IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV-2008-485-002062

	BETWEEN	SHOSHA OCHI Plaintiff
	AND	TRUSTEES EXECUTORS LIMITED Defendant

Hearing: 24 September 2009

Appearances: A J Logan for Plaintiff
G Kelly for Defendant
D Sim & T Gudmanz on behalf of Beneficiaries in Estate of Dr H Ochi in Japan (other than C Ochi)
D Tobin for K Ochi
G de Courcy as proposed litigation guardian for C Ochi

Judgment: 18 December 2009

RESERVED JUDGMENT OF HON. JUSTICE FRENCH

Introduction

[1] The late Dr Hiromoto Ochi was a wealthy Japanese businessman, domiciled in Japan. He owned property in Japan and in this country. His New Zealand assets included land as well as substantial sums of money deposited in accounts with the Bank of New Zealand.

[2] The plaintiff, Shosha Ochi, was formerly a Chinese national. She has lived much of her life in Japan and became a naturalised Japanese citizen in 2001. She claims that she and Dr Ochi lived in a de facto relationship between 1995 and his death in 2005. She claims further that in November 2004, Dr Ochi promised to transfer approximately half the money in his New Zealand bank accounts to her, and further promised that while he would retain ownership of the remaining half, she

would be free to use that half as she pleased. Dr Ochi is said to have promised she could continue to draw on the money after his death and he would arrange for her to have signing authority.

[3] Dr Ochi died in October 2005 without having ever transferred half the bank accounts into Shosha's name, and without giving her signing authority to draw on the balance.

[4] Shosha Ochi accepts that the promise to transfer money into her name amounts to an incomplete and therefore unenforceable gift. However, she claims that what was said about the remaining half (i.e. the money to be retained under Dr Ochi's name) amounted to the creation of an express inter vivos trust, Dr Ochi in effect declaring that he held one half of the bank deposits on an express trust for himself and her jointly. Thus, she says, she has a beneficial interest in half the balance of his bank deposits.

[5] Dr Ochi died without a will. He was the natural father of six children whom I shall refer to as "the Japanese heirs". Shosha Ochi has two children called Kenrin Ochi and Churin Ochi, both of whom are minors. Dr Ochi was not their natural father. He did however contribute to their maintenance. He also executed a formal acknowledgement of paternity of Kenrin, and purported to adopt Churin. After Dr Ochi's death, the Japanese heirs filed proceedings in Japan, contesting the paternity acknowledgment and the adoption. A Japanese Court has since annulled the paternity acknowledgement, finding Sosha Ochi deceived Dr Ochi into believing Kenrin was his child. The litigation regarding Churin's status is as yet unresolved. There have also been proceedings in Japan regarding company shares, the Japanese heirs alleging that documents signed by Dr Ochi or executed on his authority purporting to sell his shares were forged. The heirs successfully obtained an order for the return of the shares. Shosha Ochi was not a party to those proceedings, but she appears to have been involved in the events leading up to the execution of the relevant documents.

[6] Trustees Executors Limited has been granted letters of administration of Dr Ochi's estate in New Zealand.

[7] There is no administrator of Dr Ochi's estate in Japan. Under Japanese law, the only persons entitled on intestacy to Dr Ochi's estate in Japan are Dr Ochi's natural children and Churin, subject to the latter's adoption being upheld.

[8] As at the date of Dr Ochi's death, there was approximately $8 million in the bank accounts with the BNZ. The bank accounts are moveable property and accordingly under the law of testamentary succession, form part of Dr Ochi's estate in Japan. They are therefore not part of his New Zealand estate being administered by Trustees Executors under the grant of administration. However because of the relative complexity of the situation, Trustees Executors agreed to help facilitate the transfer of the funds to Japan. It accordingly accepted a transfer of the funds from the bank and was in the course of establishing the appropriate party or parties to whom they should be sent in Japan when these proceedings were issued.

[9] The plaintiff issued her initial proceedings against Trustees Executors only. Since then, a draft amended statement of claim has been filed which includes the Japanese heirs and Churin as intended second defendants. The amended statement of claim seeks a declaration that Trustees Executors holds half the bank deposits, including interest, on trust for the plaintiff, and a declaration that the entitlement of the Japanese heirs, if any, to the bank deposits is subject to the trust in favour of the plaintiff. The amended statement of claim also seeks an injunction or other order directing that Trustees Executors pay the plaintiff one half of the bank deposits and all accrued interest on that half.

[10] In order to protect her position until the claim can be heard, Shosha Ochi has obtained without notice an interim injunction restraining Trustees Executors from remitting the money to Japan. As at 21 September 2009, half the proceeds of the bank accounts amounted to $4,322,813.81. Trustees Executors is holding that sum pending the outcome of these proceedings.

[11] Sosha Ochi has also issued a separate set of proceedings against Dr Ochi's estate in New Zealand under the Family Protection Act 1955, and the Law Reform (Testamentary Promises) Act 1949.

[12] For their part, the Japanese heirs strongly dispute that Dr Ochi and the plaintiff were ever in a de facto relationship. They also strongly dispute he ever made any arrangements with her regarding the New Zealand bank accounts. It is clear from the affidavit evidence that there is significant hostility and mistrust between Sosha Ochi and the Japanese heirs. The latter allege the proceedings in New Zealand are a continuation of a scheme which has been carried out in Japan with the aim of unlawfully gaining control of Dr Ochi's assets. Sosha Ochi however alleges there was a feud between Dr Ochi and his children during his lifetime and that one of them in fact tried to kill him.

[13] As for Trustees Executors, it does not see itself as having anything to do with this litigation, having consented only to be administrator of Dr Ochi's estate in New Zealand. As I have mentioned, the bank accounts are not part of that estate and Trustees Executors is accordingly unhappy about being, as it sees it, dragged into a dispute over the accounts. Trustees Executors says having received the money from the bank, its only obligation is to deal with the money in accordance with the directions of the appropriate persons in Japan for distribution in accordance with Japanese law.

[14] Since these proceedings were issued, the following applications have been filed:

i) Sosha Ochi has filed an application to join the Japanese heirs and Churin as a second defendant to these proceedings, being the persons entitled to Dr Ochi's estate in Japan on intestacy (Trustees Executors oppose joinder and the Japanese heirs have filed an appearance under protest as to jurisdiction).

ii) Trustees Executors has applied to strike out the proceeding as disclosing no proper cause of action or to stay it on the ground that New Zealand is not the appropriate forum (forum non conveniens).

iii) Sosha Ochi has applied to set aside the Japanese heirs' protest as to jurisdiction.

[15] By consent, the various applications were heard together. They raised the following issues:

- As a matter of New Zealand law, can there be any cause of action against Trustees Executors when Trustees Executors is only holding the money as agent for the Japanese heirs or as a bare trustee?

- Are the statements alleged to have been made by Dr Ochi about the bank accounts capable in law of amounting to a declaration of trust?

- Is there any basis on which to serve the Japanese heirs and so assume jurisdiction against them?

- Even if there is jurisdiction, is New Zealand the appropriate forum, or should the claim more appropriately be heard in Japan applying Japanese law?

Does the current statement of claim and affidavit evidence disclose a tenable cause of action against Trustees Executors under New Zealand law?

[16] A logical starting point for consideration of the various issues is whether or not the pleadings as they currently stand disclose a tenable cause of action under New Zealand law, putting the overseas dimension to one side for the moment.

[17] Trustees Executors and the Japanese heirs contend the plaintiff does not have any cause of action against Trustees Executors, and accordingly there is not a party who has been properly served in New Zealand. This submission is based on two grounds:

(i) Trustees Executors is no more than a bare trustee in respect of the funds.

(ii) The matters of fact pleaded in the amended statement of claim cannot, as a matter of law, give rise to a trust, a submission which, if correct, would mean the end of any proceeding, whether against Trustees Executors and/or the Japanese heirs.

Is Trustees Executors a proper defendant?

[18] As regards the first ground, what is argued is that Trustees Executors has no legal right to control the distribution of the fund, and therefore is not a proper defendant. According to Trustees Executors and the Japanese heirs, because the fund is part of the Japanese estate, the only possible defendant is the relevant party in Japan. It follows that, in their submission, the current proceeding is fundamentally misconceived. If the plaintiff's concern was to prevent the money going to Japan, her correct and only course of action was for her to issue her substantive proceedings in Japan and seek a freezing order against Trustees Executors.

[19] I disagree. As Mr Logan for the plaintiff pointed out, it is important not to confuse the law of succession and the law of trust. Under the law of succession as it applies to bank accounts, the property at issue is classified as moveable, and on intestacy is subject to distribution in accordance with the law of Dr Ochi's domicile, i.e. the law of Japan. However, what the plaintiff is asserting is that during his lifetime, Dr Ochi conferred a beneficial interest on her in the deposits. The beneficial interest thereby conferred, endured and survived his death. It remained impressed on the chose in action represented by the bank account proceeds. Her case is that Trustees Executors holds the proceeds subject to that beneficial interest and all she is attempting to do in this proceeding is to enforce her proprietary right. In short, the plaintiff's argument is that she has an equitable interest in the proceeds which supervenes or overrides the law of succession. The funds that would admittedly otherwise form part of the estate in Japan have been impressed with a trust in her favour, and therefore the beneficial ownership belongs to her, not the estate.

[20] As regards the status of Trustees Executors, in my view, the correct analysis is that Trustees Executors is holding the money as an agent for the Japanese heirs. I

accept Trustees Executors does not have the legal right to control distribution of the funds, and was not acting as executor, but disagree that it necessarily follows they are not a proper defendant. Assuming the Court were to find there had been a declaration of trust, and hence an initial fiduciary relationship between Dr Ochi and the plaintiff, then under orthodox tracing principles, Trustees Executors must be a proper defendant:

> The general principle laid down in *Re Diplocks Estate* [[1948] 2 All ER 38] is that whenever there is an initial fiduciary relationship, the beneficial owner of an equitable proprietary interest in property can follow or trace it into the hands of **anyone** holding the property, except a bona fide purchaser for value without notice whose title is as usual inviolable. [emphasis added]
>
> Pettit, *Equity in the Law of Trusts* (9ed, 2001) at 530

[21] The plaintiff is therefore in my view entitled to follow the trust fund into the hands of Trustees Executors. Trustees Executors is obviously not a bona fide purchaser for value, but a volunteer, and as a volunteer holds the money subject to any equities created by Dr Ochi in his lifetime.

[22] For completeness, I should add that I do not consider there is anything in the House of Lords' explanation of the tracing doctrine in *Foskett v McKeown* [2000] 3 All ER 97, which detracts from this general statement of principle.

Are the facts as alleged capable in law of supporting a finding of a trust?

[23] As recently noted in *Robertson* v *The Official Assignee* [2008] NZCA 500 at [19], the relevant legal principles are well settled. An express trust may be created in two different ways. The conventional means is by one party transferring property to another as trustee. The other is by the owner declaring a trust over the property which will be effective and binding in law provided there is certainty of intention, certainty of subject matter and certainty of objects. The Court must also be satisfied that a present irrevocable declaration of trust has been made. While express words of declaration are unnecessary, the settlor must use words having the equivalent meaning.

[24] In this case, the plaintiff relies primarily on the words spoken to her by Dr Ochi as constituting the declaration of trust. According to the plaintiff's affidavit evidence, the promise was made in the context of Dr Ochi's dissatisfaction with a draft will that had been prepared. She goes on to depose that Dr Ochi's actual words were as follows:

> I know a good solution. I will change the ownership of half of the bank deposits in New Zealand. Half of that will be about ¥200,000,000 (at the rate of ¥70 to the New Zealand dollar). I will make it a time deposit. I will arrange that you can use the rest with your signature so that you will have as rich a life as before with me. Please feel relieved.

[25] Trustees Executors and the Japanese heirs submit that even on the plaintiff's own evidence, the three certainties are not satisfied.

[26] As regards certainty of intention, they contend the words attributed to Dr Ochi are insufficient to establish a trust, being at best simply a statement of future intention to make a gift, to give Shosha signing rights on bank accounts which would in effect be gifted to her. In support of their submission there was no certainty of intention, they also point to the following:

i) The absence of any evidence that Dr Ochi was familiar with the concept of a trust (a concept which all parties agree is unknown to Japanese law).

ii) Evidence that Dr Ochi continued to access the funds for his own benefit.

iii) Evidence of his intention to use the money to fund proposed business ventures in New Zealand.

iv) The fact money was deposited into the accounts after November 2004.

v) The fact no money was ever set aside for Shosha.

vi) The fact Dr Ochi knew how to open a joint account but took no steps to do so.

[27] In their submission, certainty of subject matter is also not established, because Dr Ochi had several bank accounts in New Zealand and none of them was ever specifically earmarked as being for the benefit of Shosha.

[28] Nor, it is argued, can there be certainty of objects when there is evidence Dr Ochi continued operating on the bank accounts after the creation of the alleged trust without any reference to Shosha.

[29] Some of the matters raised certainly undermine the strength of the plaintiff's claim. However, at this preliminary stage, they are not such as would justify me in holding the claim was so untenable it could not possibly succeed, or that there was not a serious question to be tried.

[30] As the decision in *Paul v Constance* [1977] 1 All ER 195 shows, a trust of a bank account can be declared orally. The word 'trust' need not be mentioned. In any given case, whether there was a declaration of trust requires an examination of the transaction in all the circumstances, including in particular the relationship between the parties. In the present case, the nature of the relationship between Dr Ochi and Shosha Ochi is a highly contentious issue which it is obviously impossible for me to resolve at this juncture. The assessment has also been held to be an objective one, so that where a transaction objectively appears to be a trust, it will be held to be a trust, even if it is unclear whether the settlor actually intended for there to be a trust. Thus, Dr Ochi's possible ignorance of the law of trusts will not necessarily be determinative. Further, it is legally possible for the same person to be settlor, trustee and beneficiary so long as they are not the sole beneficiary. As for the fact further money was lodged after November 2004, in my view that is not necessarily inconsistent with the existence of a trust. Apart from anything else, the plaintiff's evidence is that Dr Ochi repeated his promise on several occasions in 2005.

[31] I also do not accept the argument about there being no certainty of property. On the plaintiff's evidence, Dr Ochi both identified the property, "the bank accounts in New Zealand" and specified an interest in them. As to certainty of objects, the object was clearly the plaintiff.

[32] My conclusion under this head is that the current pleadings are not amenable to strike out on the grounds of disclosing no tenable cause of action against Trustees Executors under New Zealand law.

[33] I turn now to consider the foreign dimension to this case and issues of private international law.

Jurisdiction – service of process out of New Zealand – and forum non conveniens

[34] Under New Zealand law, jurisdiction is dependent on service. The Japanese heirs, who are of course persons out of New Zealand, contend there is no basis to serve them out of New Zealand, and accordingly the Court has no jurisdiction over them. The Japanese heirs say further the matter should be heard according to Japanese law and be heard in Japan. They emphasise the well known principle that a foreign resident abroad should not lightly be subjected to local jurisdiction.

[35] As for Trustees Executors, while it has been validly served in New Zealand, it applies to stay or dismiss the proceedings on the grounds the matter should more appropriately be heard in Japan.

[36] Because the heirs' protest as to jurisdiction relates to service of process out of New Zealand, it falls to be determined under r 6.29 of the High Court Rules. That in turn means the plaintiff must establish:

Either:

i) she has a good arguable case that the claim falls wholly within one or more of the paragraphs of r 6.27; and

ii) the Court should assume jurisdiction by reason of the matters set out in r 6.28(5)(b) to (d)

Or:

i) leave to serve out of New Zealand should be granted under r 6.28, and it is in the interests of justice that leave should be granted.

[37] The plaintiff relies primarily on the first alternative, Mr Logan submitting the second was his fall-back position. Mr Logan acknowledged that the burden of proof lay on the plaintiff in respect of all matters, including the appropriateness of New Zealand as the forum.

Does the plaintiff have a good arguable case the claim falls wholly within one or more of the paragraphs of r 6.27?

[38] Rule 6.27 sets out 22 different categories of claims.

[39] Following *Saito Offshore Pty Limited* v *Wing Hung Printing Co Limited* HC Auckland CIV-2008-404-004621, 29 June 2009, Harrison J, the word 'claim' as used in r 6.27 is not synonymous with the phrase 'cause of action'. Instead, it has a more extensive meaning, encompassing not only the concept of a cause of action but also the factual basis for the claim. Thus, Shosha Ochi must sustain her good arguable case by showing that the operative facts on which the claim is based come wholly within one or more of the 22 categories.

[40] I am satisfied the plaintiff is able to bring her claim within each of the following four categories:

i) Rule 6.27(2)(d): claim for a permanent injunction to compel the performance of an act in New Zealand. This category applies because Sosha Ochi is seeking an injunction to compel Trustees Executors to pay funds located in New Zealand to

her. Counsel for the heirs, Mr Sim, pointed out that the original statement of claim did not make any express reference to a final injunction, and suggested the subsequent amendment was a contrived device to bring the proceedings within r 6.27(2)(d), However, while the word 'injunction' may not have been mentioned in the original statement of claim, the relief sought was in the nature of an injunction.

ii) Rule 6.27(2)(e): the subject matter of the proceeding is located in New Zealand. This category applies because the subject matter of the claim, namely the money in the bank accounts, is located in New Zealand. Counsel argue that because the alleged declaration of trust took place in Japan, this case was similar to decisions such as *Jones v Flower* (1904) 24 NZLR 447 (CA); *William Cable & Co Ltd v Teagle Smith* [1928] NZLR 427; *Bayswater Marine Ltd v NZI Insurance NZ Ltd* HC Auckland CP105/97, 20 May 1998, Giles J. Those cases involved claims for damages for breach of contract or tort, and it was held that on analysis it is the contract or the tort that is the true subject matter of the claim. Thus in *Jones* what mattered was the place where the contract was made, not where the land alleged to have been sold under the contract was located. In my view, those decisions are distinguishable because none of them concerned a plaintiff claiming a beneficial interest in property in New Zealand.

iii) Rule 6.27(2)(g): relief is sought against person domiciled or ordinarily resident in New Zealand. This category applies because Sosha Ochi is seeking relief against Trustees Executors which is a New Zealand based company operating in New Zealand.

iv) Rule 6.27(2)(h): a person out of the jurisdiction is a necessary or proper party to proceedings properly brought against

> another defendant served within New Zealand and there is a real issue between the plaintiff and that defendant that the Court ought to try. This category applies because the Japanese heirs (and possibly Churin) are the persons entitled to the money being held by Trustees Executors subject only to the plaintiff's claim. In those circumstances, the Japanese heirs have an obvious interest in the outcome of this proceeding and should in my view be before the Court to enable it to effectively and completely adjudicate upon it.

[41] In addition to establishing that her claim falls within one of the categories, the plaintiff is also required to satisfy me that "the Court should assume jurisdiction by reason of the matters set out in r 6.28(5)(b) to (d)".

[42] The matters set out in r 6.28(5)(b) to (d) are:

> (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.

Is there a serious question to be tried on the merits?

[43] As will be readily apparent, this raises issues similar to those I have already considered in connection with the argument there was no tenable cause of action against Trustees Executors.

[44] In *Prime Resources Company Limited v Furu* HC Auckland CIV-2008-404-008320, 21 August 2009, Asher J held that under r 6.28(5)(b) there are two considerations:

> i) whether or not there is a substantial or serious legal issue for trial; and

ii) whether there is a credible or plausible factual basis for arguing the legal issue.

[45] For the reasons already traversed, I consider there is a substantial or serious legal issue for trial.

[46] As to whether there is a credible or plausible factual basis, I have already identified aspects of the evidence which undoubtedly detract from the claim, although they are not necessarily fatal to it. In terms of supporting evidence, the plaintiff has provided photographs of family groups which suggest a level of intimacy between her and Dr Ochi as well as a draft will together with affidavits from herself and three other witnesses. Two of those other witnesses (the plaintiff's mother and Dr Ochi's personal assistant) depose that Dr Ochi told them about the arrangements regarding the bank accounts. The credibility of the affidavits is challenged by the Japanese heirs in their affidavits. However, as Mr Logan submitted, the challenge to the evidence cannot be settled from competing affidavits. The test does not require a mini trial. It is sufficient if there is a plausible evidential foundation: see *Harris v Commerce Commission* CA 255/07, 18 March 2009 at [61].

[47] I am satisfied there is a plausible evidential foundation.

Is New Zealand the appropriate forum for the trial?

[48] It was common ground that the leading authority on this issue is the decision of the House of Lords in *Spiliada Maritime Corp v Cansulex Limited* [1986] 3 All ER 843. I was also referred to the decision of *de Dampierre v de Dampierre* [1988] AC 92.

[49] As noted in the New Zealand decision of *Wang v Yin* [2008] 3 NZLR 136, in *de Dampierre*, Lord Goff posited a two-stage enquiry: the primary step is to determine what factors provide a real or significant connection between the subject matter of the claim and the foreign forum; if they show that the other forum is more appropriate or suitable to try the case a stay should be granted unless the interests of the party and the ends of justice dictate otherwise. While one set of factors may

relevantly lead to the necessary degree of connection with a foreign jurisdiction, another set may point the other way towards an injustice if a stay forces the plaintiff into that forum. The over-arching judicial function is to achieve the appropriate balance between the interests of the parties and the ends of justice, consistent with a discretionary power.

[50] Counsel for the Japanese heirs and Trustees Executors between them advance the following reasons as to why the claim should more appropriately be heard in Japan:

- It is the law of Japan that should apply, this being the legal system with which the transaction has the closest and most real connection.

- The Japanese Courts have jurisdiction to consider the alleged arrangement.

- There are already proceedings in Japan concerning other aspects of Dr Ochi's estate.

- The plaintiff's claim is not strong.

- The case concerns the legal implications of an arrangement concerning moveable property which was made in Japan between two people who were living there.

- The connection of the proper defendants (the Japanese heirs) to New Zealand is "fragile in the extreme".

- Apart from the Trustees Executors, all the parties and witnesses live in Japan.

- There will be significant cost and inconvenience in moving all parties and witnesses to New Zealand, translating evidence and adducing evidence on Japanese law.

- Given the significant cultural differences between New Zealand and Japan, a New Zealand Judge would face real difficulties in assessing the credibility of the witnesses and in drawing inferences from conduct. Those difficulties will be compounded by the fact the Judge will also be heavily dependent on translations which may not accurately reflect the true meaning and nuances.

- The Japanese heirs have a genuine desire to have the matter heard in Japan and are not seeking to gain a tactical advantage.

[51] At the hearing, there was some debate as to whether the plaintiff would have any cause of action under Japanese law. Both sides furnished me with affidavit evidence from Japanese lawyers explaining the relevant Japanese law. There was a degree of conflict between the two Japanese lawyers. However, it was common ground that Japanese law does not recognise the concept of a trust, and that under its Civil Code an oral promise of a gift that has not been performed may be revoked at any time by the promisor or after his death by his heirs. One of the lawyers deposed that notwithstanding the seemingly strict words of the Code, Japanese Courts have been prepared to adopt a liberal interpretation and have also developed a doctrine of abuse of rights so that in certain circumstances an oral promise may be enforceable. However, there is no suggestion that the facts of this case would come within any of the established exceptions. I am satisfied the correct position is that while Shosha Ochi has, in theory, a right to bring a law suit in Japan to demand payment of the funds, she has no prospect of succeeding under Japanese law even if her evidence was accepted in its entirety.

[52] Mr Logan contended that in those circumstances, it followed there could only be the one forum, the one which provided the plaintiff with a remedy. It was not a situation of having to choose between competing forums.

[53] Mr Sim however submitted that was an artificial and circular argument which pre-supposed the existence of a trust and which begged the more fundamental question as to which law should apply in the first instance. In his submission, the "arrangement" and its legal consequences (if any) should be governed by Japanese

law because that was the implied choice of Dr Ochi or was the law with which the arrangement was most closely connected. Thus, the correct question was to ask which was the more appropriate forum to apply Japanese law and there could only be one answer to that question.

[54] The fact the arrangement was allegedly made in Japan between persons both domiciled in Japan is obviously highly significant. Against that however is the fact that Dr Ochi introduced the property to New Zealand and continued to deposit money in New Zealand. Any dealings with the property were intended to occur in New Zealand. He visited New Zealand on more than one occasion and according to the plaintiff's evidence he and the plaintiff intended to move to New Zealand. The promise was to be performed in New Zealand. The fund was and is in New Zealand currency. It represented a chose in action which was enforceable in the New Zealand Courts.

[55] In my view, the law governing this claim is the law of New Zealand and the fund is susceptible to this Court's equitable jurisdiction.

[56] I am also of the view after weighing up all the factors identified by counsel that New Zealand is the appropriate forum.

[57] In reaching that conclusion, I have been particularly influenced not only by my conclusion that New Zealand law applies but also by the existence of the other New Zealand proceeding with which this proceeding could be consolidated. The Japanese heirs have submitted to jurisdiction in the other proceeding and it is well advanced. In those circumstances, arguments about cultural nuances and the cost and inconvenience to the parties and witnesses in having to travel to New Zealand lose much of their cogency. The credibility of the plaintiff and the nature of the relationship between her and Dr Ochi will be critical in the other proceeding, just as it is in this proceeding. So too will issues about the interactions between the parties; what was said and what was done. That this is indeed the case is reinforced by the fact that for the purposes of this hearing all parties relied on the affidavit evidence filed in the other proceeding.

[58] I acknowledge that there are also of course proceedings involving the Ochi family that are or have been before the Courts in Japan. However, the Japanese proceedings in which the plaintiff has participated – those involving the status of her two children – do not involve property issues, while those in which she was not a party related exclusively to the specific issue of company shares and certain documentation.

[59] Mr Sim argued there was a significant difference between this proceeding and the other New Zealand proceeding. He submitted the latter rest on statutory concepts which are familiar to a New Zealand Judge. I do not accept that is a valid distinction. New Zealand Judges are also familiar with the concept of a trust. In my view, all the proceedings that have been filed in New Zealand essentially involve the application of familiar legal principles and concepts to unusual facts which a New Zealand Judge is likely to find very challenging, but which he or she will be required to resolve.

[60] My conclusion is that overall the interests of justice lie in this case being heard in New Zealand.

Outcome of hearing

[61] Trustees Executors' application to strike out or stay the proceeding on the ground there is no tenable cause of action and on the ground of forum non conveniens is dismissed. The interim injunction is to remain in place.

[62] The Japanese heirs' protest as to jurisdiction is set aside.

[63] The application for orders joining the Japanese heirs and Churin as Second Defendants is granted.

[64] There will also be an order appointing Mr Gerald de Courcy as litigation guardian of Churin Ochi, with Mr de Courcy's costs being met out of the estate, he having consented to that appointment and having been appointed litigation guardian

in the related Family Protection Act proceeding. The proceedings are to be served on Mr de Courcy on behalf of Churin.

[65] My understanding from the hearing was that if joinder were granted, Mr Sim would accept service of the proceedings on behalf of the Japanese heirs. If however, I am wrong about that, then leave is reserved to the plaintiff to apply for further directions as to service of the proceeding if necessary.

[66] Leave is also reserved as regards costs, should the parties be unable to reach agreement.

Solicitors:
Ross Dowling Marquet Griffin, PO Box 1144, Dunedin 9054
Downie Stewart, PO Box 1345, Dunedin 9054
D Tobin, PO Box 1424, Dunedin 9054
Gallaway Cook Allan, PO Box 143, Dunedin 9054
Greg Kelly Law, PO Box 25243, Wellington 6146