IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGĀREI-TERENGA-PARĀOA ROHE

CIV-2019-488-60
[2020] NZHC 2560

UNDER	the Trans-Tasman Proceedings Act 2010
IN THE MATTER	of a judgment registered pursuant to s 57 of the Act
BETWEEN	DEBRA GISELLA LANGE Applicant
AND	TERRY CECIL LANGE First Respondent
	MARIA ANN LANGE-TUPE Second Respondent

Hearing: 16 September 2020

Appearances: M R Walker and B B Gresson for the Applicant
C J LaHatte for the Respondents

Judgment: 30 September 2020

JUDGMENT OF GAULT J

This judgment was delivered by me on 30 September 2020 at 4:30 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors:
Mr M R Walker and Mr B B Gresson, Todd & Walker, Queenstown
Mr C J LaHatte, Wellington
Ord Legal (Respondents' instructing solicitor), Wellington

[1] Ms Debra Lange commenced this proceeding seeking a sale order to enforce a judgment of the Family Court of Western Australia dated 12 June 2019 in proceedings between the same parties.[1]

[2] This Court issued a sale order on 12 March 2020.

[3] On 7 July 2020 the respondents applied for a stay of execution of the judgment and sale order.

[4] On 2 September 2020 the respondents also applied for leave/extension of time to oppose registration of the Western Australian judgment.

Factual background

[5] Ms Lange and the first respondent, Mr Terry Lange, commenced a relationship in 1994 and married in 1997. They had two children, born in 1997 and 1999.

[6] They separated in November 2013 and were divorced in 2016.

[7] During the marriage, they lived in a property in Lockridge, Western Australia.

[8] In 2010 Mr Lange purchased a property at 58 Jason Road (also known as 995 Oruru Road, Taipa), Kaitaia, New Zealand (the Kaitaia property).[2]

[9] Ms Lange commenced the Western Australian proceeding against Mr Lange in March 2014. An interim injunction was granted in relation to the Lockridge property.

[10] The Western Australian proceeding was due for trial in July 2017, but the day before trial Ms Lange applied to join Ms Maria Lange-Tupe, the adult daughter of Mr Lange and his previous partner, as second respondent. It had been disclosed earlier in 2017 that Mr Lange had transferred the Kaitaia property to Ms Lange-Tupe for $514,633 and subsequently forgiven that debt.

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1 *Lange v Lange* [2019] FCWA 128.
2 Lots 3, 4 and 5 DP390511 Record of Title 363200.

[11] The 2017 trial was vacated, and disclosure and timetable orders were made. Ms Lange-Tupe was joined in December 2017. The proceeding was further delayed due to Ms Lange-Tupe's non-attendance at hearings in 2018. Further disclosure orders were made including to require Mr Lange to produce documents relating to the transfer of the Kaitaia property and the forgiveness of debt.

[12] The Western Australian proceeding ultimately went to a final hearing in April 2019. Ms Lange-Tupe did not attend.

[13] In a lengthy judgment dated 12 June 2019, Moncrieff J relevantly concluded that:[3]

(a) Ms Lange-Tupe had been served by way of substituted service. She had deliberately attempted to thwart service upon her.[4]

(b) The documents to effect transfer of the Kaitaia property from Mr Lange to Ms Lange-Tupe were signed in September 2016, with registration on 31 October 2016.[5] Mr Lange claimed he executed the forgiveness of debt a few days after he signed the documents to effect transfer.[6] The Judge did not accept Ms Lange-Tupe's claim in her affidavit dated 5 July 2017 that in 2010 she and her husband experienced financial hardship and Mr Lange was happy to gift her the Kaitaia property (with Ms Lange's knowledge), and that he did so in 2011.[7]

(c) Mr Lange had a legal and beneficial interest in the Kaitaia property, and the transfer and deed of forgiveness in favour of Ms Lange-Tupe were dispositions to defeat Ms Lange's claim intentionally by Mr Lange acting in concert with Ms Lange-Tupe.[8]

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3 *Lange v Lange* [2019] FCWA 128.
4 At [6] and [54]-[58].
5 At [40]-[41].
6 At [29] and [30].
7 At [39].
8 At [120].

[14] Moncrieff J ordered that the deed of forgiveness of debt be set aside.[9] In addition, the Western Australian Court relevantly ordered that the respondents jointly and severally pay to the applicant the amount of NZ$514,633 (less the amount of any payments made in compliance with the Court's other orders relating to the Lockridge property and a cash payment), and a consequential charge over the Kaitaia property.[10]

[15] The Western Australian judgment was registered in this Court on 25 July 2019 pursuant to s 57 of the Trans-Tasman Proceedings Act 2010 (TTPA).

[16] The respondents have not complied with the order of the Western Australian Court.

[17] Ms Lange seeks the sale of the Kaitaia property pursuant to the sale order.

Stay of enforcement – legal principles

[18] The application for a stay is brought under r 17.29 of the High Court Rules 2016, which provides that:

> A liable party may apply to the court for a stay of enforcement or other relief against the judgment upon the ground that a substantial miscarriage of justice would be likely to result if the judgment were enforced, and the court may give relief on just terms.

[19] It is common ground that the substantial miscarriage of justice must relate to the enforcement of the judgment, not the judgment itself.[11] Rule 17.29 is a separate and distinct rule from the power to stay execution of a judgment pending an appeal, or the power under s 65 of the TTPA to stay enforcement of a registered judgment pending an Australian appeal.

[20] Section 57(2) of the TTPA provides that, once registered, the judgment remains registered unless the registration is set aside under section 61 of the TTPA. Section 61 provides:

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9 *Lange v Lange* [2019] FCWA 128 at [121] and [220].
10 At [220].
11 *Palmerston North City Council v Birch* [2012] NZHC 3248 at [17].

> **61 Setting aside registration**
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> (1) This section specifies the only situations in which a New Zealand court in which an Australian judgment has been registered under section 57 may set aside the registration of the judgment.
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> (2) The New Zealand court must, on application by a liable person within the applicable period under subsection (3), set aside the registration of the judgment if satisfied that—
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> (a) the judgment was registered in contravention of this Act; or
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> (b) enforcement of the judgment would be contrary to public policy in New Zealand; or
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> (c) both of the following subparagraphs apply:
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> (i) the judgment was given in a proceeding the subject matter of which was immovable property, or was given in a proceeding *in rem* the subject matter of which was movable property; and
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> (ii) that property was, at the time of the proceeding in the original court or tribunal, not situated in Australia.
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> (3) An application under subsection (2) must be made—
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> (a) within 30 working days of the New Zealand court after the day on which the liable person was given notice of registration under section 62; or
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> (b) if the liable person, before or after the end of the period in paragraph (a), applies to the New Zealand court for a longer period—within any longer period the New Zealand court considers appropriate.

[21] In the enforcement of judgments context, "contrary to public policy" is a narrow exception involving notions of "repugnance" and matters that would "'shock the conscience' of a reasonable New Zealander".[12]

Discussion

[22] Mr LaHatte, for the respondents, submits that a substantial miscarriage of justice would result if the Western Australian judgment were enforced, on the basis that the registration of the judgment under the TTPA should be set aside under s 61. Mr LaHatte relies on both ss 61(2)(b) and (c) of the TTPA.

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[12] *Lane v Questnet Ltd* [2009] NZCA 578, [2010] NZAR 210 at [47], citing *Reeves v OneWorld Challenge LLC* [2006] 2 NZLR 184 (CA) at [56]-[64] and [67].

Procedure

[23] The first difficulty for the respondents is that they had not applied to set aside registration of the judgment. Their recent application dated 2 September 2020 for leave/extension of time to oppose registration of the Western Australian judgment ignores the fact that the judgment has already been registered, indeed for over a year. Given the time limit in s 61(3), the respondents needed to apply to set aside registration of the judgment within 30 working days of notice of registration.

[24] Despite the claim in Mr Lange's affidavit of 6 July 2020 that no papers were ever served on him in New Zealand seeking enforcement, the evidence indicates he had notice of registration of the judgment by 18 September 2019. Even if he did not receive the courier letter dispatched on 19 August 2019, he was given notice of the registration of the Western Australian judgment on 18 September 2019 during a judicial conference in separate New Zealand Family Court proceedings. Ms Lange-Tupe had notice of registration of the judgment by 21 August 2019 when she sent an email to Ms Lange's Western Australian solicitors stating she had received their courier letter, which enclosed the registered Western Australian judgment. Her subsequent email of 13 September 2019 claiming not to have been served relates only to the Australian proceeding and is incorrect. Therefore, the respondents needed an extension of time to apply to set aside registration.

[25] In any event, as reflected in Mr LaHatte's submissions, the recent application is in substance an application for an extension of time to apply to set aside registration of the judgment under s 61(3)(b) and I treat it accordingly. Indeed, Mr LaHatte seeks not only a stay but to set aside registration of the judgment now.

Contrary to public policy – s 61(2)(b)

[26] Turning to the grounds to set aside, in relation to s 61(2)(b) Mr LaHatte submits that enforcement of the judgment would be contrary to public policy in New Zealand because the result of the Western Australian judgment, despite the Judge's reference to a 60/40 split, is that Mr Lange will get nothing. Mr LaHatte submits that under the Western Australian judgment Ms Lange received the Lockridge property, Mr Lange has to pay off its mortgage (approximately AU$90,000 at the time of the judgment),

rates, charges and land taxes, make a cash payment of AU$140,000 and pay the NZ$514,633 to Ms Lange. Mr LaHatte submits a New Zealand court should not enforce such a gross disparity.

[27] This submission overlooks the fact that the order relating to the NZ$514,633 was an order that the respondents jointly and severally pay to Ms Lange the amount of NZ$514,633 less the amount of any payments made in compliance with other orders against Mr Lange relating to the Lockridge property and cash payment. Those amounts are not double-counted. If Mr Lange paid off the mortgage and paid the AU$140,000, the NZ$514,633 would reduce accordingly.

[28] Mr LaHatte also submits that it is contrary to public policy to allow the Western Australian Family Court to make an order for the sale of property in New Zealand that otherwise would not have been given if the issue was dealt with in the New Zealand Family Court. I do not accept this submission. First, the Western Australian Family Court did not make an order for the sale of property in New Zealand. Relevantly, it made an order that the respondents pay a sum of money. This Court's sale order is by way of enforcement process in respect of the judgment debt. Secondly, enforcement of an Australian Court's decision in New Zealand is not contrary to public policy merely because a New Zealand court applying New Zealand law would reach a different result. This was addressed by the Full Court of the Federal Court of Australia in *LFDB v SM*,[13] a case involving the mirror situation of an application to set aside registration of a New Zealand relationship property judgment under the Australian Trans-Tasman Proceedings Act 2010 (Cth). The Full Court stated:[14]

> … senior counsel for the appellants, in the course of his submissions, made the point that the Family Court of Australia does not (and would not) make a cognate order under the *Family Law Act 1975* (Cth) in similar circumstances. Assuming the correctness of this contention, as the primary judge explained, such an argument misses the point. As Kirby P explained in *Bouton v Labiche* (1994) 33 NSWLR 225 at 234:
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> > The interests of comity are not served if the courts of the common law are too eager to criticise the standards of the courts and tribunals of another jurisdiction or too reluctant to recognise their orders, which are, and remain, valid by the law of the domicile …

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13 *LFDB v SM* [2017] FCAFC 178, (2017) 256 FCR 218.
14 At 227-229.

> Put another way, it is natural, and to be expected, that different jurisdictions (including those countries with whom we have a close connexion and a shared legal heritage) adopt different solutions to the same problems without those different solutions "suffering the ignominy of being described as contrary to public policy": see *De Santis v Russo* (2001) 27 Fam LR 414 at [18] per Atkinson J.
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> …
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> In any event, at the very least, the primary judge was correct to reject the notion that merely because a different approach is taken to a common problem in an overseas jurisdiction, that difference renders such an approach contrary to public policy in Australia. The primary judge recognised at [102] that the authorities demonstrate the need to go further. As Tamberlin J noted in *Stern v National Australia Bank* [1999] FCA 1421 at [143]:
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> > The thread running through the authorities is that the extent to which the enforcement of the foreign judgment is contrary to public policy must be of a high order to establish a defence. A number of the cases involve questions of moral and ethical policy; fairness of procedure, and illegality, of a fundamental nature.

[29] Therefore, even if Mr LaHatte is correct that a New Zealand court would reach a different result, I do not consider that makes enforcement of the Western Australian judgment contrary to public policy. This proceeding is not an opportunity to relitigate the findings of the Western Australian Court by reference to New Zealand relationship property law.

[30] Mr LaHatte's other criticisms of the Western Australian judgment and the Judge's treatment of Mr Lange, and his explanation that he did not appeal for financial reasons, also do not assist in the context of s 61(2)(b). Mr Lange participated in the Western Australian proceeding. Ms Lange-Tupe was joined but chose not to participate in the proceeding (even though she had sworn an affidavit prior to joinder). The Judge found she had deliberately attempted to thwart service upon her. There is no suggestion the judgment was irregularly obtained or was registered in contravention of the TTPA (s 61(2)(a)). Enforcement of a judgment registered under the TTPA is not contrary to public policy simply because a party does not accept the judgment. As indicated, "contrary to public policy" is a narrow exception involving notions of "repugnance" and matters that would "'shock the conscience' of a reasonable New Zealander".[15] It is not an opportunity to relitigate the dispute

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[15] *Lane v Questnet Ltd* [2009] NZCA 578, [2010] NZAR 210 at [47], citing *Reeves v OneWorld Challenge LLC* [2006] 2 NZLR 184 (CA) at [56]-[64] and [67].

determined by the Western Australian Court. Nothing in the Western Australian judgment meets the threshold.

[31] In particular, Mr LaHatte submitted that Moncrieff J had no jurisdiction to make an order under s 90AE(3) of the Family Law Act 1975 (Cth) given the threshold requirements of subsections (1) and (2). As Mr Walker submitted, this Court should be slow to engage in an analysis of Australian law in this enforcement context. The Judge referred to s 90AE(3) to support the orders that flow from setting aside the deed of forgiveness,[16] which include a charge over the Kaitaia property.[17] But, in any event, I consider that in this respect as well, it is not for a New Zealand court to relitigate the matter and second-guess the Western Australian judgment in the context of an application to stay enforcement of a judgment registered under the TTPA.

[32] Furthermore, in relation to Mr Lange's criticism of the Judge's treatment of him, while Mr LaHatte submitted generally that New Zealand courts were kinder towards litigants in person and the Judge was unfair, Mr Lange's general statements in his affidavit do little to impugn the Judge's strong criticisms of his conduct during the Western Australian proceeding.[18] If anything, there is some parallel with his further delay in this proceeding. Also, Ms Lange-Tupe has sought to avoid the proceedings and delay. Their aggressive email correspondence to Ms Lange or her lawyer at various times reinforces that.

[33] For these reasons, I do not consider that enforcement of the judgment would be contrary to public policy in New Zealand.

Property outside Australia – s 61(2)(c)

[34] In relation to s 61(2)(c), Mr LaHatte submits the Western Australian "judgment was given in a proceeding the subject matter of which was immovable property" not situated in Australia, namely the Kaitaia property. Advocating a holistic approach, Mr LaHatte submits that Moncrieff J's decision setting aside the deed of forgiveness of debt was an artificial mechanism as it was effectively setting aside the transfer of

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16 *Lange v Lange* [2019] FCWA 128 at [214].
17 At [220].
18 For example, at [10]-[24] and [68]-[70].

the property itself. He submits that a substantial miscarriage of justice would occur as Moncrieff J would not have been able to make orders relating to the Kaitaia property had it been transferred by Mr Lange to Ms Lange-Tupe by way of a deed of gift.

[35] Mr Walker, for Ms Lange, submits that Moncrieff J was fully aware of the relevant provisions of the TTPA and expressly turned his mind to this issue when making the order to set aside the deed of forgiveness of debt. Moncrieff J stated:[19]

> I am satisfied within the meaning of s 106B of the [*Family Law Act 1975* (Cth)] that the New Zealand property was properly held in which the first respondent, had a legal and beneficial interest; that the transfer and, separately, deed of forgiveness constitute an instrument or disposition entered into on behalf of a party to the proceedings made such as to defeat an anticipated claim by the applicant, and, whilst s 106B specifically operates irrespective of an intention, I find on the balance of probabilities that such an outcome was an intentional one on behalf of the first respondent acting in consort with the second respondent.
>
> I do not, however, propose to set aside the transfer of the land. I propose to order that the deed of forgiveness of debt be set aside, thus rendering the second respondent remaining as liable to pay the contract sum to the first respondent, which sum I propose to include in the pool of assets available for distribution between the parties.
>
> For the benefit of any Court that may be called upon in New Zealand to effect registration of any order that I make for these reasons, I specifically express my intention not to make an order that deals with immovable property, having regard particularly to the provisions of s 61 of the *Trans-Tasman Proceedings Act 2010* (NZ), and the effective limitations upon registration of judgments involving immovable property that was not situated in Australia.

[36] No authorities were cited to me in relation to the scope of s 61(2)(c) or its equivalent in s 72(1)(c) of the Trans-Tasman Proceedings Act 2010 (Cth). According to its plain meaning, it is the subject matter of the proceeding (rather than the judgment) which must be immovable property. On that basis, Moncrieff J's confirmation that he was not making an order that deals with immovable property is not determinative. For the same reason, Mr LaHatte's submission that the Judge used an artificial mechanism in the judgment to overcome the point that the judgment related to the forgiveness of debt, not the immovable property, is misconceived. So too

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19 *Lange v Lange* [2019] FCWA 128 at [120]-[122].

is the submission that the Judge appreciated that the property would have to be sold to meet the judgment debt.

[37] Focusing on the subject matter of the proceeding (rather than the judgment) potentially widens the scope of s 61(2)(c) in the respondents' favour. The judgment indicates that at trial Ms Lange relevantly sought an order setting aside either Mr Lange's disposition of the Kaitaia property to Ms Lange-Tupe or the deed of forgiveness of debt, and consequential orders including a declaration that Mr Lange is the sole equitable owner of the Kaitaia property and a charge over it.[20] As indicated, the Judge ordered that the deed of forgiveness of debt be set aside (not the transfer), payment of the amount owed and a consequential charge over the Kaitaia property.

[38] Despite the alternative order sought setting aside the transfer and the consequential charge, I consider that, applying s 61(2)(c) in its statutory context, the Western Australian judgment was not "given in a proceeding the subject matter of which" was the Kaitaia property, for two main reasons.

[39] First, for s 61(2)(c) to apply, I consider that the immovable property outside Australia must itself be in issue in the proceeding. The relevant purposes of the TTPA are set out in s 3(1):

> The purpose of this Act is to—
>
> (a) streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency; and
>
> (b) minimise existing impediments to enforcing certain Australian judgments and regulatory sanctions; and
>
> (c) implement the Trans-Tasman Agreement in New Zealand law.

[40] The TTPA implemented the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement.[21] The relevant provision of that Trans-Tasman Agreement, paragraph 8 of Article 5, provides:

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20 *Lange v Lange* [2019] FCWA 128 at [59].
21 Made at Christchurch on 24 July 2008.

> Registration of the following judgments may be set aside in the registering court on the basis that the property in question was not, at the time of the proceedings before the court which issued the judgment, situated within the territory of the Party in which the court which issued the judgment is located:
>
> a. judgments given in an action where the subject matter is immovable property; and
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> b. judgments in an action in rem where the subject matter is movable property.

[41] I consider the words "property in question" are consistent with the need for the property itself to be in issue.

[42] Although in a different setting, a similar approach is taken in relation to representative proceedings under r 4.24 of the High Court Rules 2016, which refers to having the same interest in the "subject matter of a proceeding". In *Credit Suisse Private Equity LLC v Houghton*,[22] Elias CJ considered it was sufficient to have a community of interest "in the determination of some substantial issue of law or fact", referring to the High Court of Australia's decision in *Carnie v Esanda Finance Corp Ltd*.[23]

[43] Here, I consider the Kaitaia property itself was not in issue in the Western Australian proceeding in the sense required in s 61(2)(c). Ms Lange was not making a claim to, or seeking any interest in, the Kaitaia property itself. At most, Ms Lange was seeking an order that Mr Lange's disposition of the Kaitaia property (after separation) be set aside so it could be treated as his asset for asset valuation purposes under the Family Law Act 1975 (Cth). Indeed, she sought a consequential declaration that Mr Lange was the sole equitable owner of the Kaitaia property. As indicated, instead of setting aside Mr Lange's transfer of the Kaitaia property, the Judge set aside the forgiveness of debt, which is movable property, and included the money owed to Mr Lange for the Kaitaia property in the assets and liabilities pool for the purposes of the Family Law Act 1975 (Cth), resulting in the order that the money owed be paid and a consequential charge in respect of that debt obligation. Either way, in the

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22 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [2].

23 *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 at 408 per Brennan J. See also McHugh J at 427. Mason CJ, Deane and Dawson JJ said it may extend to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings (at 404).

Western Australian proceeding Ms Lange was merely seeking to have the asset value treated as part of the pool.

[44] The second and related reason is that interpreting s 61(2)(c) to apply on the basis that the proceeding sought (as an alternative) to have the Kaitaia property included in the assets and liabilities pool for the purposes of the Family Law Act 1975 (Cth) would mean that including the value of New Zealand land in the assets and liabilities pool in any Australian case would preclude enforcement of the judgment under the TTPA. I doubt that was the intention of s 61(2)(c) (or its Australian equivalent if the value of Australian land were somehow taken into account in a New Zealand case). That would require separate proceedings in the other country merely to include the value of the asset. The TTPA was intended to apply to personal relationships as well as to business.[24] I note that in Australian proceedings, the Court includes consideration of the parties' overseas assets, movable or immovable.[25] Australia does not have the equivalent of s 7 of the Property (Relationships) Act 1976, which limits jurisdiction over immovable property to immovable property in New Zealand. Even in New Zealand, s 7's exclusion of foreign immovables may not prevent the Court having regard to the existence of the foreign immovable to a limited extent but in doing so it must be careful to ensure that it is not applying to the foreign property the philosophy of the New Zealand statute.[26]

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24 (24 August 2010) 666 NZPD 13412.

25 *Eastgate v Cardiff* [2020] FamCA 387 at [37]; and *Yang v Lin* [2015] FCCA 3040 at [34], citing *Gilmore v Gilmore* (1993) 110 FLR 311 (FamCA).

26 In *Walker v Walker* [1983] NZLR 560 (CA) at 574 Richardson J considered that s 7 merely prevented the New Zealand Court from making orders in respect of foreign immovables. Cooke J (with whom Sir Thaddeus McCarthy agreed) said he would like to be able to adopt this view but considered it requires a wrenching of s 7. However, he concluded that the machinery provisions of the Matrimonial Property Act 1976 (as it was then) enabled the Court to make proper compensation to one spouse for post-separation acts of the other. In *Samarawickrema v Samarawickrema* [1995] 1 NZLR 14 a Full Court of the Court of Appeal confirmed that s 7(1) went further than merely to preclude classification of a foreign immovable or an order as to its disposition. It precluded any interference by a New Zealand court in the rights of the spouses in respect of the foreign immovable under the *lex situs*. The Court might in some circumstances be able to have regard to the existence of the foreign immovable to a limited extent but in doing so it must be careful to ensure that it was not applying to the foreign property the philosophy of the New Zealand statute. This may include having regard to a foreign immovable acquired after separation (as in *Walker*) or other provisions of the Act such as s 13 (extraordinary circumstances), s 16 (each owned home at date relationship began) or s 18C (dissipation of property after separation as in *Shepherd v Shepherd* [2009] NZFLR 226 (HC) at [55]). See also *Enright v Fox* (1989) 5 NZFLR 455 (HC) at 458; and *B v S* FC Whangarei FAM-2005-088-878, 25 July 2008 at [21]-[24]. I also note the Law Commission has recommended that s 7 be repealed; see Law Commission *Review of the Property (Relationships) Act 1976* (NZLC R143, 2019) at 470-479.

[45] While respecting each country's jurisdictional limits in relation to immovable property, I consider that including the money owed to Mr Lange for, or even (as alternatively sought) the value of, the Kaitaia property in the assets and liabilities pool for the purposes of the Family Law Act 1975 (Cth) in the Australian proceeding does not mean the immovable Kaitaia property is the subject matter of the proceeding in terms of s 61(2)(c). Orders in relation to the immovable property itself were not sought or made.

[46] Accordingly, I am not satisfied this ground to set aside applies either.

[47] There is another factor, albeit of secondary importance. In this case, as indicated, the respondents are out of time to apply to set aside registration of the judgment. The application for leave/extension of time to oppose registration of the Western Australian judgment, which I was willing to treat as an application for an extension of time to apply to set aside registration of the judgment under s 61(3)(b), was only filed on 2 September 2020. Even after service of the sale order in March 2020 and a visit from the Court bailiff in May 2020, the respondents delayed from August/September 2019 until July 2020 (even assuming the subsequent delay reflected a misunderstanding as to the nature of the application required). They have not provided an adequate explanation for their delay. In the particular circumstances of this case, including the adverse findings of the Western Australian Court, I would have been reluctant to grant an extension of time under s 61(3)(b) if Mr LaHatte had not sought to set aside registration of the judgment now. It is also relevant that the immovable property argument only relates to part of the judgment – setting aside registration would not preclude re-registration of the remaining part of the judgment for enforcement purposes.

Rule 17.29 – New Zealand Family Court proceeding

[48] Pursuing the application to set aside registration of the judgment effectively overtook the application for a stay under r 17.29. Given that, and Mr LaHatte's acceptance that substantial miscarriage of justice under r 17.29 must relate to the enforcement of the judgment, not the judgment itself,[27] his remaining argument in

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[27] *Palmerston North City Council v Birch* [2012] NZHC 3248 at [17].

support of a stay is based on the separate New Zealand Family Court proceeding. That proceeding, commenced by Mr Lange in March 2019, seeks a declaration as to the status of the Kaitaia property, which Mr LaHatte submits will be rendered nugatory if the property is sold. Mr Lange contends it is separate property purchased out of his inheritance. That proceeding has recently been transferred to this Court by consent. Mr LaHatte seeks timetable directions for the service of affidavits and a hearing allowing cross-examination.

[49] The existence of the New Zealand Family Court proceeding and its transfer to this Court do not justify a stay. As the substantial miscarriage of justice must relate to enforcement of the judgment, not the judgment itself, that proceeding also is not an opportunity to relitigate the findings of the Western Australian Court as to the source of funds used to purchase the Kaitaia property.[28] In any event, there is no compelling evidence to counter the findings in the Western Australian judgment.

[50] Ms Lange's consent to the transfer of that proceeding to this Court did not prejudice her position in relation to the Western Australian judgment. Whether that proceeding has any utility following the Western Australian judgment can be determined separately. Mr Walker has signalled an application for stay or dismissal, noting also that the Kaitaia property is now owned by neither party to the marriage.

Delay

[51] Delay may also weigh against a stay under r 17.29.[29] While not determinative, I consider the respondents' delay is a factor weighing against a stay. As indicated, Mr Lange only sought a stay in this Court in July 2020, a year after registration of the Western Australian judgment, and the evidence indicates that Mr Lange had notice of registration of the judgment by September 2019. Even after service of the sale order in March 2020 and a visit from the Court bailiff in May 2020, Mr Lange delayed until July 2020 before filing a stay application.

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28 *Lange v Lange* [2019] FCWA 128 at [29]-[30] and [100]-[110].
29 *Harnish v Bruce* [2014] NZHC 302 at [16].

Prejudice

[52] I do not consider that enforcement of the judgment would give rise to a miscarriage of justice. Indeed, balancing the parties' interests, a sale order is in the interests of justice. The prejudice to Ms Lange caused by delay in receiving the benefit of the judgment debt outweighs the prejudice to Mr Lange and Ms Lange-Tupe resulting from sale of the Kaitaia property. Ms Lange's Lockridge property is at risk because Mr Lange has not complied with the Western Australian Court order to pay off its mortgage.

[53] Mr Lange lives on and farms the Kaitaia property but any prejudice to him resulting from sale is outweighed by Ms Lange's interests. Also, Mr LaHatte's claim that the property is now worth less than the debt is not supported by any compelling evidence. Nor is the somewhat inconsistent claim that Mr Lange will lose the benefit of refurbishments and renovations he has spent his own time and money to complete on the property.

[54] In terms of prejudice to Ms Lange-Tupe, I accept the Kaitaia property is her main asset and the farm is her main source of income even though she does not live there. But Moncrieff J found that the transfer of the Kaitaia property and the deed of forgiveness in favour of Ms Lange-Tupe were dispositions to defeat Ms Lange's claim intentionally by Mr Lange acting with Ms Lange-Tupe. Even leaving aside the finding that they acted in concert, Ms Lange-Tupe's prejudice is losing the benefit of Mr Lange's "gift", which is outweighed by Ms Lange's interests.

[55] It may be, as Mr LaHatte submitted, that the proceeds of sale are consumed by the judgment debts including costs. If so, that is the result of enforcement of a substantial judgment debt but does not itself give rise to a miscarriage of justice.

Result

[56] The respondents' application for a stay and to set aside registration of the Western Australian judgment is dismissed.

[57] The applicant is entitled to costs on a 2B basis.

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Gault J