ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF MS A, MR B AND MS C.

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF MS A, MR B AND MS C REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA546/2021
[2023] NZCA 28

BETWEEN	B Appellant
AND	C Respondent

Hearing:	16 August 2022
Court:	Katz, Wylie and Palmer JJ
Counsel:	Appellant in person No appearance for Respondent
Judgment:	23 February 2023 at 10:30 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence on appeal is declined.

B The appeal is dismissed.

C The freezing order made by this Court in [2022] NZCA 142 on 27 April 2022 is discharged.

D Order prohibiting publication of the names or identifying particulars of Ms A, Mr B and Ms C.

E There is no order as to costs.

REASONS OF THE COURT

(Given by Katz J)

[1] The appellant, Mr B, and his then wife, Ms A,[1] filed proceedings in the High Court at Auckland against the respondent, Ms C, alleging that she had defrauded them of approximately $500,000.

[2] The proceeding has a lengthy procedural history, which we describe in more detail below. Ultimately, however, van Bohemen J, in the High Court at Auckland, found that New Zealand was not the appropriate forum for determining Ms A and Mr B's claims. Rather, the People's Republic of China (China) would be a better forum for resolving the dispute between the parties. The proceeding was accordingly dismissed.[2] (We refer to this decision as "the reconsideration judgment"). Mr B now appeals.

[3] In a subsequent decision, van Bohemen J made an order suppressing the names of the parties and reissued the reconsideration judgment with the names of the parties anonymised.[3] That order remains in force. We have therefore anonymised the names of the parties in this judgment, using the initials that were used in the reconsideration judgment.

Background

[4] Ms A and Mr B allege that Ms C has deceived them into investing money with F Ltd. F Ltd is a company based in China which was owned and/or operated by Ms C at the relevant time.

[5] Ms A and Mr B claim that they invested approximately $500,000 in F Ltd, on the understanding that their investment would be transferred to H Ltd, a New Zealand company that was also associated with Ms C. The funds would then be paid out to

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1 Mr B and Ms A have since divorced. Ms A has taken no steps in this appeal and apparently does not wish to participate further in the proceedings.

2 *A v C* [2021] NZHC 2090 [Reconsideration judgment].

3 *A v C* [2021] NZHC 2119 [Third recall judgment] at [21]–[23].

Ms A and Mr B in New Zealand, to enable them to use those funds in support of their application to immigrate to New Zealand.

[6] Ms C was arrested in China on 11 September 2015 and F Ltd ceased trading about the same time. Ms A and Mr B's investment was never repaid. Mr B has included in the case on appeal a document which appears to be a criminal appeal decision of the People's Court in Wuxi, Jiangsu, China. The document records that on 8 June 2018 Ms C was convicted of illegal fundraising. The document states that:

> [F Ltd] was fined RMB 2 millions, the defendant [Ms C] was sentenced 7.5 years and fined RMB 500,000. Another defendant … was sentenced 4.5 years and fined RMB 400,000. The asset of [F Ltd] has been sealed, attached, frozen and will be distributed to all investors in proportion. The search for any investment fund will continue, and the insufficient portion will be compensated by [F Ltd].

[7] There is no evidence as to whether the search by the Chinese authorities for the missing investment funds has identified Ms C's New Zealand assets, which include a house in Auckland and (possibly) funds held in an ANZ bank account. We assume, however, that no steps have been taken by the Chinese authorities under the Mutual Assistance in Criminal Matters Act 1992 (or otherwise) to seek to recover such assets for the benefit of F Ltd's investors.

[8] Ms A and Mr B were aware that Ms C owned a property in Auckland (the Auckland Property) as they had previously stayed there. Accordingly, on 23 March 2017, Ms A brought a claim for summary judgment against H Ltd and sought a freezing order over the Auckland Property. Mr B was joined as a plaintiff some time later. Ms A's claim was dismissed by Edwards J in a judgment dated 6 June 2017, on the basis that there was no cause of action against H Ltd. To the extent that the claim arose out of the investment agreement, it needed to be brought against F Ltd. Further, Ms A's claim did not appear to arise out of the agreement, but rather was against Ms C for failure to honour the promise to repay the investment sums or for misusing the investment funds.[4]

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4 *[A] v [H] Ltd* [2017] NZHC 1206 [Summary judgment decision] at [12]–[15].

[9] Ms A filed an amended statement of claim that attempted to address the deficiencies identified by Edwards J. At a case management conference on 6 October 2017, Associate Judge Bell ordered that the proceeding be served on Ms C by way of substituted service to her email address in China, as Ms A and Mr B had both sworn affidavits to the effect that Ms C had "disappeared".

[10] On 13 December 2017, a freezing order was granted by Lang J preventing disposal of the Auckland Property, pending determination of Ms A's claim against Ms C.[5]

[11] Ms C (who was in prison in China) took no steps in the proceeding and in August 2018 van Bohemen J entered judgment by default in favour of Ms A and Mr B (the default judgment).[6] The Judge's summary of Ms A and Mr B's evidence referred, amongst other matters, to the following aspects of the factual background:

(a) In July 2014, Ms A and Mr B had visited New Zealand to explore investment opportunities here. While in New Zealand they met Ms C, who owned H Ltd. Ms C invited Ms A and Mr B to visit her at the Auckland Property.[7] When they did so she encouraged them to invest in a foreign exchange trading business that she operated through H Ltd, by making a number of representations.[8]

(b) During the July 2014 visit Ms C gave Ms A and Mr B a prospectus regarding H Ltd's operations in New Zealand. That prospectus included various representations regarding H Ltd.[9]

(c) In March 2015, Mr B visited New Zealand again, this time staying at the Auckland Property.[10]

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5 *[A] v [C]* [2017] NZHC 3107 [Freezing order judgment].
6 *[A] v [C]* [2018] NZHC 2215 [Default judgment].
7 At [19].
8 At [20].
9 At [21]–[22].
10 At [24].

(d) Subsequently, based on their interactions and the representations made by Ms C, Ms A (and presumably also Mr B) entered into two investment agreements with F Ltd in China.[11] Ms A deposed that Ms C told Ms A and Mr B that their money would be transferred to H Ltd in New Zealand and used for "foreign currency speculation" before being refunded to them in New Zealand.[12]

(e) F Ltd, and probably also H Ltd, ceased to operate in September 2015.[13]

(f) Ms A was aware before she moved to New Zealand (Mr B followed sometime later) that the investment in F Ltd had probably been lost.[14]

(g) The funds paid by Ms A and Mr B to F Ltd were never repaid.[15]

[12] The Judge was satisfied on the balance of probabilities that Ms C had knowingly made representations, in New Zealand, that were false.[16] On his assessment of Ms A and Mr B's evidence, it was more likely than not that H Ltd was not a genuine investment operation, but had been set up to entrap people such as Ms A and Mr B who wanted to move to New Zealand, and who were keen to improve their financial situation but who had little familiarity with financial markets.[17] The Judge was further satisfied that Ms A and Mr B had relied on Ms C's false representations when they invested in F Ltd and that they had suffered damage as a result.[18] The Judge entered judgment by default against Ms C.

[13] A couple of months later, in October 2018, a lawyer representing Ms C (who was still in prison in China) filed a memorandum informing the Court that Ms C had only recently become aware of the proceeding. A notice of appearance to protest jurisdiction was subsequently filed, together with affidavits in support. Ms C also

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11 We have not been provided with copies of the investment agreements.
12 At [25]–[29].
13 At [30].
14 At [38].
15 At [39].
16 At [52]–[59].
17 At [57].
18 At [60]–[62].

applied to set aside the default judgment. The evidence filed in support of Ms C's protest to jurisdiction and application to set aside the default judgment included that:

(a) Mr B and Ms C were friends at the relevant time, and Mr B had been employed full time at F Ltd as a manager responsible for franchising.

(b) Ms C had not simply "disappeared" in October 2015. Rather, she was arrested in China on 11 September 2015 and imprisoned. Mr B was aware of this, as he was at Ms C's house when she was arrested. Mr B was himself summoned to the police station soon after Ms C's arrest to answer questions. Further, Ms C paid Mr B money to look after her parents while she was in prison.

(c) Mr B messaged the person who was looking after the Auckland Property (whom Mr B had met when visiting New Zealand) that Ms C was in custody and that he (Mr B) was trying to smuggle a phone in for her.

(d) Ms C was not in New Zealand when Ms A and Mr B visited New Zealand in July 2014 and therefore could not have made the alleged misrepresentations to them during that visit. Records from Immigration New Zealand were produced to verify this.

(e) Mr B's trip to New Zealand in March 2015 was as a member of an F Ltd team. He had stayed at Ms C's house during that visit.

(f) Ms C did not tell Ms A and Mr B that their $500,000 investment would be repaid to them in New Zealand. Nor did the investment agreement Ms A signed state this, as money invested in China must be paid out in China. It is only possible to remit up to USD 50,000 out of China without the permission of the Government, for a business venture.

(a) H Ltd was a member of Financial Services Complaints Ltd (FSCL). It was a legal and genuine company and was not set up to deceive people.

(b) The prospectus which Mr B had provided to the Court was a draft that had never been issued to the public because of the collapse of F Ltd. Ms C denied ever giving that document to Mr B.

(c) The Chinese authorities had frozen F Ltd's accounts and a process was being set up to establish what was owed to investors, and Ms A (who at that point was still the sole plaintiff) should be involved in that process.

[14] After considering this new evidence, and Ms A and Mr B's evidence in response, van Bohemen J recalled the default judgment and set it aside (the first recall judgment).[19] The Judge found that it was "now apparent that the facts as I understood them to be were incorrect" and there had not been a meeting in New Zealand at which Ms C made representations to Ms A and Mr B together. In the Judge's view, Mr B's attempts to "patch over" the new evidence that the July 2014 meeting could not have taken place "strain[ed] credulity and [did] not assist Mr B's case".[20] This was significant, as the fact that misrepresentations had been made in New Zealand was "central" to the Judge's earlier finding in the default judgment that New Zealand was an appropriate forum for the claim.[21] Based on the new evidence, the Judge was no longer satisfied that the criteria for the exercise of jurisdiction under the High Court Rules 2016 were satisfied.[22] The Judge accordingly upheld Ms C's protest to jurisdiction, dismissed the proceeding and set aside the freezing order over the Auckland Property.[23]

[15] Mr B then applied to have the first recall judgment recalled. That application was dismissed by van Bohemen J (the second recall judgment).[24]

[16] Ms A and Mr B appealed the first recall judgment and the second recall judgment to this Court (the appeal judgment). This Court found that the Judge had erred by setting the bar too high when considering whether there was a good arguable case that the claim had a sufficient New Zealand connection. Specifically, this Court

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19 *[A] v [C]* [2019] NZHC 29 [First recall judgment].
20 At [30].
21 At [32] and [59].
22 At [50]–[57] and [58]–[64]; and see High Court Rules 2016, rr 6.27–6.29.
23 At [66].
24 *[A] v [C]* [2019] NZHC 206 [Second recall judgment].

considered that there was a sufficiently plausible basis for the claim that the alleged deceit occurred in New Zealand. The appeal was therefore allowed, insofar as it related to the protest to jurisdiction.[25] The first recall judgment was set aside in relation to the protest to jurisdiction, the quashing of the freezing order, and the dismissal of the proceedings. This had the effect of reviving the freezing order granted in December 2017. The protest to jurisdiction was referred back to the High Court for reconsideration, in light of this Court's findings.[26]

The reconsideration judgment

[17] On 12 August 2021 the Judge delivered the reconsideration judgment. After reconsidering the protest to jurisdiction, he arrived at the same result as previously. The protest to jurisdiction was upheld, the proceeding was dismissed, and the freezing order was quashed.[27]

[18] The Judge noted that, in accordance with rr 6.27, 6.28 and 6.29(1) of the High Court Rules, Ms C's protest to jurisdiction must be upheld unless the court is satisfied that:[28]

> (a) There is a good arguable case that the deceit alleged by [Ms A and Mr B] occurred in New Zealand;
>
> (b) There is a serious issue to be tried on the merits;
>
> (c) New Zealand is the appropriate forum for the hearing; and
>
> (d) There are other relevant considerations that support an assumption of jurisdiction by the New Zealand courts.

[19] The Judge observed that the first question had been decided by the Court of Appeal, which found that there was a sufficiently plausible basis for Ms A and Mr B's claim that the alleged deceit occurred in New Zealand.[29] The Judge also accepted that there was a serious question to be tried on the merits, namely whether Ms C had made false representations in New Zealand to Mr B or Ms A that the funds Ms A invested in F Ltd in China would be transferred to H Ltd and paid out to Ms A in New Zealand.

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25 *[A] v [C]* [2020] NZCA 592 [Appeal judgment] at [55]–[56].
26 At [56].
27 Reconsideration judgment, above n 2, at [65]–[67].
28 At [27].
29 At [28], citing Appeal Judgment, above n 26, at [51].

Accordingly, the only two remaining questions for determination in the reconsideration judgment were:[30]

> (a) Is New Zealand the appropriate forum for hearing the claim by [Ms A and Mr B]?
>
> (b) Are there other relevant considerations that support New Zealand assuming jurisdiction?

[20] The Judge noted that the central issue (the alleged misrepresentations by Ms C to Ms A and Mr B) could only be determined after the evidence of the parties has been properly tested under cross-examination.[31] Because Ms C was detained in prison in China, however, the Judge considered it was unlikely to be possible for her to give evidence and be cross-examined before a New Zealand court. Further, the High Court might be reluctant to accept evidence being given remotely in a case where an assessment of Ms C's credibility was essential to determining the central issue. Even when Ms C has been released from prison, the Judge observed there might be an issue as to whether she can re-enter New Zealand because of her arrest and subsequent detention in China.[32] For all of these reasons, the Judge concluded it was not currently possible for Ms C to be cross-examined.[33]

[21] Other factors that, in the Judge's analysis, supported a finding that New Zealand was not the appropriate forum for resolving the dispute were that:

(a) Although the relevant representations were alleged to have been made in New Zealand, most other aspects of the dispute took place in China. Ms A's investment agreement was with F Ltd, a Chinese company. The investment agreement was signed in China and was subject to Chinese law. The initial investment matured while Ms A was still in China. A second investment agreement with F Ltd was signed in China. The second investment with F Ltd failed because of events in China. Ms C was in China. In addition, Ms A and Mr B were in China when they

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30 Reconsideration judgment, above n 2, at [30].
31 At [40], citing Appeal judgment, above n 26 at [52].
32 At [41].
33 At [42].

learned of the collapse of F Ltd and Ms C's detention. The dispute therefore had "a stronger locus in China rather than in New Zealand".[34]

(b) There was a better prospect of relevant witnesses appearing before the appropriate Chinese court or tribunal. While Ms C was unable to travel to New Zealand, Mr B could travel, and had travelled, to China.[35]

[22] The Judge went on to discuss the considerations raised by Ms A and Mr B in their amended statement of claim. Among other things, the Judge noted that:

(a) Although Ms A and Mr B are now New Zealand residents, the Court's jurisdiction in the proceeding is not based on residency and the claim arose before they became permanent residents. While Ms C's property in New Zealand provided an available source of redress if the claim were upheld, the claim itself did not relate to the property.[36]

(b) Various concerns raised by Ms A and Mr B regarding pursuing legal proceedings in China were found to be irrelevant or unsupported by evidence.[37]

[23] Ms A and Mr B subsequently applied to recall the reconsideration judgment on 13 August 2021. The application was advanced on a number of bases. Ms A and Mr B sought leave to adduce further evidence on a range of matters and to apply for third party discovery orders.[38] The application was dismissed by van Bohemen J (the third recall judgment).[39] The Judge observed that Ms A and Mr B had "had ample opportunity" to adduce the further evidence that they now sought to adduce.[40] Other matters raised in the application were not relevant to the protest to jurisdiction.[41]

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34 At [45].
35 At [46].
36 At [52]–[53].
37 At [54]–[60].
38 Third recall judgment, above n 3, at [13]–[14].
39 At [20].
40 At [16]–[17].
41 At [18].

The appeal

[24] Mr B now appeals the reconsideration judgment. Mr B's amended notice of appeal advances the following grounds of appeal:

(a) Ms C's signature on the form authorising her solicitors to act for her was forged, and the Court should therefore have found that the solicitors did not have authority to protest the Court's jurisdiction on her behalf.

(b) The Judge erred by focussing on the connections between F Ltd and China rather than the connections between H Ltd and New Zealand.

(c) The funds Mr B invested with F Ltd have been transferred to New Zealand. Further, the Chinese courts do not have jurisdiction to make a freezing order in respect of Ms C's Auckland property.

(d) Under art 188 of China's Civil Code the limitation period for a person to request the Chinese courts to protect their civil law rights is three years. Any proceedings in China are therefore now statute-barred.

(e) The Judge should have cross-examined Ms C via audiovisual link to establish whether funds sitting in an ANZ bank account in New Zealand belong to Mr B.

[25] Prior to the hearing of the appeal, Mr B applied for a freezing order over the Auckland Property, to ensure that the Property would not be disposed of before the appeal was heard. Goddard J granted the application for a freezing order in order to preserve Mr B's position pending determination of the appeal.[42]

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42 *[B] v [C]* [2022] NZCA 142 at [20].

Application to admit fresh evidence on appeal

[26] The argument that China is not an available forum because a proceeding against Ms C would now be statute-barred in that jurisdiction was not advanced in the High Court, and there was no evidence before the Judge to support such an argument.

[27] On appeal, Mr B seeks leave to file an "Affidavit of Expert Opinion" affirmed by Tong Tian Feng, who is said to be a "practicing lawyer in China". Tong Tian Feng deposes that art 188 of the Civil Code of China states that:

> The limitation period for a person to request the people's court to protect his civil-law rights is three years, unless otherwise provided by law. Unless otherwise provided by law, the limitation period begins from the date when the right holder knows or should have known that his right has been harmed and that who [sic] is the obligor. However, no protection to a right is to be granted by the people's court if 20 years have lapsed since the date when the injury occurs, except that the people's court may, upon request of the right holder, extend the limitation period under special circumstances.

[28] Tong Tian Feng's evidence is that as Mr B was aware that Ms C was arrested on 15 September 2015, he would have known that his rights had been harmed on that date, and the limitation period therefore expired on 15 September 2018. He does not explain the circumstances in which the 20-year longstop period might apply.

[29] Rule 45 of the Court of Appeal (Civil) Rules 2005 provides that the Court may grant leave to admit further evidence on appeal. Such evidence will generally not be admitted, however, unless it is fresh, credible and cogent.[43] Evidence is fresh only if it could not, with reasonable diligence, have been adduced at trial. Evidence that is not fresh will only be admitted in exceptional and compelling circumstances.[44] Evidence is cogent only if it may have a material bearing on the outcome of the appeal.[45]

[30] Here, the further evidence purports to be expert evidence of foreign law. Expert evidence of foreign law is admissible under s 144(1)(a) of the

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43 *Erceg v Balenia Ltd* [2008] NZCA 535 at [15].

44 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192–193; *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1 at [6], n 1; and *Wylie v Wylie* [2021] NZCA 521 at [24].

45 *Elliot v Family Court at Auckland* [2022] NZCA 146 at [6].

Evidence Act 2006, but such evidence must qualify as expert evidence under the definition in s 4 of that Act and meet the threshold of substantial helpfulness in s 25(1).[46]

[31] Tong Tian Feng's evidence is clearly not fresh. With reasonable diligence it could have been adduced for the protest to jurisdiction hearing in the High Court. There were further opportunities to adduce such evidence (or to seek leave to adduce it) prior to the second recall judgment, and prior to delivery of the reconsideration judgment. The Judge expressly recorded in the reconsideration judgment that Ms A and Mr B had informed him at a judicial conference that they did not wish to file further evidence or make further submissions, and they had not done so.[47]

[32] In addition to the evidence not being fresh, we have a number of other concerns regarding it. For example, it purports on the cover sheet to be an affidavit of "Expert Opinion" and commences with the phrase "I, a practicing lawyer in China, affirm …". Other than the introductory reference to Tong Tian Feng being a "practicing lawyer in China" there is no further mention of his or her legal qualifications or experience in that jurisdiction. Further, the affidavit has not been affirmed in China, but in Christchurch. There is simply insufficient information about Tong Tian Feng's qualifications to satisfy us that the affidavit qualifies as expert evidence under s 4.

[33] Of further concern, Tong Tian Feng makes no reference to the code of conduct for expert witnesses set out in sch 4 of the High Court Rules. Tong Tian Feng does not confirm that he or she has read the code of conduct and agrees to comply with it, as required by r 9.43 of the High Court Rules and s 26 of the Evidence Act.

[34] The fact that the affidavit is not fresh, the lack of information about Tong Tian Feng's qualifications, the omission of any reference to the code of conduct for expert witnesses, and the brevity of the affidavit itself (which does not refer, for example, to any commentary in relation to art 188) all weigh against its admission as further evidence on appeal. We are therefore not satisfied that this is one of the relatively rare

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46 Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence* (4th ed, Thomson Reuters, Wellington, 2018) at [EV144.02].

47 Reconsideration judgment, above n 2, at [26].

cases when evidence that is not fresh should be admitted on appeal due to "exceptional and compelling circumstances".[48]

[35] We note for completeness that the close involvement of Paul Young (also known as Jinyue Young) in this litigation, as an adviser to Ms A and Mr B, increases our concerns and makes it even more important that any expert is appropriately qualified and agrees to comply with the expert code of conduct. Mr Young was suspended from practising as a barrister or solicitor by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal on 25 September 2020, having been found guilty of disciplinary charges.[49] The Tribunal expressed concerns about Mr Young's advice to, and representation of, a client. The Tribunal also noted Mr Young's previous disciplinary history including a previous 15-month suspension. The Tribunal noted that "[c]ommon themes between the former charges and the current charges include a casual practice concerning veracity of evidence … and making serious allegations without a clear evidential foundation".[50]

[36] Mr Young appears to have been involved in these proceedings from the outset. Based on the material before us, we consider it is likely that Mr Young's role in this proceeding has gone beyond that of a translator/interpreter. In particular, we note that Mr Young acted as translator for Ms A and Mr B when their initial affidavits were filed, he is referred to as "a translator who assisted [Ms A] and [Mr B] with their proceeding" in the second recall judgment,[51] his email address appears on the coversheet of all documents filed by Mr B in this appeal, and he appeared with Mr B at the appeal hearing as his interpreter. Further, the amended statement of claim and Ms A's affidavit describe Mr Young's ongoing involvement in the proceedings, including that Mr Young encouraged her to "lodge litigation" and that, as she had no money to pay the court filing fee, Mr Young paid it on her behalf. Somewhat unusually, all (or almost all) of Ms A and Mr B's affidavits appear to be in English (rather than in Mandarin or Cantonese with an English translation) despite the fact that

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48 *Wylie v Wylie*, above n 44, at [24].
49 *National Standards Committee 1 v Young* [2020] NZLCDT 30.
50 At [19].
51 Second recall judgment, above n 24, at [5]. This was in reference to an affidavit filed by Mr Young in support of the recall application; we have not seen that affidavit and do not therefore know what the content of it was.

neither Ms A nor Mr B appear to be fluent in English. Finally, an email to ANZ dated 3 September 2018 enquires as to how much equity there is in Ms C's property. Although the name of Mr Donovan (Mr B's solicitor at the time) is written at the bottom of the email, Mr Young's name appears underneath that, with the description "Enrolled Barrister and Solicitor" below it (we note that this was prior to Mr Young's suspension).

[37] It is not clear what, if any, involvement Mr Young has had in the preparation of Tong Tian Feng's affidavit. However, as noted above, his substantial involvement in the proceeding over an extended period of time raises the possibility that he was involved in the preparation of the affidavit. This causes us some concern and makes it even more important that Tong Tian Feng be appropriately qualified as an expert and agree to comply with the code of conduct for expert witnesses.

[38] We therefore decline the application for leave to adduce further evidence on appeal. In the absence of Tong Tian Feng's affidavit, there is no expert evidence to support the submission that any proceedings against Ms C in China would now be statute-barred and that, as a result, China is not an available forum.

Should the protest to jurisdiction have been rejected on the basis that Ms C's solicitors did not have authority to act for her?

[39] Mr B submitted that Ms C's signature on an "authority to act" that was annexed to an affidavit sworn by her Chinese lawyer, Mr Gu, was forged. As a consequence, he submitted, Ms C's New Zealand solicitors did not have authority to act in the High Court proceeding on her behalf and accordingly "all evidence to recall the 1st decision and the old evidence re-iterated in the re-consideration is inadmissible".

[40] Mr B relies on the affidavit of a handwriting expert in support of this submission. He also relies on his own affidavit, which states that when he visited Ms C in prison in China he was able to view the prison's visitor logs, which did not record any visit to Ms C by her Chinese lawyer Mr Gu on or about the date on which Ms C is said to have signed the authority to act.

[41] This issue was not addressed in the reconsideration judgment. It was, however, addressed in the first recall judgment and the second recall judgment. It was also referred to, in passing, in the appeal judgment.

[42] In the first recall judgment, the Judge summarised the evidence of the handwriting expert as follows:[52]

> An affidavit sworn on 5 December 2018 by Mike Maran, a handwriting expert, who acknowledges that he does not read or write Chinese and that photocopied documents diminish the traits available for examination. Even so and on the basis only of photocopied documents, Mr Maran gives his opinion that some of the signatures alleged to have been made by [Ms C] in giving answers to the questions attached to Mr Gu's affidavit, and on the authority to act are different from the signature on a document [Ms C] signed in 2013 and were made by a different person.

[43] The Judge did not find Mr B's assertions that Ms C's signature has been fabricated, or the evidence of Mr Maran in support of those assertions, to be persuasive.[53] The Judge stated: "I have not taken that evidence into account in my decision which is based principally on facts not in dispute."[54]

[44] The issue was considered again in the second recall judgment, as one of the grounds advanced for seeking recall was that Ms C's signature on the authority to act was forged. The Judge addressed this submission as follows:[55]

> [10] [Mr B] says the authority to act is invalid because Mr Gu's affidavit was not signed and because he says [Ms C's] signature was forged. As to the first point, while [Ms C's] solicitors did initially file an unsigned affidavit from Mr Gu, they later filed an affidavit signed by Mr Gu and witnessed by a Consular Officer at the New Zealand Consulate-General in Shanghai. That means the affidavit was validly made in terms of s 10 of the Oaths and Declarations Act 1957 and the definition of "Commonwealth representative" in s 2 of that Act.
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> [11] As to the allegation that [Ms C's] signature on the authority to act was forged, [Mr B] has offered no explanation of why anyone other than [Ms C] would want to contest my decision of 27 August 2018 [the default judgment]. Moreover, even if there was a question about the authenticity of [Ms C's] signature, that does not provide any basis for recalling my decision of 29 January 2019. It does not change the fact that there had been no meeting in New Zealand in July 2014 involving [Ms C], [Ms A] and [Mr B].

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52 First recall judgment, above n 19, at [10(d)].
53 At [11].
54 At [11].
55 Second recall judgment, above n 24.

[45] In the appeal judgment, this Court dealt with the issue briefly, noting that there was affirmation evidence from Ms C's solicitor in China providing signed written confirmation of authority to act, and that the expert opinion evidence adduced by Ms A and Mr B was "highly contestable on its face".[56] In the absence of any complaint by Ms C, the Court declined to consider the issue further and the protest to jurisdiction was set aside on other grounds. As yet, there does not appear to have been a complaint by Ms C or any other additional evidence which might change the position.

[46] In any event, we consider there is no merit in this ground of appeal, for the reasons outlined by the Judge in the recall decisions, as well as several other reasons. In particular:

(a) Relatively little weight can be given to the evidence of the handwriting expert, Mr Maran, given the qualifications in his affidavit (as summarised by the Judge in the quote at [42] above).

(b) Mr Gu is a Chinese lawyer whose affidavit was witnessed by a Consular Officer at the New Zealand Consulate-General in Shanghai and was therefore validly made in terms of s 10 of the Oaths and Declarations Act 1957. In the absence of compelling evidence, it would not be appropriate for this Court (or the High Court) to find that Mr Gu had lied in his affidavit and exhibited forged documents. That is particularly so in circumstances where Mr Gu's evidence has not yet been tested under cross-examination.

(c) Mr B has not suggested any plausible reason why any person other than Ms C would seek to set aside the default judgment against Ms C, and protest the jurisdiction of the High Court, particularly given the financial costs that must have been incurred in engaging counsel in New Zealand to appear on Ms C's behalf in both the High Court and the Court of Appeal.

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[56] Appeal judgment, above n 25, at [5].

(d) Finally, it is not quite clear what the purpose of the "authority to act" document is. The High Court Rules do not require that a protest to jurisdiction be accompanied by an "authority to act" signed by the party protesting the Court's jurisdiction. Rather, the protest can simply be signed by the solicitor or counsel for the defendant (Form G 7). The protest must also be accompanied by the memorandum that is required to be attached to the first document filed by any party (Form G 10) which sets out the relevant address for service. Rule 5.37 provides that a solicitor by whom, or on whose behalf, a document is filed in the court is to be treated as warranting to the court and to all parties to the proceeding that he or she is authorised, by the party on whose behalf the document purports to be filed, to file the document.

Did the Judge fail to have regard (or give insufficient weight) to factors that connected Mr B's claim to New Zealand?

[47] Mr B submitted that the Judge failed to have regard, or gave insufficient weight, to factors that connected Mr B's claim to New Zealand. For example, he submitted, the Judge focussed unduly on the connection between F Ltd and China, rather than the connection between H Ltd and New Zealand.

[48] We do not accept this submission. The Judge accepted that there was a serious question to be tried on the merits, namely whether Ms C had made false representations in New Zealand to Mr B or Ms A that funds Mr B invested in F Ltd in China would be transferred to H Ltd and paid out to Mr B in New Zealand.[57] However, apart from the fact that some of the relevant representations had allegedly been made in New Zealand, the Judge correctly identified that the dispute had "a stronger locus in China rather than in New Zealand"[58] for the reasons summarised at [21] above.

[49] Mr B further submitted that he had "suggested" that the High Court "cross-examine [Ms C] via AVL and issue an order to check whether [a fund in an ANZ bank account] belongs to me".

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57 Reconsideration judgment, above n 2, at [29].
58 At [45].

[50] This ground of appeal is misconceived. The issues before the High Court, and this Court on appeal, are narrow in scope. They relate to whether New Zealand is an appropriate forum for the resolution of this dispute. It would not be appropriate for the Court, at this preliminary stage, to attempt to resolve disputed facts or make its own inquiries.

[51] Mr B also submitted that the Judge did not take into account that the funds that he and Ms A had invested with F Ltd were subsequently transferred to New Zealand. It is clear, however, that the Judge was aware that Ms A and Mr B *alleged* that the relevant funds had been transferred to New Zealand. The primary evidence to support that contention, however, appears to be Ms A's assertion that Ms C (who clearly had no incentive to be truthful) told her that the funds had been transferred to New Zealand. Mr B's attempts to locate the missing funds in New Zealand have to date been unsuccessful. This is reflected in Mr B's suggestion that the High Court should have cross-examined Ms C via audio-visual link and issued "an order to check" whether the funds held by ANZ in Ms C's name actually belong to Mr B.

[52] We accept that the possibility that Mr B's investment funds have been transferred to New Zealand is a relevant factor, but it is one that can carry only limited weight. The uncontroverted fact that Ms C owns property in New Zealand carries more weight. However, the Judge took this factor into account, noting that Ms C's property in New Zealand provides an available source of redress, although the claim itself does not relate to the property.[59] The Judge was correct, in our view, to conclude that this factor (and any other factors favouring a New Zealand forum) are outweighed by the numerous factors that suggest that China is the more appropriate forum for resolution of the dispute.

[53] In conclusion, it is our view that the Judge did not err in concluding that New Zealand is not the appropriate forum for determining the dispute, and that China is the more appropriate forum.

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59 At [52]–[53].

Suppression

[54] As noted above, in the third recall judgment van Bohemen J made an order suppressing the parties' names. The Judge addressed suppression as follows:[60]

> [21] I accept the plaintiffs' submission that publicity about previous judgments in this proceeding has caused hardship and personal anxiety to one of the plaintiffs, in particular. I also understand that the proceeding has taken a considerable personal toll on both the plaintiffs and that that toll could be exacerbated by further publicity.
>
> [22] I consider that suppression of only one of the parties' names may be ineffective in protecting that party from further anxiety and hardship.
>
> [23] For these reasons, I suppress all of the parties' names in this judgment and in the Reconsideration Judgment and am anonymising the parties' names in those judgments.

[55] On its wording, the suppression order does not apply directly to this judgment, as it refers only to suppression of the parties' names in the third recall judgment and the reconsideration judgment. We therefore consider it appropriate to make a further order suppressing the parties' names in order not to undermine the order made in the third recall judgment, and to anonymise the parties' names in this judgment. Absent any evidence to the contrary, we see no reason to disturb the Judge's assessment that suppression of the parties' names is justified. Accordingly, we make an order prohibiting publication of the names or identifying particulars of Ms A, Mr B and Ms C.

Result

[56] The application for leave to adduce further evidence on appeal is declined.

[57] The appeal is dismissed.

[58] The freezing order made by this Court [2022] NZCA 142 (pending the hearing of the appeal) on 27 April 2022 is discharged.

[59] We make an order prohibiting publication of the names of Ms A, Mr B and Ms C.

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[60] Third recall judgment, above n 3.

[60] As the respondent took no part in this appeal, there is no order as to costs.