IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-008320

BETWEEN	PRIME RESOURCES COMPANY LIMITED Plaintiff
AND	DING FURU First Defendant
AND	CHISUN GROUP LIMITED Second Defendant
AND	YUETANG HUANG Third Defendant

Hearing: 8 July 2009

Appearances: VTM Bruton and SL Bartlett for Plaintiff
MR Crotty and MF Noon for First Defendant

Judgment: 21 August 2009 at 3:30 pm

JUDGMENT OF ASHER J

This judgment was delivered by me on 21 August 2009 at 3:30 pm pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

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Date

Solicitors:
VTM Bruton and SL Bartlett, Brookfields, P O Box 240, Shortland Street, Auckland 1140
MR Crotty and MF Noon, Russell McVeagh, P O Box 8, Shortland Street, Auckland 1140

[1] The plaintiff, Prime Resources Company Limited ("Prime"), seeks damages from the defendants arising from a failure to settle an agreement for sale and purchase. The agreement was dated 12 May 2008, and was for the sale of a large block of land at Moirs Hill, Puhoi, for $33 million. Prime was the vendor. The named purchaser was the second defendant, Chisun Group Limited ("Chisun"). The third defendant, Yuetang 'Tommy' Huang ("Mr Huang"), is the sole director and shareholder of Chisun. The first defendant, Ding Furu ("Mr Ding"), resides in Shanghai and is a Chinese and Singaporean national. Mr Ding is allegedly the principal of Chisun and Mr Huang.

[2] Mr Ding protests the jurisdiction of this Court to hear and determine the claim against him. He was served in Singapore. Indeed, he has been served on two occasions. There has been some debate about the circumstances of the service, but that is not relevant to the issues in this proceeding.

[3] Rule 5.49 of the High Court Rules provides that a defendant who objects to the jurisdiction of the court to hear and determine a proceeding may file and serve an appearance in lieu of a statement of defence. The filing of such an appearance is not in itself a submission to jurisdiction. The ultimate question under r 5.49 is "whether the Court is satisfied that there are sufficient grounds for it "properly to assume jurisdiction": *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd (No.2)* [1989] 2 NZLR 50 (CA) at 54.

[4] The service of the proceeding on Mr Ding was without leave. Therefore r 6.29 of the High Court Rules applies. Rule 6.29(1) provides:

> **6.29 Court's discretion whether to assume jurisdiction**
>
> (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—
>
> (a) that there is—
>
> (i) a good arguable case that the claim falls wholly within 1 or more of the paragraphs of rule 6.27; and

(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.

[5] Rule 6.27 sets out the circumstances when service out of New Zealand is allowed without leave. Rule 6.28(5)(b)-(d), which sets out when the Court should grant leave, provides:

6.28 When allowed with leave

5. The court may grant an application for leave if the applicant establishes that—

…

(b) there is a serious issue to be tried on the merits; and

(c) New Zealand is the appropriate forum for the trial; and

(d) any other relevant circumstances support an assumption of jurisdiction.

[6] The first question to be considered when determining a protest to jurisdiction is whether the plaintiff has shown a good arguable case under r 6.29(1)(a)(i) that the claim comes within one or more of the paragraphs of r 6.27. This is not an issue in this case. The defendant does not query whether there is a good arguable case that at least one of the circumstances set out in r 6.27(2) applies. Rather, the parties agree that the issue to be determined is whether the Court should assume jurisdiction under r 6.29(1)(a)(ii) on the basis that, in terms of r 6.28(5)(b) there is a "serious issue to be tried on the merits". This inquiry is entirely distinct from the inquiry as to whether there is a good arguable case that the proceeding comes within the ambit of r 6.27.

[7] Rule 6.28(5) is new. It replaces the previous r 131 of the High Court Rules, where the test was whether the court was "satisfied that it has jurisdiction" or "satisfied that it has no jurisdiction" (r 131(6)). The case law under r 131 established that, before it could be satisfied that there was jurisdiction, the court needed to be satisfied that the plaintiff had a "good arguable case": *Stone v Newman* (2002) 16

PRNZ 77 at [22] – [26], *Bomac Laboratories v F Hoffman-La Roche (Ltd)* (2002) 7 NZBLC 103,627 at [28].

[8] Ms Bruton for the plaintiff suggested that the articulation now in r 6.28(5)(b) of a "serious issue to be tried on the merits" places a lower burden on a plaintiff than the previous "good arguable case" test. Mr Crotty, for Mr Ding, argued that, in essence, the test has not changed.

[9] The test of "good arguable case" was discussed in *Bomac Laboratories v F Hoffman-La Roche (Ltd)* by Harrison J at [28]. He stated:

> In my opinion … the constituent elements of the test are the existence of, first, a substantial or serious legal issue for trial … and, second, a credible or plausible factual basis for arguing the legal issue. … On satisfaction of these two requirements the claim will have a sufficiently strong foundation to warrant a New Zealand court assuming jurisdiction.

He went on to say at [41]:

> … I do not discern any significant difference between the tests of a good arguable case and a serious question to be tried. In practice, whichever label is adopted, the result is likely to be the same.

[10] Harrison J referred to the statement of Lord Goff in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 (HL) as to the approach to be taken in relation to the plaintiff's case. Lord Goff stated at p 452:

> But the Court cannot resolve disputed questions of fact on affidavit evidence; and it is inconsistent with the statement of the law by Lord Davey that if, at the end of the day, there remains a substantial question of fact or law or both, arising on the facts disclosed by the affidavits, which the plaintiff bona fide desires to try, the court should, as a rule, allow the service of the writ. If this approach is correct, the standard of proof in respect of the cause of action can broadly be stated to be whether, on the affidavit evidence before the court, there is a serious question to be tried.

[11] Both *Seaconsar* and *Bomac* were considered by the Court of Appeal in *Harris v The Commerce Commission* [2009] NZCA 84. After referring to both cases, Arnold J observed at [60]:

> While it seems that their Lordships in *Seaconsar* did see a difference between the two tests (see 456-457 per Lord Goff), we consider that the general approach articulated by Harrison J in *Bomac* at [41] is correct, at

> least under the High Court Rules as they stood. (We note that the new High Court Rules, rr 6.28 and 6.29, incorporate the *Seaconsar* formulation – serious question to be tried. *We make no comment on whether that introduces a different test.)* We see Harrison J's approach as being consistent with the "straight forward" test referred to by this Court in *Stone*.
>
> [emphasis added]

It was left open, therefore, whether the new rules have changed the approach to be taken as to the threshold of strength of case to be crossed by the applicant.

[12] I do not discern a real difference in meaning between a "good arguable case" and a "serious question to be tried on the merits". Such a question must be more than merely arguable, or identifiable as a possible issue, and have some apparent merit. It must be more than speculative: *Stone* at [24]. It can be compared to the threshold test of serious question to be tried applicable to interim injunctions. It exists so that foreign residents are not put to the cost and inconvenience of defending a hopeless or clearly weak claim. The Courts will be cautious, and exercise restraint, before accepting that such a foreign resident living overseas and owing no allegiance to this jurisdiction, should be required to submit to it: *Societe Generale de Paris v Dreyfus Brothers* (1885) 29 Ch D 239 at 243; *Eyre v Nationwide News Proprietory Limited* [1967] NZLR 851 at 854. However the threshold is lower than the "good arguable case' required before a freezing order will issue under r 32.2: *BNZ v Hawkins* (1989) 1 PRNZ 451.

[13] Therefore I conclude that the specific introduction of the "serious question to be tried on the merits" test in r 6.28 has not changed the threshold test, and will treat the cases discussing the threshold prior to the new r 6.28 as applicable. In that regard I adopt Harrison J's formulation of the meaning of the phrase "good arguable case" in *Bomac*, which has wide judicial acceptance. In determining whether there is a serious issue to be tried I will consider whether there is a substantial or serious legal issue for trial and, second, a credible or plausible factual basis for arguing the legal issue.

The claims against Mr Ding

Breach of contract claim

[14] The first cause of action against Mr Ding is based on the assumption that he is the party who contracted to buy the land, and that he has breached the contract and is liable for damages. It is pleaded that the purchaser warranted to Prime that the purchaser was not required to obtain any approval pursuant to the Overseas Investment Act 2005. It is alleged that this was an express warranty in the agreement for sale and purchase, and that there was a breach of this warranty and that ultimately approval was required. It is alleged that, although the agreement for sale and purchase shows Chisun as the purchaser, in fact Chisun was the agent of Mr Ding. If Mr Ding was in fact the contracting party, there can be no doubt that there is a serious issue to be tried on the merits, and indeed Mr Crotty did not argue otherwise. It was this cause of action that Ms Bruton, in her initial submissions, put forward as the primary basis of claim.

[15] Negotiations in respect of the purchase of the land between Prime and Mr Ding's representatives began in mid 2007. After considerable discussions and exchanges, on about 14 March 2008 Mr Ding submitted an agreement for sale and purchase to Prime offering to purchase the land. There were ongoing discussions and a counter-offer, and difficulties became apparent associated with the requirement that Mr Ding obtain Overseas Investment Office ("OIO") approval for the purchase. It is alleged in the statement of claim that by email dated 27 April 2008 Mr Huang advised that he had Mr Ding's "final instruction", and that it was possible for an agreement to be entered into without OIO consent being required. The statement of claim refers to various meetings and some correspondence, which indicate that Mr Ding is the person who has the money and who wishes to purchase the property, and that Mr Huang is assisting him in this endeavour.

[16] Detailed affidavit evidence was filed by Mr Chung, who is a director of Prime, and he has produced a substantial body of evidence indicating that Mr Ding was in charge of the negotiations for the purchaser. However, that evidence shows that, because of the difficulties of obtaining OIO approval, it was decided that

Mr Ding could not be the purchaser. Chisun was set up to be the purchaser, with Mr Huang as its shareholder and director. It was intended that Chisun, as a company not involving Mr Ding as either shareholder or director, would not require OIO approval. Ultimately the agreement for sale and purchase referred to at [1] was entered into on 12 May 2008.

[17] The purchaser is shown as "Chisun or Nominee". Clause 33.1 of the agreement provided:

> The purchaser warrants to the vendor that the purchaser is not required to obtain any approval pursuant to The Overseas Investment Act and that entry by the purchaser into the agreement is not in any way impeding the operation of the Overseas Investment Act 2005 nor obstructing any exercise of any power or function under the Act for the purposes of s 43 or 44 of the Overseas Investment Act 2005.

Mr Chung deposes that in Mr Ding's presence he asked Mr Huang whether he was sure that OIO approval would not be required for the agreement to proceed. Mr Huang replied in the presence of Mr Ding that such consent was not required because the purchaser would be Chisun. He said that Chisun would not need OIO consent. An initial deposit of $80,000 was paid into the trust account of Prime's solicitors.

[18] Mr Ding's solicitors, Russell McVeagh, in due course on 23 June 2008 wrote to the OIO. They recorded that they had instructions to act for Mr Ding in relation to his intention to purchase property in New Zealand, and that Mr Ding intended to immigrate to New Zealand, and that he was in the process of making the required applications to obtain a grant of residency. They stated that to satisfy the active investor migrant policy criteria he wished to purchase property in New Zealand. They went on to describe the Puhoi property and the fact that it was being purchased by Chisun, which had agreed to onsell the land to Mr Ding subject to Mr Ding obtaining the relevant consent pursuant to the Act. The letter explained that Mr Ding would be advancing funds by way of loan to Chisun. It advised that Mr Ding had advanced the money by way of loan to Chisun to pay the initial deposit, that Mr Ding would advance further funds to Chisun so that it could settle the transaction with Prime, and that Mr Ding intended to immediately purchase 24.6 of the shares in Chisun from Mr Huang.

[19] The OIO responded that if Chisun purchased the land in those circumstances it would breach the Act unless it had obtained consent in advance. The OIO advised that Chisun was an "associate" of Mr Ding as defined in s 8 of the Overseas Investment Act 2005. It was stated in the letter that it had been explained to Mr Ding that Chisun had to be held independently, and that Mr Ding could not exert control over Chisun beyond control which reflected the ownership of any shares he might obtain.

[20] Clearly OIO consent could not be forthcoming. The second deposit, due under the agreement, was not paid. The agreement for sale and purchase was cancelled by Prime on 11 July 2008, approximately two months after it had been entered into. It was cancelled on the basis that the warranty that OIO approval was not required, had been breached.

[21] The primary claim for breach of clause 33.1 of the agreement (the warranty that no OIO consent was required) is on its face against the stated contracting party, Chisun, and indeed Chisun has been joined and this has been pleaded against it. However, this is an alternative pleading. Ms Bruton submits that there is at least a serious question to be tried that it was Mr Ding that was the contracting party. She relies on the chain of events leading up to the signing of the agreement, that undoubtedly shows that it was Mr Ding that had the money and was controlling the actions of Mr Huang. Indeed, this is not in dispute. It was Mr Ding who wanted ultimately to own the property, and to whom Mr Huang and the others involved from the purchaser's perspective answered. She submits that therefore Mr Huang and Chisun entered into the agreement as Mr Ding's agents.

[22] However, Mr Ding, Chisun and Mr Huang did not intend to create a relationship of principal and agent. That would have been self-defeating, as it is clear from the affidavits and the exhibits that it was known to all that Mr Ding, as principal and as purchaser, would have had to have obtained OIO consent. To avoid this another contracting party was chosen, Chisun. It was expressly intended that Mr Ding would not be the contracting party.

[23] If parties wish to set up legal structures in transactions for particular commercial purposes, and the structures are legally created, those structures will be recognised at law even if the creation was for an ulterior commercial purpose. It was explained in *NZI Bank Limited v Euro-National Corporation Limited* [1992] 3 NZLR 528 (CA) at 539, following an established line of authority including *Re Securitibank Limited (No. 2)* [1978] 2 NZLR 136 (CA), that the true nature of a transaction is to be ascertained by careful consideration of the legal arrangements actually entered into and carried out. The parties are free to choose whatever lawful arrangements suit their purposes, providing they are not shams.

[24] Although Mr Ding was controlling the transaction, and Chisun for that matter, this did not make Chisun his agent. Mr Ding did not intend Chisun to be his agent, and Chisun did not intend to be Mr Ding's agent. The parties in fact intended the opposite; they intended that Chisun be a stand-alone contracting party that Mr Ding would finance and in which he would later obtain shares. Any other arrangement would have been fatal to what they intended, which was that by making Chisun the purchaser with Mr Ding to be the financier, they would overcome OIO difficulties. Undoubtedly, as Ms Bruton submitted, Mr Huang was Mr Ding's agent for the purposes of the negotiations. But he was not the purchaser; it was decided that the purchaser would be Chisun.

[25] It is true, as Ms Bruton submits, that a relationship of principal and agent can be express, or implied from the conduct or situation of the parties. However, such an intention cannot be inferred in this case. The converse intention was explicit, namely that Mr Ding not be the contracting party.

[26] Ms Bruton, in her later submissions, argued that the agreement could be seen as a sham. She referred to *Official Assignee v Sanctuary Propvest Limited* HC AK CIV-2009-404-0852 11 June 2009, Asher J, in arguing that the company could be seen as being set up for an improper purpose, and not to operate as a company at all.

[27] However, Chisun was not a sham company. It was set up with Mr Huang as shareholder and director with the intention that the legal company formalities be observed, and without any attempt to hide Mr Ding's intention to finance it and

acquire shares in it. There was nothing improper about its creation, and the way it was intended to run. There was full disclosure of the true position by Mr Ding's lawyers Russell McVeagh to the OIO, when the views of the OIO were sought. It was not a situation such as arose in *Official Assignee v Sanctuary Propvest Limited*, where a bankrupt set up a company to buy land to defeat the prohibition on bankrupts owing property, with a director appointed who had no comprehension of the nature of the company structure, or his obligations. Here the structure was not designed to conceal Mr Ding's involvement, and there is nothing to indicate that Mr Huang did not understand or would not observe his duties as director. Rather, Mr Ding's involvement was put into another category, as lender to Chisun, later as shareholder, and ultimately as purchaser from Chisun. This strategy, set up to avoid the need for OIO approval, ultimately proved mistaken and in vain, because it did not obviate the need for approval, but there was no element of impropriety. The creation of Chisun was neither illegal nor improper, and the company was to operate as a stand-alone entity. It is not arguable that it was a sham.

[28] Thus the first and primary cause of action against Mr Ding must fail, as there is no serious question to be tried that he was a contracting party and liable for breach.

[29] It is therefore not necessary to consider further arguments raised on behalf of Mr Ding, relying on the lack of any memorandum in writing signed by Mr Ding, as required by s 24 of the Property Law Act 2007.

Misrepresentation

[30] The second cause of action against Mr Ding is based on misrepresentation under the Contractual Remedies Act 1979, and the third on breach of the Fair Trading Act 1986. The particular misrepresentation relied on in both of these causes of action is the same: that Chisun was not required to obtain OIO approval under the Overseas Investment Act 2005 in order to complete the purchase, whereas in fact the approval was so required. It is not necessary to deal with the claim under the Contractual Remedies Act as I have found that there was no contract with Mr Ding.

[31] Mr Ding does not speak English, and there was no suggestion that he personally made any representation about the availability of OIO approval. However, there is evidence that at the time of the signing of the agreement on 12 May 2008 or shortly before, Mr Ding's agents did indicate that OIO approval would not be required for a purchase by Chisun. This is corroborated by the express words of clause 33.1. While I have found that Chisun was not Mr Ding's agent for the purchase of the agreement for sale and purchase, I find that it is quite arguable that in representations in the negotiations leading up to signing the agreement, Mr Huang and others were speaking as agents for Mr Ding.

[32] Mr Crotty for Mr Ding argued that there could be no misrepresentation, as Chisun, as a New Zealand company with Mr Huang as a New Zealand shareholder and director, did not need OIO approval. However, I think it is seriously arguable that any representation about OIO approval was on a broader basis. It was not that Chisun did not require OIO approval to purchase, but rather that Chisun would be able to get OIO approval with Mr Ding providing the financial support for the purchase and the property ultimately being transferred by Chisun to him. It is certainly arguable that if the representation was that broad, that it was a misrepresentation. As was shown, OIO approval was required if Mr Ding was to be providing the financial support, and was to be the ultimate purchaser.

[33] The representations were made by those acting as agents for Mr Ding: his lawyers, Mr Huang, and the real estate persons acting for him. It is arguable that in making the representation, they were acting for Mr Ding as well as Chisun. The representations were made at about the time when it became clear that it was contemplated that Chisun would purchase, on or about 12 May 2008. Ms Bruton argued for a date a few weeks earlier, but on the material before the Court this is most unlikely. The representation pleaded relates to Chisun, and Chisun was only put forward as purchaser on or about 12 May 2008.

[34] Thus, I conclude that there is a serious question to be tried that on about 12 May 2008 Mr Ding, through his agents, made a representation that could properly could ascribed to him rather than Chisun, that OIO approval would not be required

by Chisun. There is a serious question to be tried that this was misleading conduct under the Fair Trading Act.

[35] However, that does not mean that the protest to jurisdiction fails. The real question is whether it is arguable that there has been any significant loss arising from the alleged misrepresentation. The relevant period must be that between the time of the representation on about 12 May 2008, and the time of the cancellation of the agreement two months later. Before that there was no operating misrepresentation, and after that it cannot be argued that there was any reliance.

[36] The only loss that is pleaded in this regard is "delay costs for the development, full details of which will be provided before this matter goes to trial". This pleading was elaborated on in submissions. Ms Bruton argued that for the period between the representation and the cancellation, Prime stopped marketing the property or individual sections. She submitted that it was arguable that Prime suffered loss during this period, given the fact that the property market was falling. It lost sales, because it did not try to sell sections, relying on the representation that OIO consent would not be required and that the sale would proceed. This is in essence a claim based on loss of opportunity; here the opportunity to sell in the two month period. I accept Mr Crotty's submission that loss of opportunity alone is not enough; some prospect of successful sales in the relevant period must be shown.

[37] Ms Bruton referred to a third affidavit filed by Mr Chung after the first part of this hearing, when it became clear that there was a lack of evidence on the issue of loss. Mr Chung asserted that Prime did not try to sell sections when it was relying on the misrepresentation. He deposed that it "would likely" have sold 10 to 12 lifestyle sections if he had started marketing from February through to August 2008, prior to the drop in the market. He relied on a valuation of a Mr OJ Davies, which he exhibited, which stated that there was an overall decline in value between March and September 2008 for lifestyle blocks in the central area of Rodney of at least 20 percent, which could have even been as high as 25 percent. He asserted that the net sale proceeds if he had sold ten lots would have been $3,300,000.

[38] In his affidavit he proceeded on the basis that he can claim for losses from the start of his negotiations with Mr Ding, but this is incorrect, and indeed was not an argument pursued by Ms Bruton. He can only claim for losses during the period when he was relying on the pleaded representation. He also implied that he could not do anything for some time after cancellation because he was in a state of shock. This is not a credible assertion. Given the up and down nature of the negotiations throughout the year, and Mr Chung's obvious commercial experience, it is not possible that such a claim could succeed.

[39] Neither Mr Chung nor Mr Davies addressed directly the issue of whether there would have been any actual diminution in value for the specific period between early May 2008 and early July 2008. That issue was more specifically addressed in an affidavit filed by a valuer, Mr Kerr, on behalf of Mr Ding. He gave an opinion that there was only a nominal change in market value between the date of the agreement, 12 May 2008, and the date of cancellation on 11 July 2008. Mr Kerr's evidence was that during May and July 2008 the demand for vacant lifestyle lots was weak, and that lots without title and promoted off the plans were unlikely to be sold.

[40] While it is not appropriate in proceedings such as this to determine genuinely disputed questions of fact, the Court is not obliged to put to one side commonsense, or to ignore the practical realities of the situation. Prime had been involved in a long-term effort to sell sections off the plans, which preceded by some months any involvement by Mr Ding, and which continued after cancellation. Ultimately some time after cancellation resource consent was obtained. It seems unlikely that any significant loss would have been suffered during a period of approximately two months delay in this ongoing process, which appears to have taken a number of years. The fact is that there is no hard evidence that Prime could have sold any of the sections at all in the two-month period. It had not sold any sections in the period immediately before, and it does not appear to have sold any sections in the period immediately afterwards. The lots had not yet been created and the titles had not issued. The valuation report annexed to Mr Chung's affidavit stated that it was anticipated that there would be a sales program over at least 18 months required to sell the 35 lots, through a concentrated marketing program. Clearly any sales were a long term project.

[41] The agreement for sale and purchase was in any event conditional on due diligence and resource consent. I am left with the overwhelming impression that a claim against Mr Ding based on misleading and deceptive conduct, and founded on a cessation of marketing efforts for approximately two months, is highly speculative. Conceivably a court might find itself satisfied that there was some small loss of opportunity during this period. However, I view it as highly unlikely that any significant claim could be established. Any amounts shown to have been lost are likely to be *de minimis.*

[42] The Court in such a situation must stand back and bear in mind the purpose of the serious question to be tried threshold. Defendants from another jurisdiction, who are not New Zealand residents, are not lightly required to defend New Zealand proceedings. While there may be a claim for a notional breach of the Fair Trading Act, and losses were minimal. There is no plausible factual basis for a Court to make an order of any significance in respect of such loss. To require Mr Ding to come to New Zealand and defend such a speculative claim would defeat the purpose of the protest to jurisdiction regime.

[43] Mr Chung, in his third affidavit, put forward another basis for claim. He said that if the representation about Chisun not requiring OIO approval had not been made, that Prime would have entered into a contract with Mr Ding rather than Chisun. However, in his earlier affidavits Mr Chung stated that his negotiations with Mr Ding fell apart because of the uncertainty concerning Mr Ding's ability to get OIO approval. He sought to resile from this in his last affidavit, once it was clear that the earlier testimony was inconvenient. His assertion is not supported by any of the written material and I do not find it at all credible. Further, even if it were true, there was no loss, as Mr Ding clearly could not get OIO approval. I do not consider that this ground has any chance of success.

Result

[44] The plaintiff's application for an order setting aside the second defendant's notice of protest to jurisdiction is dismissed, and the claims against Mr Ding are dismissed under r 6.29(1).

[45] The second defendant will have costs from the plaintiff on a 2B scale, plus reasonable disursements.

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Asher J