

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2008-404-4621

BETWEEN	SAITO OFFSHORE PTY LTD Plaintiff
AND	WING HUNG PRINTING COMPANY LTD First Defendant
AND	ADAPT IDENTIFICATION, LLC Second Defendant
AND	SHORE TO SHORE BV Third Defendant

Hearing: 24 April 2009

Appearances: Stephen Mills QC and Chris Patterson for Plaintiff
Matthew Sumpter for Defendants

Judgment: 29 June 2009

JUDGMENT OF HARRISON J

*In accordance with R11.5 I direct that the Registrar
endorse this judgment with the delivery time of
4:00 pm on 29 June 2009*

SOLICITORS

Davenports West (Auckland) for Plaintiff
Chapman Tripp (Auckland) for Defendants

COUNSEL

SJ Mills QC; CT Patterson

Introduction

[1] Saito Offshore Pty Ltd (Saito) is a company incorporated in Victoria, Australia, with its corporate headquarters and place of business in Auckland. It has issued this proceeding in the High Court against three overseas corporations: Wing Hung Printing Co Ltd (Wing); Adapt Identification LLC (Adapt); and Shore to Shore BV (Shore), which are incorporated in Hong Kong, the United States and the Netherlands respectively. All three defendants have common shareholders and directors and if incorporated in New Zealand would be related companies: s 2(3) Companies Act 1993.

[2] Saito's statement of claim pleads numerous causes of action, focusing principally on allegations of breach of confidentiality obligations and of a contractual obligation to provide access to a designated IT system together with the economic torts falling under the generic head of interference with contractual relations.

[3] The defendants have responded with an application to dismiss the proceeding on two jurisdictional grounds. First, they say that Saito's claim does not establish or raise a good arguable case on jurisdiction or a serious issue on the merits. Second, and alternatively, they say that New Zealand is not the appropriate forum for trial (without identifying the proper forum). Saito opposes.

[4] With a refreshing reliance on the metaphorical, Mr Matthew Sumpter, counsel for the defendants, describes Saito's current and third statement of claim as a 'Phoenix' pleading – an oblique recognition that Saito's recent engagement of Mr Stephen Mills QC has salvaged something from the ashes of its earlier pleadings. The question posed by Mr Sumpter is whether Saito has done enough to survive an application to strike out.

Background

[5] It is common ground that on 2 October 2000 Saito New Zealand Ltd (SNZ) and Shore entered into a written joint venture proposal for the purpose, among other

things, of incorporating a joint venture company to offer 'source marked' labels and tags to New Zealand, Australian and Pacific Island customers. At that time Shore carried on business as a supplier of information technology solutions, logistics and product design for the labelling and tag industry through an information technology system known as 'W.O.R.L.D IT'. Saito was incorporated as the joint venture company on 31 October 2000. SNZ and Shore each held 50% of its shares. Its directors were Mr Gavin Hodder, a director and shareholder of SNZ, Mr John Lau, a Wing director, and Messrs Howard Kurdin and Charles Rowland, Shore representatives.

[6] SNZ and Shore signed a shareholders agreement on 19 January 2001 setting out Saito's aims and objectives and the parties' rights and obligations as shareholders. The shareholders agreement defined information which was to be treated as 'confidential information' both by Saito and its shareholders: clause 1(1). Both shareholders agreed in relation to each other and Saito that the confidential information would be used only for the purposes of the business; the information would not be disclosed except in accordance with the provisions of the agreement; and the parties' rights and obligations relating to the confidential information would survive determination of the agreement: clause 16(3)-(6).

[7] Following Saito's incorporation SNZ provided a range of confidential information to the new company for use in its business. The information included the customer and contact bases of all SNZ's procurement parties in Australia and New Zealand, including The Warehouse, Pumpkin Patch and Farmers; SNZ's buying agents in New Zealand and Australia for the purposes of design, commercial presentations and discussions with the 'specifiers' that had been implemented, tested and signed off by SNZ; the systems that had been used by SNZ; 'contacts and relationship building steps' with both the NZ based procurement and specifying parties; the marketing and branding undertaken by SNZ in New Zealand and Australia; design and data format that had originated from SNZ; and data streams which were used to make changes to the W.O.R.L.D IT system provided by Shore.

[8] SNZ and Shore entered into a written licence agreement on 31 December 2003 for a term of 10 years commencing on 1 January 2004 with a single right of

renewal for a further 10 years. Shore agreed to grant Saito the right to use its W.O.R.L.D IT system in New Zealand, Australia and specific Pacific Island countries. The agreement also provided for Shore to collect payments from Saito's customers, pay the manufacturers of the labels, remit the balance of the funds to Saito, and invoice Saito for its licence fees.

[9] Contemporaneously the parties entered into a written share purchase agreement for the purpose of giving effect to the licence agreement and providing for SNZ to purchase Shore's shares in Saito. Saito pleads that the share purchase agreement had the effect of terminating the shareholders agreement. At the same time Messrs Lau, Kurdin and Rowland resigned as directors, leaving Mr Hodder as Saito's sole director.

[10] Saito alleges that:

- (1) From January 2004 Shore and Saito operated generally in accordance with the licence agreement. But from April 2006 Shore breached its obligations by ceasing to remit funds to Saito. Messrs Hodder and Lau then entered into negotiations in an attempt to resolve this breach. Mr Lau had either actual or ostensible authority to act as agent for all three defendants in these negotiations;
- (2) On or about 18 November 2006 Messrs Hodder and Lau entered into a written Memorandum of Understanding (the MOU), presumably as the culmination of their negotiations. Its apparent purpose was to provide a mechanism for transferring Shore's legal obligations owed to Saito to Adapt. Saito would move from using the W.O.R.L.D IT system to Adapt's ADAPT IT. In consideration Shore's liability under the licence agreement would be terminated, but the intent of that instrument 'would continue under the new arrangements';
- (3) It was an express or implied term of the MOU that Saito would obtain access to the ADAPT IT system in return for surrendering its rights of access to the W.O.R.L.D IT system; Adapt would co-operate with

Saito to ensure there was 'a seamless transition' from one IT system to the other; the W.O.R.L.D IT system would continue to be available to Saito until such time as the ADAPT IT system was available; and Adapt would enter into 'the new agreement' referred to in the MOU, provided the parties were able to agree on terms which were not inconsistent with the intent of that instrument;

- (4) Adapt unlawfully breached its obligations under the MOU by giving notice through its solicitors on 13 February 2007 that it was terminating the MOU, before Saito obtained access to the ADAPT IT system, on the ground that 'no agreement will be agreed between the parties in the foreseeable future'. Furthermore, Adapt's solicitors gave notice to Saito on 10 May 2007 that the company's access to the W.O.R.L.D IT platform would be disabled on 19 May, which actually occurred on 18 May.

[11] Saito pleads that as a consequence of Shore disabling access to its W.O.R.L.D IT system and Adapt's refusal to provide access to its ADAPT IT system it was left without access to any suitable IT system for its business; it was unable to provide the online booking, payment and related systems to its customers which were integral to its ability to carry on business effectively; and it was unable to obtain access to an alternative IT system provided by Checkpoint Systems Ltd until January 2008 and, in the interim, it lost some of its main customers.

[12] Furthermore, Saito pleads that on dates unknown between January 2001 and May 2007 Wing and Adapt received from Saito and one of its employees confidential information which had been generated by Saito in circumstances where they knew the information was confidential to Saito; and that in or about April and May 2007 the companies used this confidential information to solicit and obtain orders from entities which were previously Saito customers including Bendon, Quicksilver, Pumpkin Patch, Australian Warehouse, Farmers, Kathmandu, Hallensteins, and Rivers Australia.

[13] Saito pleads some seven causes of action arising from these circumstances. The first against all three defendants is for misleading and deceptive conduct in breach of the Fair Trading Act 1986, apparently based on representations made in the MOU. The second against all defendants is for wrongful use of confidential information. The third and fourth allege discrete breaches of contract by Adapt and Shore, the former based on the MOU. The fifth, sixth and seventh plead the economic torts of unlawful interference with contractual relations and interference with trade or business by unlawful means by all defendants, on the premise that the MOU created a binding contractual relationship between Saito and Adapt, with which Wing actively interfered.

[14] Saito seeks the equitable remedy of an account of profits on the claim for breach of confidence together with an order for delivery up of confidential information. The company seeks special damages to be quantified prior to trial and, in some cases, for exemplary damages of \$100,000, on the other six causes of action.

Protest to Jurisdiction

[15] By way of brief overview, the High Court Rules provide that an originating document may be served out of the High Court of New Zealand without leave in 22 specified cases: r 6.27. Leave is required in all other cases: r 6.28. If service has been effected out of New Zealand without leave, and the defendant exercises its right to protest the Court's jurisdiction under r 5.49, the Court must dismiss the proceeding unless the plaintiff establishes a number of specific conditions: r 6.29.

[16] The rules relating to the right of an overseas party to protest this Court's jurisdiction were revised by amendments introduced on 1 February 2009. To the best of counsel's knowledge, the new rules have not been the subject of judicial consideration. Previously, following the introduction of the High Court Rules on 1 January 1986, the right to protest was governed by what were rr 131 (now r 5.49), 219 and 220 (now amended by rr 6.27, 6.28 and 6.29). The earlier rules were the subject of frequent consideration at appellate level: see *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd (No 2)* [1989] 2 NZLR 50 (CA) (reversed on

other grounds: [1990] 3 NZLR 513 (PC)); *Stone v Newman* (2002) 16 PRNZ 77, and *Harris v Commerce Commission* [2009] NZCA 84.

[17] The approach adopted under the previous rules was summarised by Cooke P in *Kuwait Asia Bank* at pp 51-52:

So far as relevant the scheme of the new High Court Rules is that by R 219 if a statement of claim and notice of proceeding cannot be served in New Zealand – as is apparently the case here, the bank not having a place of business in New Zealand – they may be served out of New Zealand without leave in a range of cases specified in various paragraphs. In the event two paragraphs are relied on by the plaintiff here, (a) and (h):

(a) Where any act or omission for or in respect of which damages are claimed was done or occurred in New Zealand:

...

(h) Where any person out of New Zealand is a necessary or proper party to a proceeding properly brought against some other person duly served or to be served within New Zealand:

By R 131 a defendant who objects to the jurisdiction of the Court to hear and determine the proceeding may instead of filing a statement of defence file and serve an appearance stating his objection; this is not to be deemed a submission to the jurisdiction. Having filed an appearance the defendant may then apply to the Court to dismiss the proceeding. On hearing such an application the Court, if satisfied that it has no jurisdiction, shall dismiss the proceeding, but, if satisfied that it has jurisdiction, shall dismiss the application and set aside the appearance. An order may be made on terms, but it is to be noted that the rule envisages a definite determination as to jurisdiction one way or the other at the preliminary stage when application is made under the rule. Any issues of fact or law necessary to be determined in order to decide whether the case justifies leave under R 219 must therefore be determined at this stage. R 437 is perhaps wide enough to authorise incidental directions as to the procedure for determining such issues, and in any event R 131 itself must extend by implication to whatever steps are necessary. Nevertheless the very absence of express provisions in R 131 for the trial of preliminary issues, discovery and other matters suggests that the rule is not intended to be a vehicle or substitute for the trial of major issues in the action itself.

[18] In deciding this issue the Court said at p 54:

The ultimate issue under R 131 is whether the Court is satisfied that there are sufficient grounds for it properly to assume jurisdiction. The strength of the plaintiff's case against the party served abroad and all the circumstances of the case have to be weighed. Where, as here, the action has a strong New Zealand association and arises from business or investment undertaken by a foreign company in New Zealand, we think that it is enough to show a

good arguable case against the foreigner within (a) or (h). If the dispute has little connection with New Zealand and it could be seen as exorbitant to assert jurisdiction over the foreigner, a stricter standard may well be appropriate.

[19] This Court must always bear in mind the principle of restraint concerning a foreign citizen resident overseas: *Stone* at [26], while recognising that ‘developments in communications and transport have somewhat reduced the force of the practical considerations behind this principle’: *Worldwide NZ LLC v Quay Park Arena Management Ltd* [2008] 1 NZLR 106 at [20], approved in *Harris* at [20](a). Also, the New Zealand legislature will be slow to assert jurisdiction where conduct occurs wholly outside of New Zealand, even if it has consequences here: *Harris* at [20](b).

[20] While the jurisdictional criteria provided by the original r 131 are retained in the new r 6.27, the combined effect of rr 6.28 and 6.29 is that, in the event of a challenge to jurisdiction, where the proceeding has been served out of New Zealand without leave, the plaintiff must satisfy two sequential conditions: (1) a good arguable case that ‘the claim falls wholly within one or more of the paragraphs of r 6.27’; and (2) the Court should assume jurisdiction by reason of a number of factors including that (a) there is a serious issue to be tried on the merits and (b) New Zealand is the appropriate forum for the trial. Previously these two distinct stages of inquiry have often merged or overlapped: *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd* (2002) 7 NZBLC 103,627 at [28(d)].

(1) *Good Arguable Case*

(a) *Principles*

[21] The first or jurisdictional inquiry is whether Saito has shown a good arguable case that its claim falls wholly within one or more of the statutory criteria. The plaintiff will satisfy the ‘good arguable case’ test: *Harris* at [61]:

... if the claim against the overseas resident is arguable as a matter of law and is plausible ... and not speculative. Clearly the test does not envisage a mini trial. We emphasise that the “plausibility” requirement does not mean that the court will determine credibility issues where there is a contest on the

affidavits, except in exceptional cases where the court can be satisfied that the claim is meritless.

[22] Mr Sumpter's threshold and overarching submission is that Saito cannot establish that all its seven causes of action satisfy the good arguable case test. This argument is based upon the statutory requirement that 'the claim falls wholly within one or more of the paragraphs of rule 6.27': r 6.29(1)(a)(i). Mr Sumpter submits that "the claim" refers to the aggregate of the plaintiff's causes of action. As a consequence, he says, the Court must dismiss the proceeding if one of Saito's causes of action fails to meet the statutory test. This all or nothing proposition sets the jurisdictional bar at a high level.

[23] In support Mr Sumpter relies on this passage from *McGechan on Procedure* at HR6.27.05:

Does all of the proceeding have to come within r 6.27?

There was early authority for the proposition that all of a proceeding had to come within the paragraphs of this rule before service out of New Zealand was permitted: *Jones v Flower* (1904) 24 NZLR 447 (CA). However, Harrison J in *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd* (2002) 7 NZBLC 103,627 (HC) and O'Regan J in *Baxter v RMC Group plc* [2003] 1 NZLR 304 (HC) have both held that it is enough if one cause of action within the proceeding comes within the situations specified by the rule. As Harrison J noted, the inquiry is into whether or not the foreign parties were properly served out of jurisdiction. Thus, satisfaction on one cause of action is sufficient.

The new Rules appear to have restored the old position. On its face, rule 6.27 does not state that all of the claims must come within one or other of the paragraphs of subclause (2) before service may be effected out of New Zealand. However, r 6.29(1) provides that, if the overseas defendant files a protest to jurisdiction under r 5.49, the Court must dismiss the proceeding unless the party effecting service establishes (among other things) that there is a good arguable case that the claim falls 'wholly' within one or more of the paragraphs of r 6.27 or that, had that party applied for leave under r 6.28, leave would have been granted.

[24] Mr Sumpter observes that the approach adopted in *Jones v Flower* is effectively endorsed in this passage from Dicey, Morris and Collins: *The Conflict of Laws* (14ed 2006) at 11-154:

It is not permissible to litigate any other cause of action which does not fall within one of the clauses [of the English equivalent to r 6.27]. Where

permission to serve out of the jurisdiction is based on one cause of action it cannot be treated as permission based on some other cause of action.

Mr Sumpter also cites numerous Australian and English authorities. He submits that it would be contrary to policy to grant leave where a proceeding includes an arguable “but shaky” cause of action, allowing its use as “a stalking horse for unmeritorious claims” which either may be unknown in the foreign law governing all or part of the conduct in issue or could greatly increase the cost and resourcing burden on a foreign defendant with no connection to New Zealand. He raises the spectre of expanded discovery or the plaintiff’s use of the tactic of “nuisance” settlements.

[25] I do not accept Mr Sumpter’s construction of rr 6.27 and 6.29. I think that it is misconceived because of its focus on the concept of a cause of action instead of ‘the claim’. I shall explain my reasons more fully after reciting the material parts of the new rules.

[26] Rule 5.49 provides the right to appear and object to jurisdiction is as follows:

(1) A defendant who objects to the jurisdiction of the court to hear and determine the proceeding may, within the time allowed for filing a statement of defence and instead of so doing, file and serve an appearance stating the defendant's objection and the grounds for it.

...

(3) A defendant who has filed an appearance may apply to the court to dismiss the proceeding on the ground that the court has no jurisdiction to hear and determine it.

(4) The court hearing an application under subclause (3) must,—

(a) if it is satisfied that it has no jurisdiction to hear and determine the proceeding, dismiss the proceeding; but

(b) if it is satisfied that it has jurisdiction to hear and determine the proceeding, dismiss the application and set aside the appearance.

....

(8) The court, in exercising its powers under this rule, may do so on any terms and conditions the court thinks just and, in particular, on setting aside the appearance it may extend the time within which the defendant may file and serve a statement of defence and may give any directions that appear necessary regarding any further steps in

the proceeding in all respects as though the application were an application for directions under rule 7.9.

[27] Rule 6.27 provides that:

- (2) An originating document may be served out of New Zealand without leave in the following [22] cases...

[28] Rule 6.29 materially states:

- (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.

[29] Finally, r 6.28 states:

- (5) The court may grant an application for leave if the applicant establishes that—
 - (a) the claim has a real and substantial connection with New Zealand; and
 - (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.

[30] These principles emerge from the relevant rules read in combination:

- (1) Rule 6.27 identifies 22 separate criteria for assuming jurisdiction. All are of a factual nature. The qualifying event inherent in each is a type

of factual connection or association with New Zealand sufficient to justify our courts in assuming jurisdiction: see *Kuwait Asia Bank* at 54. For example, when a claim is made in tort, the qualifying event is either: (a) the occurrence or doing in New Zealand of an act or omission “in respect of which damage was sustained” or (b) the sustaining of damage in New Zealand: r 6.27(2)(a)(i) and (ii). Similarly when a plaintiff seeks to enforce a contract, each qualifying event such as the places of execution, breach or performance must occur in New Zealand: r 6.27(2)(b) and (c). The word ‘claim’ only appears in five criteria: r 6.27(2)(a), (d), (h), (j) and (l);

- (2) The threshold test under r 6.29 is whether there is a good arguable case that ‘the claim’ falls wholly within one or more of the r 6.27 criteria. The word ‘claim’ has a broad meaning in this context and is not, contrary to Mr Sumpter’s submission, synonymous with the phrase ‘a cause of action’. The concept of a claim necessarily includes causes of action but the focus is upon its factual basis. See *Bray v F Hoffman-La Roche Ltd and Ors* (2003) 200 ALR 607:

[112] The noun ‘claim’ has a wide range of meaning. Relevantly it includes a demand for something as being due and also a statement of one’s right to something: see the *New Shorter Oxford English Dictionary*, p 409; the *Macquarie Dictionary*, 2nd ed, p 332. That is, a demand for a payment or other relief and a statement of the basis upon which that demand is made.

[113] In my opinion, the word ‘claim’ is not to be construed as limited to ‘cause of action’. It should be construed as including a cause of action, in the sense of a (stated) basis of one’s right to something, and also a demand for what is due by virtue of that right, whether it be damages, an injunction or any other relief.

See also *Black’s Law Dictionary* (8ed 2004) at 264 defining ‘claim’ as including ‘the aggregate of operative facts giving rise to a right enforceable by a Court’;

- (3) It follows that on a challenge to a proceeding served without leave the plaintiff must sustain its good arguable case by showing that the

operative facts on which the claim is based come wholly within one or more of the 22 statutory categories. This is because the jurisdiction of a New Zealand Court is territorial, and as it derives from statute an overseas party cannot lawfully be exposed to a claim falling outside r 6.27: see *Donohue v Armco Inc* [2002] 1 All ER 749 per Lord Bingham at 758. A difficulty will not arise, however, where the same or similar facts, satisfying one or more qualifying criteria, are interrelated or common to all causes of action. That commonality is frequently reflected in the similarity of relief sought;

- (4) An issue is only likely to arise in practice where a plaintiff pleads in the one statement of claim a number of unrelated causes of action, some of which plainly fail to satisfy the r 6.27 factual criteria. Strictly speaking, there is no limitation on the number of causes of action which may be included in the same statement of claim, or a limitation on their relationship: r 5.28(1). But a Court is likely to order separate trials in the absence of an interrelationship. Thus a New Zealand plaintiff properly advised is likely to include within a statement of claim against an overseas entity only those causes of action arising from a common factual foundation;
- (5) There is a commonly worded obligation to dismiss ‘the proceeding’ unless the plaintiff shows a good arguable case that its claim falls wholly within one or more of the 22 statutory criteria (r 6.29) or if the Court is satisfied that it has no jurisdiction to hear and determine the proceeding (r 5.49(4)). It would not be contrary to the spirit of the rules, however, to dismiss a proceeding where the operative facts of the claim fall substantially within r 6.27 but some do not, forcing the plaintiff to file and serve a new proceeding including a complying statement of claim. In that situation the Court could, for example, adjourn the application to dismiss on condition that the plaintiff filed an amended statement of claim within a fixed period (r 5.49(8)). On satisfaction of the condition, the application would be dismissed and the appearance under protest set aside. Whatever happened, the Court

would have jurisdiction to allow the plaintiff an opportunity to file an amended pleading analogously with the discretion applied on an application to strike out

[31] This analysis appears consistent with the observations on the previous rules in *Harris* at [70]-[73]:

[70] We consider that where the causes of action are related, and a good arguable case is found on one, it is appropriate to permit the other causes of action to proceed as well. To adopt the very narrow approach advanced by the appellants seems to us wrong in principle and, in practical terms, to be artificial and wasteful of court resources.

[71] We acknowledge, however, that the position may be different where the causes of action do not arise out of the same sequence of events, so that they are largely independent of each other. The same may also apply where one cause of action can be shown to be certain to fail because, even accepting the facts alleged, the claim is unsustainable.

[72] While it is true that Harrison J in *Bomac* (at [45]) and O'Regan J in *Baxter* (at [28]) seem to have accepted the broader approach, in each case the causes of action arose out of the same sequence of events and so were connected. Accordingly, neither Judge needed to utilise the broader approach. Similarly in *Bray*, where the Full Court of the Federal Court appeared to accept the broader approach even though the causes of action were clearly interrelated: see Carr J at [38] – [55], Branson J at [176] – [190] and Finkelson J at [221] – [230]. We are reluctant to go that far in the present case, however, as it is not necessary to do so, and because we see considerable force in the points Mr Goddard made in relation to the broader view.

[73] In the present case the various claims against each appellant are clearly related. An overarching understanding is alleged, together with a number of specific understandings arising out of that over-arching understanding. All the understandings relate to market manipulation of the timber preservatives market and all involve substantially the same players. Accordingly we consider that it would be sufficient to establish a good arguable case in relation to one claim to allow all to proceed.

[32] I do not think *Jones v Flower* is authority to the contrary. The plaintiff was refused leave to issue proceedings out of New Zealand where his statement of claim was based upon a contract entered into between English residents in that country relating to land in New Zealand. By pleading two separate causes of action he sought the remedies of damages and a declaration of trust of the property.

[33] The Court of Appeal was satisfied in *Jones* that the primary or essential claim common to both causes of action was for breach of a contract which was plainly

justiciable in England. The equitable claim, even though it had a connection to New Zealand, was purely derivative or consequential. Chapman J was satisfied that the proceeding did not have the requisite factual association with New Zealand, and that as a matter of discretion it would be unfair to force the defendant to submit to the New Zealand Courts on the equitable claim because to meet it he would have to answer the contract claim. It was a backdoor and arguably abusive attempt to assert jurisdiction. Its facts are far removed from these.

[34] I bear in mind, of course, that in *Harris* the Court was guided by the existence of the same, largely interdependent, sequence of events. Here, as Mr Mills submits, Saito's claims against each defendant arise from one distinct and interrelated, although lengthy, sequence. The principal participants were the same throughout. The core factual allegations provide common ground for the separately pleaded claims against each defendant.

(b) *Factual Assessment*

[35] In accordance with the prescribed form, Saito's notice provided:

10. Five of the classes of case in which the High Court may exercise jurisdiction are where:
 - (a) Where any act or omission for or in respect of which damages are claimed was done or occurred in New Zealand; or
 - (b) Where the contract sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any proceeding, or for the breach whereof damages or other relief is demanded in the proceeding was made or entered into in New Zealand, or was to be wholly or in part performed in New Zealand; or
 - (c) Where there has been a breach in New Zealand of any contract, wherever made; or
 - (d) Where it is sought to compel or restrain the performance of any act in New Zealand; or
 - (e) Where the subject-matter of the proceeding is land, stock, or other property situated in New Zealand, or any act, deed, will, instrument, or thing affecting such land, stock, or property.

11. In this case the plaintiff claims that:
- (a) the material contractual agreements and or transactions were entered into, and/or occurred, in New Zealand;
 - (b) the confidential information which it alleges has been misappropriated by you was collected and/or generated in New Zealand, and was supplied to you via electronic transmissions originating in New Zealand;
 - (c) the misrepresentations alleged to have been made by you in relation to the Memorandum of Understanding of 5 December 2006 were received by the plaintiff in New Zealand. Further, that the cancellation of the License Agreement, which the plaintiff alleges it agreed to in reliance on said misrepresentations, was agreed to and/or effected by way of the plaintiff's email sent from New Zealand;
 - (d) the subject matter of these proceedings in part the goodwill the plaintiff has and/or had with its customers in New Zealand;
 - (e) the conspiracy and deceit alleged by the plaintiff was undertaken in part in New Zealand via the involvement of Mr Prakash Shahri in said conspiracy and deceit; and
 - (f) the relief sought by the plaintiff includes injunctive relief compelling you not to deal with its customers in New Zealand.

[36] Saito's current statement of claim has abandoned the conspiracy and deceit cause of action and its prayer for injunctive relief (para 14(e)-(f)). The original allegations of misrepresentation are converted into a claim for deceptive and misleading conduct under the Fair Trading Act. The question then is whether or not Saito has established a good arguable case that its claim falls wholly within one or more of the remaining statutory criteria (para 14(a)-(d)).

[37] In argument Mr Mills reversed the chronological sequence of Saito's pleading. He relies first on the three alleged economic torts: (1) Wing's unlawful interference with Saito's contractual relations with Adapt (fifth cause of action); (2) Wing's interference with Saito's trade or business with Adapt by unlawful means (sixth cause of action); and (3) Wing's interference with Saito's contractual relations with Shore (seventh cause of action). Mr Mills submits that the evidence shows that, on these causes of action, an act or omission in respect of which the damage was sustained, was done or occurred in New Zealand (r 6.27(2)(a)(i)) or the damage was

sustained in New Zealand (r 6.27(2)(a)(ii)): see paras 13(a) and 14(a) and (d) of the notice of proceeding. The fifth and seventh causes of action rely in particular on the MOU.

[38] Consistently with his underlying proposition on the combined effects of rr 6.27 and 6.29, Mr Sumpter's opposition did not specifically address these arguments. Instead he undertook a detailed analysis of whether each cause of action satisfied the good arguable case test. For the reasons I have given, I do not think that approach is correct; it falls for proper consideration at the second stage of the inquiry into whether there is a serious issue for trial on the merits. Mr Sumpter's only reference to Mr Mills' arguments was a brief observation that Wing's conduct took place in China. He also says that Saito has failed to advance any relevant evidence of damage sustained in New Zealand as a result of Wing's allegedly tortious act.

[39] I am more than satisfied that Saito has established that the factual foundation for its first three causes of action meet both r 6.27(2)(a)(i) and (b). I agree with Mr Mills. Throughout its contractual relationship with Shore, Saito obtained access to the latter's W.O.R.L.D IT system from New Zealand. So, too, did its New Zealand based customers. The MOU envisaged the same arrangements with Adapt. The latter's notice of termination of the MOU took effect here. There can be no dispute that the damage claimed by Saito, if proven, was sustained in New Zealand.

[40] I am independently satisfied that what Mr Mills refers to generically as the two contract causes of action also meet the statutory test. Saito alleges that (1) Adapt breached its contractual obligations arising under the MOU to make its Adapt IT system available (third cause of action) and (2) Shore independently breached its contractual obligation by disabling Saito's access to its W.O.R.L.D IT system prior to Adapt's system being made available (fourth cause of action). In both cases Mr Mills submits that the contracts sought to be enforced were breached here (r 6.27(2)(c)).

[41] Mr Sumpter counters that Saito's evidence on this point is 'skinny at best'. He says the MOU is not a contract and thus does not meet the statutory

requirements. I am satisfied that the MOU is arguably of contractual force and effect. While, as Mr Mills accepts, the MOU was not entered into in New Zealand, it was performed in part at least by Saito surrendering its contractual right of access from New Zealand to the W.O.R.L.D IT system and taking steps to move to the Adapt system.

[42] Mr Mills submits that Saito's claim for breach of confidentiality (second cause of action) also meets the statutory criteria. He points to the pleading of part performance in New Zealand of both the shareholders and licence agreements, with their specific obligations of confidentiality, and the overwhelming inference of breach here given that the asserted confidentiality relates in part to information about Saito's New Zealand based customers. Independently, as on the other causes of action, Saito has allegedly suffered loss in this country. I agree.

[43] Finally, Mr Mills submits that the claim for breach of the Fair Trading Act (first cause of action) satisfies the statutory criteria on the ground that an act or omission relevant to the cause of action occurred in New Zealand and that the loss or damage was sustained here. Again, for the reasons given, I agree.

[44] In summary, I am satisfied that Saito has met the first jurisdictional requirement of proving a good arguable case that its claim falls wholly within one or more of the statutory criteria provided by r 6.27.

(2) *Serious Issue*

(a) *Principles*

[45] The second stage of the inquiry is to determine whether there is 'a serious issue to be tried on the merits': r 6.28(5)(b). The reference to the singular is important. In my judgment, in conformity with the approach mandated by rr 6.27 and 6.29, Saito need only establish one serious issue for trial arising from the parts of the claim which meet the factual jurisdictional threshold, whether or not they are the basis for one or a number of causes of action. It is sufficient if those qualifying facts

give rise to one seriously triable issue; it is unnecessary to subject each related cause of action to a separate inquiry into whether such an issue arises.

[46] Whether there is any distinction between the touchstones of good arguable case and a serious issue for trial is moot. In *Harris* the Court expressed the provisional view, approving *Bomac* at [41]-[42], that under the previous rules at least the distinction between the two tests was more semantic than real: at [60]. Mr Mills observes that, if anything, the serious issue criterion sets a lower standard for the plaintiff than the good arguable case test: see *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 (HL) per Lord Goff at 456:

But if jurisdiction is established [under the English equivalent of s 27], and it is also established that England is the forum conveniens, I can see no good reason why any particular degree of cogency should be required in relation to the merits of the plaintiff's case.

[47] The Rules Committee must have discerned a difference. Otherwise it would not have recommended the discrete tests of a good arguable case (r 6.27) and a serious issue to be tried on the merits (r 6.29). But for myself I cannot identify a real distinction between *Harris*' articulation of the former at [61] and *Seaconsar*'s formulation of the latter at 456.

(b) *Facts*

[48] It is appropriate at this juncture to return briefly to the chronological thrust of Saito's case.

[49] The principal and enduring legal relationship was between Saito and Shore from 2001 to 2006. Shore's status evolved from that of an equal shareholder in the company or as a joint venturer with Saito's parent into an arm's length role as the licensor of Saito's use of its intellectual property. The arrangement apparently worked satisfactorily and uneventfully until April 2006 when Shore fell into breach by failing to account for funds held on Saito's behalf. There is no express pleading to this effect but I infer that this breach was symptomatic of Shore's wider problems in complying with its fundamental obligation to provide Saito with access to its IT system.

[50] Saito's case is that Wing and Adapt agreed through Mr Lau's agency to step into the breach created by Shore's non-performance. They were related companies with the capacity and ability to take over Shore's functions. But, according to Saito, Wing and Adapt unlawfully reneged on their undertakings in two ways. One was to make wrongful use of confidential information which they had acquired by virtue of their relationship with Shore and appropriate a large part of Saito's customer base. The other was to refuse to make available to Saito an alternative IT system, leaving the company in a void for some months which Wing and Adapt exploited to their advantage.

[51] Both counsel addressed the competing factual evidence found in the affidavits sworn for both sides. I note this approach only to record my satisfaction that it would be inappropriate to attempt to resolve evidential conflicts at this stage. I am not satisfied that any of it can be condemned now as implausible.

[52] Saito's case hinges around two sets of allegedly binding contractual instruments. The first, relating to its originating and direct relationship with Shore, is constituted by the joint venture proposal, the shareholders agreement, the licence agreement and the share purchase agreement. The second, relating to a proposed substitute relationship with Adapt, is constituted solely by the MOU. The question is whether either or both give rise to a serious question for trial on the merits.

[53] Mr Sumpter does not challenge the contractual effect of the first set of documents. Saito relies on them as the primary foundation for its claims against all defendants for wrongful use of confidential information. That category is reduced to information about Saito's accounts with eleven nominated companies. Mr Sumpter accepts that the contractual matrix is relevant in providing a definition of "confidential information". He submits, however, that the information about client accounts either does not have the necessary quality of confidence about it to justify equitable protection or is not defined with sufficient precision.

[54] I mean no disrespect to Mr Sumpter's carefully constructed argument in recording my rejection of it. The contractual documents read in conjunction with Saito's affidavits provide a credible foundation for a Court to conclude, in the

absence of contrary evidence, that Shore agreed that information about Saito's customer lists possessed the quality of confidence sufficient to justify legal prosecution; that Shore would not have acquired the information but for the contractual relationship with Saito; and that as related companies Adapt and Wing acquired details of the information from Shore, knowing of its confidential status.

[55] Whether or not the information was in the public domain anyway or whether any of the defendants has wrongfully obtained or misused it, will be factual questions for determination at trial. I am in no doubt that Saito has established a serious issue for trial against all three defendants arising from the first set of contractual documents.

[56] The MOU is the source of most of Saito's causes of action. Mr Sumpter dismisses its contractual validity on the ground that the MOU is no more than an unenforceable agreement to agree – a “staging post” or statement of future intention on the road to a possibly binding agreement at a later stage. He says it lacks the requisite certainty for contractual enforceability.

[57] I have reviewed the provisions of the MOU in the factual context of an exchange of correspondence between the parties. I am satisfied that a court could construe the document read as a whole as intending to create an immediately binding contractual relationship between Saito and Adapt. While it opens with reference to and contemplation of subsequent document, the MOU sets out detailed terms governing Adapt's obligations to supply its system in substitution for the Shore system together with a precise pricing regime for the cost of Adapt's services. Factual questions about breach, and Wing's participation in Adapt's decision to terminate the MOU, will require determination at trial. Alternatively, the document, if not of contractual effect, may arguably provide the basis for a claim for deceptive conduct under the Fair Trading Act.

(3) *Forum*

[58] The third inquiry is into whether or not New Zealand is the appropriate forum: rr 6.28(5)(c) and 6.29.

[59] Saito also bears the burden on this issue. The defendants oppose on the grounds that: (1) they have no presence in New Zealand (Saito and is incorporated in Victoria, Australia; Shore in the Netherlands; Wing in Hong Kong; and Adapt in the United States); (2) the various contracts between the parties provide the law of Victoria as governing and that the courts in that state have non-exclusive jurisdiction; (3) the commercial activities and arrangements were principally outside New Zealand; (4) the defendants' primary witnesses are located in Asia and the United States; and (5) the defendants have no New Zealand assets.

[60] Mr Sumpter observes that the only real and substantial connection between this plaintiff and New Zealand is that Saito's parent company and executives are based in Auckland. He says that the costs and inconvenience of bringing the defendants' witnesses for trial would be extraordinary, both in direct expense and disruption to the defendants' businesses. Furthermore, he says, Saito is able to pursue the defendants' in their own jurisdictions.

[61] I shall deal first with this last submission. I can only infer that Mr Sumpter submits that Saito should issue three separate sets of proceedings in Hong Kong, the United States and Australia. The impracticability of that course is obvious, both in terms of replication of costs and resources and then possibly conflicting results where the claims are interrelated and arise from the same sequence of events. It is most telling, as Mr Mills emphasises, that Mr Sumpter did not attempt to nominate the appropriate forum to hear and determine this proceeding.

[62] In my judgment the facts weigh heavily in favour of New Zealand as the forum *conveniens*. As earlier noted, recent developments in transport and communications have reduced the force of the general principle that it is undesirable to subject a foreigner, who owes no allegiance to New Zealand, to the jurisdiction of its courts. Moreover, this case has a heavy, or if not predominately, New Zealand flavour.

[63] As Mr Mills points out, the defendants have had significant contact with New Zealand, first through Shore and more latterly through Wing and Adapt. Shore participated for some years as a substantial shareholder in a New Zealand entity. Its

related companies, Adapt and Wing, later became involved, arguably in substitution for Shore. Saito predominately operated out of New Zealand. Its client base, which is effectively the subject of the claim, substantially operated from here or Australia. I do not consider that any issue of enforcement of judgments is decisive. Standing back, considering the case in the round, a New Zealand court would, I think, be the most effective forum for granting relief for the claim as a whole.

[64] The defendants have overplayed their hand on inconvenience. They say the cost and commercial disruption to their business of conducting a trial in New Zealand will be extraordinary. I cannot follow that proposition, given that most if not all the primary witnesses will be located within the Asia Pacific region. Inevitably there will be some disruption for a foreign corporation in conducting its defence in a New Zealand court. I do not accept that that might be out of the ordinary for any of these defendants.

[65] That is why I am satisfied that a New Zealand court is the appropriate forum to hear Saito's proceeding.

Result

[66] The defendants' application to dismiss the proceeding is dismissed, and they are ordered to file full statements of defence on or before 14 August 2009. The registry is to allocate a conference date for the proceeding before an Associate Judge for the purpose of timetabling directions.

[67] Costs must follow the event. The defendants are jointly and severally ordered to pay Saito's costs and disbursements according to category 2B. I certify for one counsel.

[68] I wish to express my gratitude to both Mr Mills and Mr Sumpter for the quality of their written and oral arguments.

Rhys Harrison J