconscionable (or vexatious or oppressive) litigation in the foreign state", such as a fraudulent proceeding, or "the disregard of a right in contract not to be sued in the foreign state" (at [107]).

Turning to anti-enforcement injunctions more specifically, the Court did not think it was helpful to say that they "should only be granted in 'exceptional circumstances'", although it would be "a rare case that the conditions for their grant will be met" (at [108], adopting the language of Males LJ in *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599, [2020] 1 CLC 816). Citing Adrian Briggs (*Civil Jurisdiction and Judgments* (8th ed, Routledge, Oxford, 2025) at 463), the Court noted that the enforcement of a judgment that has been wrongfully obtained "aggravates the original wrong" (at [108]). However, an applicant would have to be able to explain why there had been no earlier application for an anti-suit injunction; and where the anti-enforcement injunction seeks to prevent enforcement in the country in which the judgment was given, "comity may demand particular restraint" (at [109]).

The Court described comity as "the need for domestic courts to respect the legitimate exercise of jurisdiction by the courts of a foreign state" (at [10], [113], citing Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [1.29]). It accepted that "comity is a consideration necessitating caution in making anti-suit or anti-enforcement injunctions that cut across the authority of a foreign court acting within its legitimate jurisdiction" (at [116]). However, comity had "a measure of elasticity"; it did not "entail blind deference" (at [116]).

Crucially, the Court considered that fraud "reframes ordinary comity considerations" (at [117]). First, fraud is a "paradigm" case of vexatious and oppressive conduct that justifies an injunction if the fraudster is in the court's jurisdiction (*Ellerman Lines Ltd v Read* [1928] 2 KB 144 (CA)) (at [117], [118]-[128]). Second, there is "a mutual interest in both courts to act quickly and effectively to restrain such conduct". In fact, the Court went so far as to say that "[r]espect by the foreign court for the domestic court's anti-fraud orders may reasonably be expected" (at [117], [128]-[130]).

Finally, there was no requirement that an applicant exhausts local remedies in the foreign court before applying for an injunction (at [134]). In this sense, anti-suit or anti-enforcement injunctions are not a "measure of last resort", as the Court of

Appeal had considered. The Court accepted counsel's submission that "the idea that the New Zealand courts should wait and see whether the Kentucky courts do the 'correct' thing is 'not only invidious but the reverse of comity'" (at [134]).

This case

Kea was "that rare case" where direct evidence of fraud justified the grant of anti-enforcement relief (at [120]). According to the Supreme Court, the fraud "[set] out to make a fool of both jurisdictions" (at [127]):

> *One court exerts jurisdiction upon a wholly false premise— both as to jurisdiction and obligations; the other—despite being the proper forum to address the fraud—is then counselled to act with restraint out of a need for comity for the first court.*

The courts that were invoked in this case had "a mutual interest in stifling cross-border fraud of this kind", and their international cooperation was consistent with a commitment to the rule of law (at [128]). From this perspective, the High Court's anti-enforcement orders "enhance, rather than erode, comity" (at [128]). Expert evidence of US law confirmed that an injunction to stop the continued perpetration of a fraud would be consistent with US notions of comity (at [129]).

The fact that WFTL had been placed in protective interim liquidation also reframed the comity considerations in the case (at [131]). WFTL was controlled by the liquidators, who were subject to the High Court's personal jurisdiction. An order "requiring them to seek discharge of the default judgment … ought to be within the remedies that Court ought to be able to exercise" (at [132]). The liquidators recognised "that they cannot take any responsible or lawful action other than to have the default judgment discharged" (at [131]) but the orders were still necessary to allow the liquidators to fulfil their duties (at [132], [136]). In these circumstances, the injunctions were "consistent with protecting the Court's processes and officers" (at [133]).

The Court concluded that the anti-enforcement orders were not only justified but also necessary (at [136]): "If not in this case, then when? If not by the New Zealand High Court, then by whom?" The level of fraud in this case was such that "even requiring a party to apply for a stay or dismissal in the foreign court would be unjust" (at [135], citing Thomas Raphael *The Anti-Suit Injunction* (2nd ed, Oxford University Press, Oxford, 2019) at [5.45]). The proceedings in the Kentucky courts were "a core operative element of the fraud" (at [135]). If the High Court had not made the interim orders in this case, "control of WFTL, and with it the default judgment … would by now have passed well beyond the New Zealand jurisdiction" (at [135]); the "status quo for both jurisdictions would soon have shifted as part of this swirling, evolving fraudulent enterprise" (at [136]).

Comment

The existence of the fraud was not in issue, and neither was the High Court's conclusion that it had jurisdiction – and that it was the appropriate forum – to determine the claim for fraudulent conspiracy. But the Supreme Court made it clear that the High Court's approach to jurisdiction, at a time when the existence of fraud was "a strongly arguable possibility", was "entirely correct" (at [103]). The alleged fraudster was in New Zealand, which made it appropriate for the New Zealand court to become involved, culminating in the grant of anti-enforcement relief once the question of fraud had been finally determined.

Why is it appropriate for a New Zealand court to decide on the right- or wrongfulness of proceedings in a foreign court (see here)? Should such decisions not fall exclusively within the foreign court's jurisdiction? The Kentucky court in this case had taken the position, at first instance, that the default judgment should stand.

The Supreme Court acknowledged that anti-suit and anti-enforcement injunctions "cut across the authority of a foreign court acting within its legitimate jurisdiction" (at [116]). But in the case of fraudulent proceedings, the fraudster's jurisdiction, too, is connected to the fraud and has a responsibility to stop it. In fact, comity here requires cooperation to stop the fraud, and within this framing of cooperation, questions about the courts' relative jurisdictional authority do not arise. If anything, it is the foreign court, the court that entertained the fraudulent proceedings, that may be thought to be interfering with comity if it denies the importance of combatting fraud (see [117]).

While the Court of Appeal had been sceptical of the legitimacy of anti-suit and anti-enforcement injunctions, the Supreme Court recognised them as valid and established tools of the conflict of laws. It pointed to the history of anti-suit and anti-enforcement injunctions as originating in the courts of equity, which granted injunctions to restrain proceedings in the common law courts, to explain why they are "very much a creature of the Anglo-American common law" (at [104], referring to Martin Davies and others *Nygh's Conflict of Laws in Australia* (11th ed, LexisNexis, Sydney, 2026) at [9.2]). At the same time, the Supreme Court's thoughtful analysis of the relationship between fraud and comity may inspire New Zealand courts to tread carefully in future cases. If anti-suit and anti-enforcement injunctions "cut across the authority of a foreign court acting within its legitimate jurisdiction", there needs to be a convincing reason on the facts of a particular case why they are not, in fact, an undue interference with comity.