IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA159/2019
[2019] NZCA 472

BETWEEN	COMMERCE COMMISSION Appellant
AND	VIAGOGO AG Respondent

Hearing:	29 August 2019
Court:	Clifford, Gilbert and Goddard JJ
Counsel:	J D Every-Palmer QC, J L W Wass and A D Luck for Appellant A J Lloyd, H O Meikle-Downing and S L Michelsen for Respondent
Judgment:	2 October 2019 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The application for interim relief is remitted to the High Court.

C There is no order as to costs.

REASONS OF THE COURT

(Given by Goddard J)

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Introduction

[1] In November 2018 the Commerce Commission (the Commission) filed proceedings against Viagogo AG (Viagogo) claiming that Viagogo is making false, misleading or deceptive representations to New Zealand consumers through its ticket reselling website, in breach of the Fair Trading Act 1986 (FTA). Viagogo is incorporated and headquartered in Switzerland. It has no physical place of business in New Zealand.

[2] Viagogo declined to accept service of the proceedings through its New Zealand lawyers. It required the Commission to serve the proceedings at its headquarters in Switzerland. And it advised the Commission that if the proceedings were served on it

in Switzerland, it would object to the jurisdiction of the New Zealand courts to determine the claims against it. The Commission proceeded to arrange service of the proceedings on Viagogo in Switzerland through diplomatic channels. This process can take many months.

[3] Before the proceedings had been served on Viagogo in Switzerland, the Commission applied without notice for an interim injunction restraining Viagogo from making certain types of representation to New Zealand consumers through its website. The Commission advised Viagogo's New Zealand lawyers that it was applying for a without notice injunction.

[4] The Commission's application was heard on 5 February 2019. Counsel for Viagogo appeared at the High Court hearing on a *Pickwick* basis,[1] and without prejudice to Viagogo's position that it needed to be formally served in Switzerland and would be protesting jurisdiction. (It is common ground that an appearance on this basis did not amount to submission to the jurisdiction of the New Zealand courts.)

[5] In a judgment delivered on 18 February 2019 (High Court decision) the High Court held that it had no jurisdiction to grant interim relief against Viagogo before Viagogo had been served with the proceedings.[2] That approach was consistent with other New Zealand High Court decisions holding that the court has no jurisdiction to grant interim relief against an overseas defendant unless and until the proceedings have been served, and any protest to jurisdiction has been determined.[3]

[6] The Commission appealed, arguing that the High Court can grant interim relief before service of proceedings on an overseas defendant and before any protest to jurisdiction has been determined, and should have done so in this case.

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1 That is, the application remained a "without notice" application that had not been served on Viagogo in accordance with the High Court Rules 2016, but counsel for Viagogo were advised of the hearing and were present at it, and were heard in relation to the application. The name is derived from *Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd* [1972] 1 WLR 1213 (Ch).

2 *Commerce Commission v Viagogo AG* [2019] NZHC 187 [High Court decision].

3 *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd* [1997] 1 NZLR 186 (CA); *Rimini Ltd v Manning Management and Marketing Pty Ltd* [2003] 3 NZLR 22 (HC); *Hamilton v Inifiniti Capital Andante Ltd* HC Auckland CIV-2008-404-2304, 7 May 2008; and *Discovery Geo Corp v STP Energy Pte Ltd* [2012] NZHC 3549, [2013] 2 NZLR 122.

Summary

[7] The jurisdiction of the High Court to determine a claim against a defendant depends on service of the defendant in accordance with the High Court Rules 2016. The court cannot proceed to finally determine a claim against a defendant while any protest to jurisdiction is outstanding. But as we explain below, the jurisdiction of the court to grant interim relief is not limited in the same way. Interim relief may be granted against an overseas defendant before service of the proceedings, and before any protest has been determined, in order to improve the prospect of the court being able to do justice between the parties after a determination of the merits at a trial. Put another way, the court is not deprived of the ability to make orders that are required to enable it to do effective justice between the parties in the future, in the event that the substantive claim is heard by a New Zealand court, simply because a defendant is to be served overseas or has objected to the jurisdiction of the New Zealand court.

[8] The fact that the defendant is to be served overseas, and the prospect of a protest to jurisdiction, are factors that the court will need to consider when deciding whether it is in the overall interests of justice to grant interim relief. Those factors are relevant to the likelihood of an eventual determination of the merits at a trial before a New Zealand court. That in turn is relevant to an assessment of the overall interests of justice. But those factors do not preclude the court from granting interim relief.

[9] Because the High Court erred in finding that it did not have jurisdiction to grant interim relief, we have allowed this appeal. But matters have moved on since the High Court hearing. The proceedings have been served on Viagogo in Switzerland. Viagogo has filed a protest to jurisdiction. And we were advised by counsel that changes have been made to certain aspects of the Viagogo website that were the subject of the Commission's application. In those circumstances, the parties agreed that we should not consider the merits of the Commission's application for interim relief. The Commission will need to consider the changes made to Viagogo's website, and decide whether in light of those changes it wishes to pursue its application for interim relief. If the Commission decides to pursue the application for interim relief, that application will need to be dealt with in the High Court on notice to Viagogo

and on the basis of up to date information about the Viagogo website. We have remitted the application to the High Court to enable this to occur.

The proceedings

The Commission's claims against Viagogo

[10] The Commission pleads that Viagogo is a ticket reselling company. It operates a website at www.viagogo.com/nz that offers tickets to sporting, music and entertainment events in New Zealand for sale to consumers located in New Zealand.

[11] The Commission says that Viagogo makes representations on the website which are intended for consumers in New Zealand; markets to New Zealand consumers by purchasing advertisements displayed on search results viewed by New Zealand consumers; sends marketing emails to email addresses with New Zealand domains; and on occasion calls consumers in New Zealand in the course of its business.

[12] The Commission alleges that:

(a) Viagogo makes representations about the quantity of tickets available for an event that are false, misleading or deceptive, in breach of ss 9, 11 and 13(b) of the FTA.

(b) Viagogo makes representations about the price of tickets that are false, misleading or deceptive in breach of ss 9, 11 and 13(g) of the FTA.

(c) Viagogo makes representations that consumers are guaranteed to receive valid tickets which are false, misleading or deceptive in breach of ss 9, 11, 13(e) and 13(i) of the FTA.

(d) Viagogo has in the past made representations that it was an "official" ticket seller that were false, misleading or deceptive in breach of ss 9, 11 and 13(e) of the FTA.

[13] The Commission's statement of claim seeks orders under s 41(1)(a) of the FTA restraining Viagogo from continuing to make the relevant representations, and orders under s 42(1)(b) requiring Viagogo to publish corrective statements.

[14] The Commission's statement of claim also includes a cause of action in relation to the "governing law term" in Viagogo's standard terms and conditions. That term provides that New Zealand consumers may only bring proceedings against Viagogo in the courts of Geneva, Switzerland, and provides for disputes to be determined in accordance with Swiss law. The Commission pleads that this governing law term is an unfair contract term within the meaning of s 46L of the FTA. The Commission seeks a declaration to that effect.

The Commission's without notice application for an interim injunction

[15] The Commission's without notice application for an interim injunction sought orders restraining Viagogo from making certain representations on its website. The application was made on the basis that there is a good arguable case that the representations made by Viagogo breach the FTA, and that interim relief is desirable to prevent ongoing breaches of the FTA pending resolution of the proceedings. The Commission says that the balance of convenience and overall justice of the case favour granting the interim relief sought.

[16] Viagogo says that there is no jurisdiction to grant the interim relief sought: that is the issue addressed in this appeal. Viagogo also says that the FTA does not apply to its conduct, all of which takes place outside New Zealand. Viagogo says that even if there is jurisdiction to grant the interim relief sought, there are a number of reasons why such relief should not be granted.

[17] Because we do not need to consider the merits of the application for interim injunction, we need not set out in any more detail the grounds on which the orders are sought by the Commission, or Viagogo's response to those grounds.

High Court decision

[18] The Judge concisely summarised the recent New Zealand authorities on the grant of interim relief against an overseas defendant who objects to jurisdiction:

> [7] With one exception, [*Dale v Jeffrey* HC Auckland CIV-2007-404-2015, 24 April 2007] New Zealand courts have consistently declined to determine interlocutory applications, including those for interim relief, where the defendant has objected to jurisdiction until that issue is resolved. In *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd* the Court of Appeal held that where the defendant served overseas had filed a protest to jurisdiction, the plaintiff's summary judgment application could not be determined until jurisdiction had been resolved. [*Advanced Cardiovascular Systems Inc v Universal Specialties Ltd* [1997] 1 NZLR 186 (CA).] Subsequent High Court decisions have followed that approach in relation to applications for interim injunctions. [*Rimini Ltd v Manning Management and Marketing Pty Ltd* [2003] 3 NZLR 22 (HC); *Hamilton v Infiniti Capital Andante Ltd* HC Auckland CIV-2008-404-2304, 7 May 2008.] All these cases involved defendants that had been served.

[19] However in this case, as the Judge noted, Viagogo had not been served.[4] The Judge considered that the case was closer, in those circumstances, to *Discovery Geo Corp v STP Energy Pte Ltd*.[5] She quoted the following passage from *Discovery Geo*:

> [39] First, jurisdiction at heart is dependent on valid service on the defendant. … Where service offshore is involved, some rectitude is required. It involves, as has often been said, an exercise of sovereignty within the country in which service is effected. … Of course in some circumstances, involving true urgency, formal service by means of substituted service might be permissible. … However, no application for substituted service was made in this case.
>
> (Footnotes omitted.)

[20] The problem for the Commission, the Judge said, was that the defendant had not yet been served.[6] She observed that there may be circumstances in which genuine urgency precludes formal service being effected before an application is dealt with.[7] She suggested that in those circumstances a plaintiff can avail itself of the provision for substituted service in r 6.8 of the High Court Rules.[8] She concluded that

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4 High Court decision, above n 2, at [8].
5 *Discovery Geo Corp v STP Energy Pte Ltd,* above n 3.
6 High Court decision, above n 2, at [13].
7 At [14].
8 At [14].

jurisdiction did not exist that would allow her to consider and determine the application for interim relief.[9] The application was therefore dismissed.[10]

The Commission's appeal

[21] The Commission appeals from that decision, arguing that the High Court does have jurisdiction to grant interim relief before proceedings have been served on an overseas defendant and before any protest to jurisdiction by that defendant has been determined.

[22] The Commission acknowledges that matters have moved on to some extent in the present case, as summarised at [9] above. However the Commission says that it is in the nature of applications of this kind that they arise in circumstances of urgency, and will not be fully argued. It is therefore important for this Court to determine whether jurisdiction exists to grant interim relief in cases of this kind. Moreover the issue remains live, as although Viagogo has now been served it has filed a protest to jurisdiction. The Commission may wish to bring its application for interim relief on for hearing before that protest has been finally determined.

Interim relief against overseas defendants: relevant provisions

The High Court's power to grant interim injunctions

[23] The High Court has power to grant interim injunctions under the High Court Rules, and in the exercise of its inherent jurisdiction.

[24] Rule 7.53 provides:

> **7.53 Application for injunction**
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> (1) An application for an interlocutory injunction may be made by a party before or after the commencement of the hearing of a proceeding, whether or not an injunction is claimed in the party's statement of claim, counterclaim, or third party notice.

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9 At [15].
10 At [15].

> (2) The plaintiff may not make an application for an interlocutory injunction before the commencement of the proceeding except in case of urgency, and any injunction granted before the commencement of the proceeding—
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> (a) must provide for the commencement of the proceeding; and
>
> (b) may be granted on any further terms that the Judge thinks just.

[25] As r 7.53(2) recognises, in urgent cases the court can grant an interim injunction before a proceeding has been filed. In such cases the injunction will necessarily be granted before the (yet to be filed) proceedings have been served.

[26] Other provisions in the High Court Rules also contemplate the grant of interim relief before proceedings have been commenced, and thus before they have been served:

(a) Freezing orders may be granted under pt 32 of the High Court Rules where an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in the High Court, or (if certain conditions are met) in an overseas court.[11] As the reference to prospective causes of action makes plain, the substantive proceeding need not have been filed (and may not be able to be filed for some time, until the cause of action accrues).

(b) Part 33 provides for search orders to be granted in a proceeding or before a proceeding commences, to secure or preserve evidence that may be relevant in the proceeding.[12]

(c) Rule 7.81 provides for interim relief to be granted in support of judicial proceedings "commenced or to be commenced outside New Zealand".

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11 High Court Rules, r 32.5.
12 Rule 33.2.

[27] The inherent jurisdiction of the High Court is recognised in s 12 of the Senior Courts Act 2016, which provides:

> **12 Jurisdiction of High Court**
>
> The High Court has—
>
> (a) the jurisdiction that it had on the commencement of this Act; and
>
> (b) the judicial jurisdiction that may be necessary to administer the laws of New Zealand; and
>
> (c) the jurisdiction conferred on it by any other Act.

[28] The inherent jurisdiction of the High Court to make interim orders before proceedings have been served on a defendant is illustrated by the development by the courts of freezing (*Mareva*) [13] and search (*Anton Piller*)[14] orders. These were initially granted pursuant to the inherent jurisdiction of the court, before detailed statutory provision was made for orders of these types. Freezing and search orders are almost invariably made before proceedings have been served on a defendant: service would give rise to the very risk (dissipation of assets in the case of freezing orders; destruction of evidence in the case of search orders) that such orders are designed to prevent.

[29] It is commonplace for interim relief to be granted against a defendant present in New Zealand, under the High Court Rules and the court's inherent jurisdiction, before the proceedings have been served on the defendant. This is appropriate where the purpose of the order would be undermined by serving the proceedings before the orders are made, or in cases where the interim relief is so urgent that it is not possible to formally serve the defendant before seeking that relief.[15] It is clear that service of proceedings is not a necessary prerequisite for the grant of interim relief, at least in the case of domestic defendants. One of the issues in this case is whether the position is different in the case of overseas defendants.

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13 Named after *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (CA).

14 Named after *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

15 Applications in the second category should be rare, and every attempt should be made to provide such notice as possible — even if it is only a telephone call or text or email — to alert the defendant to what is happening and enable them to participate on a *Pickwick* basis.

General principles governing grant of interim injunctions

[30] The principles that govern the grant of interim injunctions under r 7.53 and the court's inherent jurisdiction are well settled. The court will usually adopt a two-stage approach.[16] The first inquiry is whether there is a serious question to be tried. If that threshold is met, the court moves on to consider whether the balance of convenience favours granting or refusing relief. But as this Court observed in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*, considerations are marshalled under these (non-exhaustive) heads as "an aid to determining, as regards the grant or refusal of an interim injunction, where overall justice lies. In every case the Judge has finally to stand back and ask himself that question."[17]

[31] As Lord Hoffmann said in delivering the advice of the Privy Council in *National Commercial Bank Jamaica Ltd v Olint Corp Ltd*:[18]

> The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. …
>
> The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.

Proceedings against overseas defendants

[32] The High Court has jurisdiction to hear and determine a claim against a defendant who has been properly served with proceedings in accordance with the High Court Rules. Proceedings can be served on a defendant in New Zealand as of right. Statutory authority is required for service of proceedings on a defendant outside New Zealand.[19] The Trans-Tasman Proceedings Act 2010 provides for service of most New Zealand High Court civil proceedings in Australia without the leave of the court.[20] Service of High Court proceedings in other countries is governed by the High Court Rules.[21] The Rules make detailed provision for the circumstances in

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16 See *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL).
17 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142.
18 *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16, [2009] 1 WLR 1405 at [16] and [17].
19 *Cockburn v Kinzie Industries Inc* (1988) 1 PRNZ 243 (HC).
20 Trans-Tasman Proceedings Act 2010: see in particular s 13.
21 High Court Rules, pt 6 sub-pt 4.

which High Court proceedings can be served outside New Zealand, either without the leave of the court (under r 6.27) or with the leave of the court (under r 6.28).[22]

[33] A defendant on whom proceedings are served outside New Zealand under rr 6.27 and 6.28 may, instead of filing a defence, file an appearance objecting to jurisdiction under r 5.49. (An appearance objecting to jurisdiction is also commonly referred to as a protest to jurisdiction.) Where a protest to jurisdiction has been filed, the defendant may apply to the court to dismiss the proceeding on the ground that the court has no jurisdiction to hear and determine it.[23] The plaintiff may also apply to set aside the defendant's appearance.[24] The court must either dismiss the proceeding, if it is satisfied that it has no jurisdiction to hear and determine the proceeding, or set aside the appearance.[25]

[34] Rule 6.29 governs applications to dismiss a proceeding or to set aside an appearance where the proceedings were served outside New Zealand. The relevant limbs provide:

> **6.29 Court's discretion whether to assume jurisdiction**
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> (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—
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> (a) that there is—
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> (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.

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22 These rules do not apply to service of proceedings in Australia if those proceedings can be served under the Trans-Tasman Proceedings Act: see r 6.36.

23 Rule 5.49(3).

24 Rule 5.49(5).

25 Rule 5.49(6).

> (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.

[35] The High Court cannot proceed to hear and finally determine a claim against an overseas defendant until the proceedings have been served on that defendant in accordance with the High Court Rules, and any protest to jurisdiction has been determined.

Interim injunctions against overseas defendants

[36] The court can grant interim relief against an overseas defendant who is properly before the court. An order such as an injunction is a personal order that can be enforced against a defendant who fails to comply with that order by a range of sanctions that do not depend on the defendant's presence in New Zealand, including the sanction of debarring that defendant from defending the proceedings.[26]

[37] The High Court has on a number of occasions granted interim injunctions, freezing orders and other forms of interim relief against an overseas defendant without notice before the proceedings have been served and any protest to jurisdiction made and determined.[27] However there is a line of High Court authority to the effect that the court has no jurisdiction to grant interim relief against an overseas defendant prior to service on that defendant, and prior to determination of any protest to jurisdiction.[28] The correctness of these decisions was the principal issue before us on this appeal.

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[26] *Derby & Co Ltd v Weldon (Nos. 3 and 4)* [1990] Ch 65 (CA), see especially at 81; and *Derby & Co Ltd v Weldon (No. 6)* [1990] 1 WLR 1139 (CA), see especially at 1149–1150.

[27] See for example *Hunt v BP Exploration Co (Libya) Ltd* [1980] 1 NZLR 104 (SC); *Equipment Finance Ltd v C Keeton Ltd* (1999) 13 PRNZ 319 (HC); *Chief Executive of the Ministry of Business, Innovation and Employment v Swastik Solution Ltd* [2015] NZHC 1913; and *Otoy New Zealand Ltd v Kozlov* [2017] NZHC 1485. Interim relief has also been granted in these circumstances by the Australian courts: see for example *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2014] WASCA 178, (2014) 288 FLR 299; and *Australian Competition and Consumer Commission v Chen* [2003] FCA 897, (2003) 201 ALR 40. The position is the same in England: see for example *Derby & Co Ltd v Weldon (Nos. 3 and 4)*, above n 26; *Derby & Co Ltd v Weldon (No. 6)*, above n 26; *Republic of Haiti v Duvalier* [1990] 1 QB 202 (CA); *Altertext Inc v Advanced Data Communications Ltd* [1985] 1 WLR 457 (Ch); *Grupo Torras SA v Sheikh Fahad Mohammed Al-Sabah* [2014] 2 CLC 636 (CA); and *BVC v EWF* [2018] EWHC 2674 (QB).

[28] *Rimini Ltd v Manning Management and Marketing Pty Ltd,* above n 3; *Hamilton v Infiniti Capital Andante Ltd*, above n 3; and *Discovery Geo Corp v STP Energy Pte Ltd*, above n 3.

Submissions for the Commission

[38] The Commission acknowledged the well-established principle referred to above that the jurisdiction of the High Court to determine a claim against a defendant on the merits depends on service of proceedings on that defendant.

[39] The Commission did not seek to challenge the decision of this Court in *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd*, where the Court held that it was necessary to determine the defendant's protest to jurisdiction before embarking on a hearing of the plaintiff's interlocutory application for summary judgment.[29] However the Commission submitted that this did not mean that other forms of interlocutory application, and in particular applications for interim injunctions, are precluded pending service on an overseas defendant and determination of any protest to jurisdiction.

[40] The Commission said that the courts have long granted freezing orders without notice, and other interim injunctions without notice, against foreign respondents. The Commission submitted that the High Court decisions that suggest that interim relief is not available before service are wrong, and should be overturned.[30]

[41] The Commission also submitted that interim relief is available against a foreign respondent after service, but before a protest to jurisdiction is resolved. The High Court decisions to the contrary should be overturned.[31] The *Advanced Cardiovascular Systems* case was concerned with summary judgment, not with interim relief designed to protect the position pending ultimate determination of the proceedings. The exercise of jurisdiction in these circumstances is consistent with international law and comity.

[42] The Commission submitted that the test for whether the High Court has jurisdiction to grant interim injunctive relief should be whether the defendant is amenable to the jurisdiction of the court. The plaintiff must "make a credible

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29 *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd*, above n 3.
30 *Discovery Geo Corp v STP Energy Pte Ltd*, above n 3; and High Court decision, above n 2.
31 *Rimini Ltd v Manning Management and Marketing Pty Ltd*, above n 3; and *Hamilton v Infiniti Capital Andante Ltd*, above n 3.

showing" that the defendant is amenable to jurisdiction, in the sense that the defendant can properly be served with the proceedings outside New Zealand under the High Court Rules. Jurisdiction to grant interim relief does not depend on service having taken place, or on resolution of any protest to jurisdiction.

[43] The Commission submitted that substituted service is not the answer to the practical need to grant urgent interim relief against an overseas defendant in some cases, either as a matter of principle or in practice.

Submissions for Viagogo

[44] Viagogo's written submissions contended that the court's jurisdiction to grant interim relief was dependent on first establishing that the court has jurisdiction to hear and determine the substantive proceedings against that defendant. So, Viagogo argued, there can be no jurisdiction to grant interim relief against a defendant with no presence in New Zealand until such time as the proceedings have been served on that defendant, and any protest to jurisdiction has been determined.

[45] Mr Lloyd, for Viagogo, recognised that this argument is difficult to reconcile with the authorities on interim relief against foreign defendants, and in particular the many cases in which freezing orders have been issued without notice against foreign defendants. He also acknowledged that it would be problematic if the New Zealand court could not grant interim relief on a without notice basis against overseas defendants where, for example, the relief relates to bank accounts or other property in New Zealand. He therefore advanced a more nuanced version of the argument at the hearing before us.

[46] First, Mr Lloyd accepted that in the case of a defendant who is present in New Zealand or ordinarily resident in New Zealand at the time the proceedings are commenced, interim relief can be granted before service of the proceedings. In particular, where proceedings are served outside New Zealand on a defendant who is ordinarily resident in New Zealand but temporarily abroad, interim relief against that defendant can be granted before any protest to jurisdiction has been determined. Second, he accepted that interim relief could be granted against a defendant outside New Zealand in relation to property in New Zealand, for example to restrain dealings

with that property, before service and before determination of any protest by that defendant. He submitted that there needs to be a connection between the subject matter of the interim relief sought, and New Zealand, which is sufficient to enable the New Zealand court to exercise an inherently territorial jurisdiction against a defendant whose amenability to the jurisdiction has not yet been finally determined.

[47] Mr Lloyd argued that this result follows from the general principles established by the authorities on the exercise of jurisdiction against overseas defendants, and the need for caution before requiring an overseas defendant to answer a claim before the New Zealand courts. The thrust of his argument was that it would be illogical and inappropriate for a New Zealand court to exercise jurisdiction to make interim orders against an overseas defendant in circumstances where the jurisdiction of the court to hear the claim against that defendant was yet to be established, and where the court might ultimately conclude that it did not have any jurisdiction over that defendant.

[48] In particular, Mr Lloyd said, New Zealand courts cannot grant interim injunctions that are mandatory in character in the absence of a real connection between the defendant and New Zealand. The relief sought by the Commission would require Viagogo to take steps outside New Zealand to modify its website, which is hosted outside New Zealand. Such orders, he submitted, are beyond the jurisdiction of the New Zealand courts.

Analysis

The different senses of the term "jurisdiction"

[49] It is helpful to begin by clarifying some terminology. The term "jurisdiction" is used in a number of senses. At least three are relevant here. It is important to keep them distinct. A failure to do so can lead to confusion.

[50] First, the term "subject matter jurisdiction" is sometimes used (and was at times used by counsel in this appeal) to refer to the question of whether New Zealand legislation applies to a particular set of circumstances. The use of the term

"jurisdiction" is best avoided in this context.[32] Rather, the question is whether the relevant legislation, properly interpreted, applies in circumstances that have some connection with countries other than New Zealand — for example, where the conduct in issue occurs outside New Zealand, or partly in New Zealand and partly outside New Zealand. As both parties accepted before us, that is a separate question from the question of whether the New Zealand courts have jurisdiction to determine a claim against a particular defendant. A New Zealand court may have jurisdiction to determine a claim against a particular defendant even though the substance of the claim is not governed by New Zealand law. Conversely, the New Zealand court may not have jurisdiction (or may decline jurisdiction) to determine a claim against a particular defendant even though New Zealand law governs certain aspects of that claim.

[51] The High Court will need to decide whether the FTA applies to the conduct of Viagogo that is the subject of these proceedings. But that is a different question from the questions whether:

(a) the High Court has jurisdiction to hear and determine the Commission's substantive proceedings against Viagogo; and

(b) the High Court has jurisdiction to grant interim relief against Viagogo at this stage in the proceedings.

[52] In [51(a)] the term "jurisdiction" is used to refer to the jurisdiction of the court to finally determine a substantive claim against a particular defendant: personal jurisdiction (or, in the Latin to which private international lawyers remain stubbornly attached, *in personam* jurisdiction). It is well established, and was accepted by both parties, that the (personal) jurisdiction of the New Zealand court to hear and determine a claim against a defendant depends on valid service of the proceedings on that

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[32] The term is more apt where the issue is whether a court has jurisdiction to hear a claim of a particular kind: for example, whether a claim falls within the subject-matter jurisdiction of the Employment Court. That usage underscores the confusion that can arise if the term is also used indiscriminately to refer to the quite distinct question of whether or not a particular New Zealand statute applies in a case with cross-border elements. A court may have subject-matter jurisdiction in this sense — for example, the Employment Court may have (subject-matter) jurisdiction to hear an employment dispute — even though the substance of the dispute is not governed by New Zealand employment legislation.

defendant in accordance with the High Court Rules. That service may occur in New Zealand, or outside New Zealand. If the proceedings are served on a defendant in New Zealand, that defendant can ask the court to decline to exercise jurisdiction on the grounds that another forum is more appropriate. If the proceedings are served on a defendant outside New Zealand, that defendant can protest the jurisdiction of the New Zealand court. If the defendant protests the jurisdiction of the New Zealand court, that protest must be determined before the court can move on to determine the substantive claim against that defendant.[33]

[53] The third sense in which the term is used in some of the authorities, and in the High Court decision, concerns the jurisdiction of the court to grant interim relief. That is the sense in which the term is used in paragraph [51(b)] above. In what circumstances does a New Zealand court have the power to grant interim relief against a defendant pending final determination of a proceeding?

[54] At the heart of this appeal is the question of whether jurisdiction to grant interim relief — jurisdiction in the sense explained in paragraph [53] above — is dependent on the plaintiff having established jurisdiction in the sense explained in paragraph [52] above — that is, jurisdiction to hear and determine the substantive claim against the defendant.

The recent New Zealand authorities

[55] As noted above, it was common ground before us that the jurisdiction of the High Court to determine a claim against an overseas defendant on the merits depends on valid service of that defendant in accordance with the High Court Rules. That principle was applied by this Court in *Advanced Cardiovascular Systems*.[34] The plaintiff, Universal Specialties Ltd, sought summary judgment against Advanced Cardiovascular Systems (ACS). ACS filed a protest to jurisdiction, and applied to dismiss the proceeding on the ground that the court had no jurisdiction to hear and determine it. The application to dismiss the proceeding came before a Master, who dismissed the application and set aside the appearance protesting jurisdiction. ACS

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33 *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd*, above n 3; and *Cockburn v Kinzie Industries Inc*, above n 19.

34 *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd*, above n 3.

applied for a review of that decision before a judge. The High Court Judge adjourned that application to enable the summary judgment application to be heard, on the basis that if the summary judgment application was unsuccessful then ACS could bring on its application in respect of the substantive proceedings. ACS appealed.

[56] As this Court said, if the court entertained the summary judgment application it was necessarily accepting jurisdiction to hear and determine the proceeding: [35]

> It is difficult to see how the Court can thereafter logically decide that it has no jurisdiction. It is the jurisdiction of the Court to entertain the claim which is now at issue, and that must be determined prior to the Court embarking on a hearing of the proceeding, whether substantively or in any interlocutory way. If the summary judgment application were to proceed, ACS would have to submit to the jurisdiction if it desired to defend. That would almost certainly involve the filing of affidavits, as well as an appearance by counsel to argue the issues.

[57] The High Court Judge had erred in allowing the summary judgment application to go to hearing before the initial question of jurisdiction was determined.[36] It would make no sense for the New Zealand court to decide the merits of an application for summary judgment — which if successful would determine the claim on the merits against the defendant — and subsequently consider whether or not it should exercise jurisdiction to determine the merits of the claim. That would be illogical and unworkable. The court cannot determine a claim against an overseas defendant on the merits, whether at trial or on an interlocutory application such as an application for summary judgment, until the defendant has been served and any protest to jurisdiction has been determined.

[58] However the reference in the passage set out at [56] above to embarking on a hearing of the proceeding "in an interlocutory way" appears to have caused confusion in subsequent cases.

[59] In *Rimini Ltd v Manning Management and Marketing Pty Ltd*, the plaintiff brought proceedings in the New Zealand High Court in connection with termination of a franchise it had granted to the Sydney-based first defendant.[37] The plaintiff sought

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35 At 189–190.
36 At 190.
37 *Rimini Ltd v Manning Management and Marketing Pty Ltd*, above n 3.

interim relief in relation to return of confidential information and other matters arising out of the termination of the franchise. The defendants opposed the grant of interim relief, and filed an appearance under protest to jurisdiction. The plaintiff applied to set that appearance aside.

[60] The plaintiff sought to have its application for interim relief heard pending determination of the protest to jurisdiction. The Judge, after referring to *Advanced Cardiovascular Systems*, held that he could not do so.[38] He said that the Court in *Advanced Cardiovascular Systems* held that "the protest to jurisdiction must be considered and determined before any step, including an interlocutory application, is taken in the proceedings".[39] If the Court were to entertain an interlocutory application, it would necessarily be accepting jurisdiction to hear and determine the proceeding.[40] He was therefore required to determine the protest to jurisdiction at the outset, on the assumption that both an interlocutory and substantive hearing would be required.[41]

[61] As we explain in more detail below, the grant of interim relief does not involve accepting that the court has jurisdiction to hear and determine a proceeding on the merits. It is sufficient that there is a real prospect that the court will proceed to hear and determine the proceeding on its merits, and that it is in the interests of justice to grant relief designed to ensure that if and when the court does hear the proceeding, it is in a position to do substantial justice between the parties. It is logically consistent for the court to grant interim relief on this basis, then subsequently determine that it is not appropriate for the court to exercise jurisdiction to hear and determine the proceeding on the merits. The grant of interim relief is not equivalent to entertaining a summary judgment application in which the court is being asked to enter judgment against the defendant on the merits.

[62] In *Hamilton v Infiniti Capital Andante Ltd*, the plaintiff filed proceedings in the High Court against a number of defendants based outside New Zealand.[42] The plaintiff sought interim injunctions to restrain conduct which he argued was

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38 At [39].
39 At [39].
40 At [39].
41 At [39]–[40].
42 *Hamilton v Infiniti Capital Andante Ltd*, above n 3.

contrary to a shareholders' agreement he had entered into with one of the defendants. The defendants filed protests to jurisdiction. The question before the Court was whether that protest had to be heard and determined before the Court could embark on a consideration of the interim injunction application.[43] The Judge referred to the observation in *Advanced Cardiovascular Systems* that the court's jurisdiction "must be determined prior to the Court embarking on a hearing of the proceeding, whether substantively or in any interlocutory way".[44] He considered that no real distinction could be drawn between a summary judgment application of the type to which the Court of Appeal referred in *Advanced Cardiovascular Systems*, and an interim injunction application of the type in issue in *Infiniti*.[45] Both are interlocutory in nature.[46] He considered that *Advanced Cardiovascular Systems* was indistinguishable, and that the protest had to be determined first.[47] The Court could not grant relief in terms of the interim injunction application until that had occurred.[48]

[63] For the reasons set out at [61] above, the Judge in *Infiniti* erred in suggesting that there was no relevant distinction between a summary judgment application and an interim injunction application in this context. The nature and significance of that distinction are discussed in more detail below.

[64] In *Discovery Geo* the applicant filed an originating application in New Zealand seeking an interim injunction against the defendant pending determination of an arbitration in London under the International Chamber of Commerce Commercial Arbitration Rules.[49] The relief was sought on an urgent without notice basis.[50] Counsel for the defendant appeared on a *Pickwick* basis.[51] The Judge accepted the defendant's argument that the Court did not have jurisdiction to grant interim relief for two reasons.[52] First, jurisdiction is dependent on valid service on the defendant.[53]

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43 At [8].
44 At [13], citing *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd*, above n 3, at 189–190.
45 At [14].
46 At [14].
47 At [14] and [16].
48 At [16].
49 *Discovery Geo Corp v STP Energy Pte Ltd*, above n 3, at [29].
50 At [29].
51 At [32].
52 At [38].
53 At [39], citing *Cockburn v Kinzie Industries Inc*, above n 19.

The applicant was entitled to issue proceedings as of right and serve without leave.[54] But service in accordance with the Rules had not been effected:[55]

> Where service offshore is involved, some rectitude is required. It involves, as has often been said, an exercise of sovereignty within the country which service is effected. … Of course in some circumstances, involving true urgency, formal service by means of substituted service might be permissible. That much is contemplated by the English Court of Appeal decision in *Bayat v Cecil* [[2011] EWCA Civ 135, [2011] 1 WLR 3086 at [68]]. However, no application for substituted service was made in this case.
>
> (Footnotes omitted.)

[65] Second, the Judge said, even if he was wrong in that respect, there was a more fundamental problem:[56]

> If a foreign defendant has indeed been served, the Court has provisional jurisdiction. It is subject to any protest as to jurisdiction. In the present case such a protest is foreshadowed. STP makes these points: it is a Singaporean company, over which the New Zealand Courts have no personal jurisdiction. The ICC arbitration is taking place in London, where the English Courts have supervisory jurisdiction pursuant to the Arbitration Act 1986 (UK). The interim measures application does not concern an asset located in New Zealand (although that is debateable). No relief or order has been sought against the New Zealand decision-maker, and the only measures sought are orders that a Singaporean company with no presence in New Zealand takes steps to seek to influence that process.

[66] After referring to *Advanced Cardiovascular Systems*, *Rimini*, and *Infiniti*, the Judge concluded that interim relief should not be granted before the protest had been determined:[57]

> [The defendant] must have the right to file a proper protest, and evidence in support of it. The Court will then consider whether it has jurisdiction. It should not now proceed on the basis that it should make interim orders, however innocuous they perhaps might be, on the basis it *might* have jurisdiction.

[67] The Judge went on to identify two additional reasons why interim relief should not be granted in that case, even if there were jurisdiction to grant such relief.[58]

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54 At [39].
55 At [39].
56 At [40].
57 At [43].
58 At [60].

[68] The Judge was right to take into account the likelihood of a protest to jurisdiction, and the prospect that the Court would not ultimately exercise jurisdiction. But as we explain below, these are factors that go to the assessment of the overall interests of justice, rather than to the ability of the Court to grant interim relief.

Service is not a prerequisite to the grant of interim relief

[69] We begin by addressing the argument that the court has no jurisdiction to grant interim relief until a defendant has been served with the proceedings.

[70] As noted above, that is plainly not the position so far as domestic defendants are concerned. The power of the High Court to grant interim relief is necessarily linked to the existence of a proceeding that has been, or is to be, filed. Normally, the proceeding will have been filed in the High Court before (or at the same time as) the interim relief is sought. But it is clear from r 7.53(2) that in urgent cases the power to grant interim relief can be exercised in connection with a proceeding yet to be filed. The relief must be urgent and the order must provide for the commencement of the proceedings. But the court can grant interim relief even though the proceedings have not been filed, let alone served on the intended defendant.[59]

[71] It is common for interim relief to be granted against a New Zealand-based defendant before service of proceedings, and it is often necessary to do so in order for that interim relief to be effective.

[72] There is nothing in the language of r 7.53 to suggest that the position is different in relation to overseas defendants. The rules governing service of proceedings outside New Zealand do not make any special provision concerning the grant of interim relief pending service. So any limit on the broad power to grant relief in connection with existing or prospective proceedings in r 7.53 would need to be implied from the scheme of the High Court Rules, or as a matter of general principle. We do not consider that any such limit can be implied.

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[59] As noted at [26] above, the position is the same in relation to freezing orders, search orders, and orders for interim relief in support of foreign proceedings.

[73] To the contrary, we consider that the ability to grant interim relief before service on an overseas defendant, in order to preserve the position pending a possible trial before the New Zealand courts, is necessary if the court is to be able to do substantial justice between the parties in those cases where it does ultimately hear and determine the proceeding. Injunctions preventing a defendant from dealing with funds in which the plaintiff claims an interest, and freezing orders designed to ensure that an eventual judgment can be satisfied, are perhaps the simplest and clearest examples. If orders of these types could not be made until after an overseas defendant had been served, they would never in practice be available against overseas defendants. Such orders are frequently made in New Zealand, Australia and England.[60] They meet an important practical need.

[74] Examples can readily be multiplied. Orders may be sought against an overseas defendant in relation to breaches of intellectual property rights in New Zealand as a result of distribution into New Zealand by that defendant of infringing products. An order may be sought against a defendant to prevent disclosure of commercially confidential information to the plaintiff's business rivals in New Zealand. An individual plaintiff may seek an injunction preventing disclosure to persons in New Zealand of personal information, such as intimate photographs. In all of these cases, the ability of the New Zealand court to do effective justice between the parties following a trial would be irretrievably compromised if relief could not be granted until after the proceedings had been served. There is nothing in the High Court Rules, or in the general principles governing the grant of injunctions, that would compel that unsatisfactory result.

[75] It is of course correct that proceedings must be properly served on a defendant outside New Zealand in accordance with the detailed regime set out in the High Court Rules. But the mere fact that service has not yet occurred does not preclude the grant of interim relief against a defendant outside New Zealand, any more than it would in relation to a defendant present in New Zealand.

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[60] Some examples are listed at n 27 above.

[76] The amenability of the defendant to service outside New Zealand is relevant to the assessment of whether interim relief should be granted: we return to that topic below. But the more extreme version of Viagogo's argument set out in its written submissions is untenable: the fact that service has not occurred does not give rise to a jurisdictional barrier to the grant of interim relief.

Interim relief pending determination of a protest to jurisdiction

[77] The argument that the court should not exercise jurisdiction to grant interim relief against a defendant that has filed a protest to jurisdiction, or that is likely to do so, is on its face more plausible. The Judges in *Rimini*, *Infiniti*, and *Discovery Geo* were understandably troubled by the prospect of the court making orders against an overseas defendant in circumstances where the High Court had not yet determined whether it had jurisdiction to hear and determine the proceedings.

[78] There is no express limit on the power of the court to grant interim relief in such circumstances. All that is required is a proceeding that has been, or is to be, filed in the High Court. Nor do we consider that any such restriction is implicit in the rules in relation to service out of New Zealand and objections to jurisdiction. To the contrary, we consider that it is necessary for the court to have the ability to grant interim relief in cases where proceedings have been filed in the High Court that may eventually lead to a trial of the proceedings in New Zealand. The court would be deprived of the ability to do effective justice between the parties if it could not grant interim relief designed to ensure that it will be in a position to do so if and when a trial occurs. The examples given in paragraphs [73] and [74] and above are equally relevant in this context. If the court's ability to grant interim relief is postponed until proceedings have been served and any protest to jurisdiction has been finally determined, there would be many cases in which the New Zealand court would eventually proceed to hear and determine the proceedings but would be unable to do effective justice between the parties at that time. Any final orders would have been rendered futile from a practical perspective.

[79] The apparent tension between the making of orders against an overseas defendant and the right of that defendant to object to the jurisdiction of

the New Zealand court is resolved by focusing on the sense in which the term "jurisdiction" is used in the context of the rules governing service of proceedings outside New Zealand, and objections to jurisdiction. The objection to jurisdiction contemplated by the rules is an objection to the jurisdiction of the court to hear and determine the proceeding on the merits: jurisdiction in the sense identified at [52] above. But the court plainly has jurisdiction to entertain the proceedings and make orders for the purpose of determining the objection to jurisdiction. For example, and at the risk of stating the obvious, the court has jurisdiction to hear and decide an application under r 5.49(3) to dismiss the proceeding, or an application under r 5.49(5) to set aside the appearance under protest. That is, the court has jurisdiction to determine whether it should proceed to exercise jurisdiction to determine the substantive claim. The court can make a range of orders that are ancillary to (preliminary) determinations of this kind, such as case management orders.

[80] Most importantly for present purposes, we consider that the court has the power to grant interim relief in connection with the proceeding at this preliminary stage to ensure that if the court does ultimately hear and decide the claim on the merits, it is able to do effective justice between the parties. The ability to grant interim relief in these circumstances is a necessary corollary of the court's ability to receive the claim and determine whether or not to hear it on the merits.

[81] The power to grant an interim injunction in these circumstances is available under r 7.53, which we do not consider can be read down in the manner contended for by Viagogo. It is also available as a matter of inherent jurisdiction: the power to make such orders is in our view necessary to administer the laws of New Zealand. It is not an unreasonable assertion of jurisdiction to require a defendant to comply with interim orders designed to enable substantial justice to be done between the parties, whether by the New Zealand court or another court, while the New Zealand court determines whether or not it will hear and determine the substantive proceeding.

[82] This approach is consistent with the approach adopted by the courts in Australia and England. There are no features of the New Zealand legal landscape that require a different approach.

[83] Mr Lloyd emphasised the principle that "a foreigner resident abroad will not lightly be subjected to the local jurisdiction".[61] The High Court Rules in relation to service out of New Zealand are designed to achieve a balance between the need for practical justice to be done in a world where cross-border dealings are ever more common, and the burden on a foreign defendant of being required to defend proceedings in New Zealand. We do not consider that any further gloss on those rules is helpful, or appropriate in the current day. We agree with the observations of Lord Sumption in *Abela v Baadarani*:[62]

> [53] In his judgment in the Court of Appeal, Longmore LJ described the service of the English court's process out of the jurisdiction as an "exorbitant" jurisdiction, which would be made even more exorbitant by retrospectively authorising the mode of service adopted in this case. This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view of the situation. The adoption in English law of the doctrine of forum non conveniens and the accession by the United Kingdom to a number of conventions regulating the international jurisdiction of national courts, means that in the overwhelming majority of cases where service out is authorised there will have been either a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and this country. Moreover, there is now a far greater measure of practical reciprocity than there once was. Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries. The basic principles on which the jurisdiction is exercisable by the English courts are similar to those underlying a number of international jurisdictional conventions, notably the Brussels Convention … and the Lugano Convention … . The characterisation of the service of process abroad as an assertion of sovereignty may have been superficially plausible under the old form of writ ("We command you …"). But it is, and probably always was, in reality no more than notice of the commencement of proceedings which was necessary to enable the defendant to decide whether and if so how to respond in his own interest. It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.

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61 *Société Générale de Paris v Dreyfus Bros* (1885) 29 Ch D 239; and *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513 (PC) at 524.

62 *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043. Lord Neuberger, Lord Reed and Lord Carnwath agreed with the judgment of Lord Sumption. Lord Clarke also agreed with these observations of Lord Sumption at [45].

[84] The important point for present purposes is that the traditional caution of the New Zealand courts in relation to the exercise of jurisdiction to hear and determine claims against foreign defendants cannot be elevated into a jurisdictional limit on the ability of the New Zealand courts to grant interim relief in an appropriate case against a defendant served outside New Zealand, where it is in the overall interests of justice to do so.

The relevance of an actual or potential protest to jurisdiction

[85] We should not be understood as suggesting that interim relief can be granted without any reference to the jurisdiction of the New Zealand court to hear and determine the substantive claim against the defendant. The inquiry into whether there is a serious issue to be tried is in effect an inquiry into whether there is a real prospect that the court will ultimately grant relief against the defendant. It is the prospect of an eventual determination in favour of the plaintiff that justifies preserving the position until the court has had an opportunity to finally determine whether to grant the relief sought by the plaintiff.

[86] If it is clear that the court will not exercise jurisdiction to entertain the substantive claim against the defendant, it would be inappropriate to grant interim relief to preserve the position pending a determination that will never come. (It may however be appropriate to grant relief under r 7.81 in support of proceedings in another, more appropriate, forum.[63]) Conversely, where it is clear that the New Zealand court can and will exercise jurisdiction, even though it has been necessary to serve the defendant abroad, the mere fact of service abroad will be of little relevance in deciding whether or not to grant interim relief.

[87] Where an interim injunction is sought against a defendant to be served outside New Zealand and the position is less clear cut, the court will need to consider, as one factor in the assessment of the overall interests of justice, the prospect that there will be a hearing on the merits before the New Zealand court.

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63 As noted above, r 7.81 provides for interim relief to be granted in support of judicial proceedings commenced or to be commenced outside New Zealand, provided certain criteria are met.

[88] The factors that Mr Lloyd sought to identify as jurisdictional pre-requisites for the grant of interim relief — the ordinary residence of the defendant in New Zealand, the presence of property in New Zealand to which the injunction relates, or conduct in New Zealand to which the injunction relates — are all factors that may be relevant to the overall assessment of whether interim relief should be granted. A New Zealand court is likely to be more willing to grant interim relief against a defendant with a close connection with New Zealand, or in relation to property or conduct in New Zealand. But none of these factors can be elevated to the status of a jurisdictional prerequisite.

[89] It would not be appropriate for us to seek to resolve, in the context of this appeal, the difference of views between the parties as to whether Viagogo is engaging in conduct in New Zealand, or carrying on business in New Zealand, for the purposes of the FTA. But we can indicate that in the context of an application for interim relief to restrain statements made to consumers in New Zealand, the focus should be on the practical reality of whether communications are being directed to New Zealand consumers, rather than on matters such as where a website is hosted or whether the communications are made using "push" technology (such as telephone calls or emails addressed to consumers), or "pull" technology (such as a website that is accessed by consumers). Technical questions of this kind, which have no bearing on the practical implications of any interim orders for the affected parties, are unlikely to be relevant to an assessment of the overall interests of justice.

[90] Nor do we consider that it is helpful to seek to characterise an injunction as prohibitive or mandatory in this context. As Lord Hoffmann said in *Olint*, such arguments "are barren. … What matters is what the practical consequences of the actual injunction are likely to be."[64] The problematic nature of this classification is well illustrated by the present case. An order restraining the making of statements would normally be seen as prohibitive in nature. But if a defendant has automated the making of such statements, using a website (or an auto-dialler, or some other form of technology) some positive action by that defendant would be required to stop that conduct from continuing. There is a sense in which an order requiring that action to be taken could be described as mandatory. Arguing about how such an order should

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64 *National Commercial Bank of Jamaica Ltd v Olint Corp Ltd,* above n 18, at [20].

be labelled is in our view beside the point. Rather, what matters is the practical implications of the order for the affected parties. This in turn informs an assessment of the overall interests of justice.

[91] The practical effectiveness of granting the interim injunction sought may be a relevant factor in some cases. There are obvious difficulties in enforcing injunctions issued against a person without a presence in New Zealand. But the court should not assume that merely because a defendant is outside New Zealand, the order will not be complied with.[65] There may be effective sanctions in New Zealand, including the exercise of the contempt jurisdiction against an individual defendant on their return to New Zealand, the sequestration of assets of the defendant in New Zealand, debarring the defendant from defending the proceedings on the merits, or bringing the order to the attention of third parties present in New Zealand in order to deter them from facilitating breaches by the defendant and exposing themselves to the contempt jurisdiction of the court as a result. And putting the question of sanctions to one side, a reputable defendant is likely to be reluctant to simply disregard an order made by a court. Rather, they are likely to seek to persuade the court that any order made without notice should be set aside. They are of course able to do so without submitting to the jurisdiction of the New Zealand court: appearing to resist provisional or protective measures while maintaining an objection to jurisdiction is not a submission to jurisdiction.[66]

[92] Where a defendant is to be served abroad without leave under r 6.27, and the court is asked to grant interim relief against that defendant before service or before determination of any protest to jurisdiction, the court should consider, on a preliminary basis, the matters set out in r 6.29: is there a good arguable case that the claim falls wholly within one or more of the paragraphs of r 6.27? Is there a serious issue to be tried on the merits? Is New Zealand the appropriate forum for the trial of the proceeding? Are there any other circumstances relevant to whether the New Zealand court should exercise jurisdiction? The court should consider, again

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65 *Derby & Co Ltd v Weldon (Nos. 3 and 4)*, above n 26, at 81.

66 Lord Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) vol 1 at [11-129]; *Williams & Glyn's Bank Plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438 (HL) at 443–444; and *Air Nauru v Niue Airlines Ltd* [1993] 2 NZLR 632 (HC) at 638.

on a preliminary basis, whether having regard to these matters there is a real prospect that the New Zealand court will exercise jurisdiction to hear the proceedings. The more likely it is that the New Zealand court will hear and determine the case on the merits, the less the weight that is likely to be given to the fact that the defendant is to be served abroad when considering the application for interim relief.

[93] If the defendant is to be served abroad with leave under r 6.28, and interim relief is sought at the same time as leave to serve outside New Zealand, the factors relevant to the grant of leave will also be relevant to an assessment of the appropriateness of granting interim relief. The stronger the case for leave, the less the weight that is likely to be given to the fact that the defendant is to be served abroad when considering the application for interim relief.

[94] Conversely, the mere fact that a defendant is outside New Zealand should not encourage the making of without notice interim orders. An application for interim relief should be made without notice to the defendant only where that is essential, either because giving advance notice will defeat the purpose of the order sought, or because the application is so urgent that it is not feasible to give notice. Applications in the second category should be rare, and every attempt should be made to provide such notice as possible — even if it is only a telephone call or text or email — to alert the defendant to what is happening and enable them to participate on a *Pickwick* basis. As noted above, such participation does not amount to submission to jurisdiction, and goes some way to meeting basic natural justice concerns. Where interim relief is sought and granted without notice, the period for which the relief is made effective should in most, if not all, cases be a short period before a date on which the application will be called again, and determined on a "with notice" basis. The appropriateness of continuing the interim relief can then be determined after hearing from both parties. Again, appearing for the purpose of opposing interim relief of this kind while maintaining an objection to jurisdiction does not amount to a submission to jurisdiction by the defendant.

Substituted service

[95] Finally, we should say something about substituted service. The High Court decision suggests that in genuinely urgent cases, an alternative approach would be to seek an order for substituted service on the defendant.[67] The defendant having been served, there would then be no jurisdictional barrier to the grant of interim relief.[68] This reflects a similar suggestion made in *Discovery Geo*.[69]

[96] As explained above, there is no jurisdictional barrier to the grant of interim relief merely because the proceedings have not yet been served on a defendant outside New Zealand, or because a protest by that defendant has not been determined. But quite apart from that, we do not consider that substituted service is an appropriate alternative in urgent cases.

[97] Rule 6.8 permits an order to be made for substituted service "[i]f reasonable efforts have been made to serve a document by a method permitted or required under these rules, and either the document has come to the knowledge of the person to be served or it cannot be promptly served". In urgent cases, and in particular in cases where it is not appropriate to serve the defendant before obtaining interim relief, it is difficult to see how the "reasonable efforts" requirement can be met.

[98] As a matter of principle, moreover, we do not consider that r 6.8 can be used to do an "end run" around the rules in relation to service of proceedings on defendants outside New Zealand.[70] Rule 6.8 can be invoked where a defendant is overseas. But it remains necessary to comply with rr 6.27 and 6.28. If r 6.27 applies, attempts must normally have been made to serve the defendant overseas. If r 6.28 applies, an application under r 6.8 will not normally be appropriate unless leave has been obtained and reasonable attempts have been made to effect service.

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67 High Court decision, above n 2, at [14].

68 At [14].

69 *Discovery Geo Corp v STP Energy Pte Ltd,* above n 3, at [39].

70 Lord Collins, above n 66, at [8-051]; *Knauf UK GmbH v British Gypsum Ltd* [2001] EWCA Civ 1570, [2002] 1 WLR 907 at [46]–[47]; *Cecil v Bayat* [2011] EWCA Civ 135, [2011] 1 WLR 3086 at [67]–[70] and [113]; *Von Wyl v Engeler* [1998] 3 NZLR 416 (CA) at 421; *Metropolitan Glass and Glazing Ltd v The Ship "Lydia Oldendorf"* (2000) 14 PRNZ 671 (HC); *Laurie v Carroll* (1958) 98 CLR 310 (HCA); *Myerson v Martin* [1979] 1 WLR 1390 (CA); and *Mondial Trading Pty Ltd v Interocean Marine Transport Inc* (1985) 65 ALR 155 (HCA).

[99] The fact that it will take some time to effect service on a defendant in a manner that is lawful in the country where the proceedings are to be served is not of itself a good reason for making an order for substituted service. Service through official channels under r 6.33 can be slow and expensive. The practical difficulties caused by the need to serve proceedings through official channels in some countries could be reduced by New Zealand acceding to the Hague Service Convention.[71] That would simplify service of New Zealand proceedings in many countries where service by official channels is currently required. But the courts cannot respond to these difficulties on an ad hoc basis by making orders that provide for service on a defendant in another country in a manner that would contravene the law of that country. That would be both wrong as a matter of principle, and ineffective: r 6.32(4) expressly provides that service outside New Zealand is not valid if it is effected contrary to the law of the country where service is effected.

[100] Nor would substituted service eliminate the prospect of a protest to jurisdiction. Substituted service on a defendant outside New Zealand under r 6.8 does not preclude the defendant from objecting to the jurisdiction of the New Zealand court: it would be wrong in principle for an order about the mode of service to defeat a defendant's rights under rr 5.49 and 6.29. So substituted service would not in fact solve the concern expressed in cases such as *Discovery Geo* that the court would be making interim orders against an overseas defendant before it had decided whether or not to exercise jurisdiction to hear and determine the proceedings against that defendant.

Conclusion

[101] It follows that the application should not have been dismissed on the grounds that the Court did not have jurisdiction to make the orders sought. We therefore allow the appeal against the order dismissing the application. The application is remitted to the High Court.

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[71] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 658 UNTS 163 (signed 15 November 1965, entered into force 10 February 1969). Acceding to this widely ratified Convention would simplify service of New Zealand proceedings in Switzerland and many other European countries, and in a number of countries in the Asia-Pacific region with which New Zealand has significant links including China and Japan.

[102] As noted above, the Commission will need to decide whether, in light of the recent changes to Viagogo's website, it still wishes to seek interim relief. If so, then the application should be dealt with on notice. The High Court will need to make timetable orders in relation to the interim relief application and the application which we anticipate the Commission will file under r 5.49(5) to set aside Viagogo's protest. It may well be sensible to hear the applications at the same time, though that is a matter for the High Court.

[103] Counsel for Viagogo appeared before the High Court and before this Court on a *Pickwick* basis, and without prejudice to Viagogo's objection to New Zealand jurisdiction. In these circumstances the Commission quite properly did not seek costs.

Result

[104] The appeal is allowed.

[105] The application for interim relief is remitted to the High Court.

[106] There is no order as to costs.

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