

AN INTERIM NON-PUBLICATION ORDER APPLIES TO SPECIFIC
DETAILS CONTAINED IN THIS JUDGMENT UNTIL FINAL DISPOSITION
OF THE PROCEEDING OF FURTHER ORDER OF THIS COURT.
SEE [121] OF THIS JUDGMENT.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE

CIV-2024-404-2341
[2024] NZHC 3907

BETWEEN	AVRAHAM YAACOV AGAM Plaintiff
AND	JONATHAN ANDREW MOON First Defendant
	OUTER ASPECT IP LIMITED Second Defendant

Hearing:	14 November 2024
Appearances:	KT Glover and CI Hadlee for the Plaintiff FE Geiringer and SGT Ma Ching for the Defendants
Judgment:	18 December 2024

[REDACTED] JUDGMENT OF BECROFT J
[As to application to rescind interim injunction]

*This judgment was delivered by me on 18 December 2024 at 4pm
pursuant to r 11.5 of the High Court Rules 2016.*

Registrar/Deputy Registrar

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Solicitors/Counsel:
Hudson Gavin Martin, Auckland
LeeSalmonLong, Auckland
K Glover, Shortland Chambers, Auckland
F Geiringer, Lambton Chambers, Wellington

Application and result

[1] This is an application to rescind or, in the alternative, vary an interim injunction.

[2] In the end I conclude that the interim injunction should continue. There are at least five seriously arguable questions in this dispute which only a full evidential hearing can determine. The balance of convenience favours, but only just, continuation of the injunction. However, I also conclude that in these unusual circumstances, Mr Avraham Agam should provide NZD 2 million in support of his undertaking as to damages. What follows are my detailed reasons.

The parties

[3] The plaintiff, who obtained the interim injunction, is Mr Agam, a 96-year-old internationally renowned artist who lives in Tel Aviv, Israel.

[4] Mr Agam designs, amongst other things, lenticular works, being three-dimensional artworks made of various materials including plastic strips, which can seem to change in appearance depending on the angle from which they are viewed.

[5] The first defendant, who applies to have the interim injunction set aside or varied, is Mr Jonathan Moon. He is the director of the second defendant, Outer Aspect IP Limited (OAIP).

[6] OAIP provides New Zealand-based services to Mr Agam in relation to the production of his lenticular pieces. These services include preparing computer models of Mr Agam's digitally provided designs and the subsequent creation of the physical artworks (both originals but mainly prints) using what I understand to be a sophisticated 3D printing process.

[7] The parties have worked together for approximately 12 years. OAIP has undertaken the production work, as described, since about 2016.

The dispute

[8] The working arrangement between Mr Agam and Mr Moon was said to be mutually beneficial until about 2022. Indeed, Mr Moon would visit Mr Agam in Tel Aviv, and in one instance Paris, to take instructions from him and to discuss production. On one occasion, Mr Agam and his adult children visited Mr Moon in Auckland to inspect production and to sign a number of his artworks.

[9] However, their business relationship has now irretrievably broken down. Mr Agam says there have been significant and unexplained increases in the amounts charged by OAIP. Mr Moon and OAIP, for their part, maintain that Mr Agam has simply failed, refused, or generally prevaricated in terms of paying properly authenticated accounts issued in accordance with pre-agreed terms and conditions.

[10] This proceeding relates to 3,782 artworks consisting of 266 “originals” and approximately 3,500 “prints” of designs by Mr Agam. These artworks were produced by OAIP. They remain in OAIP’s possession. They are apparently professionally stored in a series of 15 specialised crates in a secure and undisclosed Auckland location.

[11] The retained artworks form part of a greater body of 9,122 originals and prints that Mr Agam contracted with OAIP to produce over the course of their dealings, starting in 2016. 5,346 artworks were delivered to Mr Agam in Tel Aviv in three tranches and OAIP has been paid for their production and delivery.

[12] However, since that time, and after Mr Agam visited New Zealand between November 2022 and March 2023, the business relationship distinctly soured. During his time in New Zealand, Mr Agam inspected and signed a disputed number of artworks. After that process was completed, a dispute arose over payment for the services provided by OAIP. That dispute remains unresolved and is at the heart of this proceeding.

[13] OAIP claims that more than USD 4.1 million is outstanding. Mr Agam disputes this and considers many or all of the charges to be inappropriately inflated. He says he did not agree to the alleged terms and conditions. He says he has sought,

but is yet to obtain, substantiation of alleged third-party, storage, insurance, and interest costs. He says he disputes those costs. He also challenges what are said to be outstanding production costs.

[14] While it is accepted that Mr Agam paid over USD 999,000 in three amounts during 2022, the purpose of these payments—whether on account or as a final payment for production costs—is very much in dispute.

[15] For its part, OAIP maintains the costs are all legitimate, in line with previously paid accounts and incurred in the normal course of their business, and Mr Agam's concerns are entirely unfounded and meritless.

[16] Mr Agam continued to seek details of the amounts owed and proper substantiation of the accounts. He also sought access to, and inspection of, all the artworks that OAIP says it has in its possession. This was to check whether the artworks were all signed by Mr Agam; were authorised by him; and were in good condition and generally saleable (in terms of production quality and any impacts of OAIP's storage).

[17] OAIP, on the other hand, has become increasingly frustrated by Mr Agam's delays in substantively responding to its requests for payment. Instead of setting out his position as to which fees were payable, it is said that Mr Agam's response challenged the original terms and conditions of the business agreement, requested significant volumes of material to justify OAIP's commercial fees, [Redacted]. OAIP says it made repeated attempts to contact Mr Agam directly to resolve the issue, but without result.

[18] It seems something of a stalemate arose.

[19] Eventually, OAIP took steps to explore a potential sale of the artworks in its possession. In doing so, OAIP (now) claims it has a lien over the artworks, entitling it to sell a sufficient number of them to satisfy Mr Agam's outstanding debt.¹

¹ Pursuant to Contract and Commercial Law Act 2017, ss 341–344.

[20] Mr Agam then became aware, through his international connections, that OAIP was offering, or considering offering, approximately 2,500 artworks it had produced on behalf of Mr Agam in its possession to galleries and third parties. Mr Agam understood this was to be sometimes in bulk, on a “fire sale” basis, for a minimum price of USD 1.6 million.

[21] It is accepted that OAIP did so without notification to Mr Agam. In Mr Agam’s view, if properly marketed and sold on an individual basis, the 2,547 artworks in total might fetch approximately USD 20 million.

Obtaining the interim injunction

[22] The tender process was scheduled to close on 23 September 2024. Mr Agam says he became aware of this “fire sale” only shortly before the closure date, on 17 September 2024. Mr Agam was extremely concerned about the prospect of the artworks, constituting his intellectual property being sold without his permission, to cover costs that he generally disputed. But Mr Agam says he was also very concerned as to the downstream impact on the value of his work. He maintained that flooding the market with his unique creations risked significantly devaluing their worth. This would also, he said, devalue the worth of artworks already sold to buyers.

[23] Mr Agam immediately requested undertakings from Mr Moon and OAIP that they would not sell the art until the dispute regarding the invoices was resolved.

[24] Attempts were made to contact the defendants and their solicitors to obtain such undertakings. On 19 September 2024, Mr Moon advised Mr Agam’s counsel that he refused to provide the undertakings requested unless Mr Agam paid the amount claimed by OAIP, entered into a full and final acceptable settlement agreement, and arranged for the collection of the art. Counsel for Mr Agam replied seeking undertakings that Mr Moon and OAIP would not dispose of the artworks or create further copies until further order of the Court, and delivery of the art was to be arranged to Mr Agam within 10 days.

[25] No further response was provided. On 23 September 2024, Mr Agam sought and obtained a without notice interim injunction against Mr Moon and OAIP.²

[26] In the judgment ordering the without notice interim injunction, Wilkinson-Smith J was satisfied that there was a serious question to be tried including issues of infringement of copyright should the defendants sell or reproduce the art. The Judge considered that the balance of convenience favoured the granting of interim injunctive relief because if the sale went ahead, it would affect Mr Agam's ability to recover the artworks. Accordingly, the interim injunction was granted.

[27] In the present application, OAIP applied to rescind the without notice interim injunction. Mr Agam has also sought confidentiality and non-publication orders [Redacted].

Problems with this hearing

[28] The application to rescind the affidavit is accompanied by a significant bundle of documents, a bundle of authorities and detailed submissions from both parties.

[29] The matter was urgent for OAIP as it faced repayment of a significant loan of approximately NZD 1.9 million on 19 December 2024.

[30] I understand, in general terms, that without OAIP being able to either sell at least some of the artworks in the exercise of its asserted lien to satisfy the alleged debt, OAIP will face serious liquidity problems.

[31] There was no time available for the Court to hear full arguments on this application before Christmas.

[32] Counsel, therefore, agreed to "shoehorn" the hearing into a one-and-a-quarter hour "slot" available for straightforward matters as part of a Duty Judge week in Auckland.

² See *Agam v Moon* [2024] NZHC 2749.

[33] Both counsel responsibly admitted that this was, they felt, the only alternative open to them. At the same time, they accepted at the beginning of this hearing that realistically there was clearly insufficient time available for proper argument.

[34] I adjourned the matter for a day, in the hope that responsible and pragmatic settlement might take place. Such hopes proved in vain. I heard argument the next day, allowing 30 minutes for each party with 15 minutes in reply.

[35] The arguments were therefore truncated and, in all the circumstances, somewhat cursory. I now make a decision, as best I can, based on the short oral arguments and the voluminous material previously filed.

[36] I deal with each of the issues raised in turn.

First issue: rescission for material non-disclosure?

[37] As can probably be expected, the parties are divided on this question. In my view, it is a somewhat profitless exercise to resolve it. Pragmatically, it is unnecessary given the pressure of time. More importantly, all the relevant, on notice, arguments are now before the Court anyway. The real issue now is not whether (for alleged procedural failures) the interim injunction ought to have been granted, but whether it should continue. Mr Geiringer, for Mr Moon and OAIP, responsibly, seemed minded to accept this. Nevertheless, out of respect to counsels' submissions, I briefly traverse the arguments.

[38] Mr Geiringer is of the view that Mr Agam did not comply with r 7.23 of the High Court Rules 2016. Particularly that there was material non-disclosure of relevant facts and of defences that might be relied upon by OAIP.

[39] Mr Geiringer emphasises that Mr Agam did not file a completed affidavit. In fact, it seems that no draft affidavit by Mr Agam even existed at the time of filing. Also, the application was not accompanied by a statement of claim.

[40] Mr Geiringer was extremely concerned that Mr Agam’s solicitor’s summary of OAIP’s position was, in his view, not only inappropriately brief [Redacted]. Neither was it disclosed by Mr Agam that he had requested OAIP to develop and produce over 9,000 prints since 2016, including the prints in issue, and that he had already paid for the majority of the services provided in respect of those prints without demur.

[41] Equally fundamental, Mr Geiringer says that Mr Agam’s solicitor failed to draw the Court’s attention to OAIP’s common law and statutory rights to satisfy outstanding debts by way of an artificer’s lien.

[42] In Mr Geiringer’s view the non-disclosure was serious, has not been fully remedied, and warrants rescission.

[43] On the other hand, Mr Glover argues in the urgency of the situation, all relevant facts were sufficiently drawn to the Court’s attention. Mr Agam’s application related only to the disputed invoices which were all set out together with significant other documentation in an affidavit by a law clerk employed by solicitors for Mr Agam. In Mr Glover’s view, Mr Agam’s solicitor correctly recorded OAIP’s view of its rights to sell or dispose of the artworks, including under the Contract and Commercial Law Act 2017 (CCLA).

[44] Given the closing date of the imminent tender and the limited time in which to prepare the application and accompanying documents, Mr Glover contends all reasonable steps were taken to ascertain OAIP’s position and any possible defences.

[45] Mr Glover submits that the threshold for recession for a without notice interim injunction based on material of non-disclosure is high, and it is not met here. He submits that such a step will occur “only in egregious cases”,³ where the non-disclosure is “so appalling that the ultimate sanction of discharge would be justified”,⁴ or where there are “exceptional circumstances”.⁵ Mr Geiringer’s view is that Mr Glover has overstated the severity of the test.

³ *Allen v Commissioner of Inland Revenue* (2004) 21 NZTC 18,718 (CA) at [93].

⁴ *Jennings v Crown Prosecution Service* [2005] EWCA Civ 746, [2005] 4 All ER 391 at [64] per Longmore LJ.

⁵ *Green Way Ltd v Mutual Construction Ltd* [2021] NZHC 1704 at [76]–[77].

[46] I have some sympathy for Mr Geiringer's position. However, Mr Agam's solicitor was faced with an urgent situation. He made his position clear, and in the urgency of the situation, could have hardly done more. As I say, this is not a matter that I need to resolve. I have simply recorded the parties' position for the record. It is not necessary for me to go further than these comments.

[47] In the light of the full written arguments presented to the Court, it is in everyone's interest that I now consider whether the interim injunction be continued. As counsel agree, that involves first an examination of whether there is a serious question to be tried, and if so, where the balance of convenience lies.

Second issue: is there a serious question to be tried?

Can it be established, at this stage, what is owed by Mr Agam to OAIP?

[48] The starting point is what amount is owed by Mr Agam to OAIP? This, in turn, revolves around a series of five disputed invoices,⁶ which were all received in an accumulated "wash-up" account for USD 3,652,497.46.

[49] The major invoice, no. 3291 for USD 3,112,162.95 dated 30 November 2023, is for all outstanding costs in respect of "Optical Effect Lenticular Art Projects Completion" from 27 December 2017 until 30 November 2023. Mr Agam is concerned with this invoice given it covers such a long period and comes after he had already paid accounts during that period for production. The other four invoices relate primarily to alleged high-security storage costs, overdue interest, and capital advances.

[50] During 2022, as I understand it, Mr Agam made three payments totalling approximately USD 990,000. These include USD 74,000 said by OAIP to be for a studio in New Zealand where Mr Agam's prints could be exhibited; USD 218,114 for production of large originals, received by OAIP in April 2022; and USD 689,000 received from Mr Agam on 9 December 2022. This last payment, Mr Moon deposes, was sought as further payment for services provided by OAIP as part of the overall

⁶ Invoice Nos. 3289, 3291, 3292, 3294 and 3297. These are all recorded in an affidavit filed in support of Mr Agam dated 19 September 2004.

project. However, it was paid prior to those fees being set out in a finalised invoice by OAIP.

[51] I have no reason to doubt that total payment of USD 990,000 was included by OAIP in the final accounting “wrap up” in the February 2024 invoice. That said, I infer that the USD 689,000 paid by Mr Agam, is regarded by him as a final payment but, by Mr Moon, as a part payment in respect of a final invoice for production costs still to be rendered. In Mr Agam’s view, there are no outstanding amounts owed by him to OAIP for the production of the works.

[52] As I analyse the invoices and the significant supporting documentation, it is difficult to establish, without detailed evidence, what is the specific production work to which the largest invoice (invoice no. 3291 for USD 3,112,162.95) relates. I can well understand Mr Agam’s concerns regarding authentication of the invoice given that it refers to work over a six-year period, which are effectively outstanding production costs for the whole project.

[53] It may be that this can all be quickly resolved. Mr Geiringer sought to set out an analysis of production costs claimed in invoice no. 3291 compared to production costs set out in invoices previously paid for artworks produced and delivered. I agree that the costs seem, generally, to be levied at a very similar rate. And it seems that the costs relate only to the artworks currently in OAIP’s possession and not delivered because of non-payment. But without hearing further evidence, I could not be sure even on the balance of probabilities.

[54] My point is that Mr Moon may well be able to substantiate the mathematics of the disputed invoices and may be able to properly reconcile them all from a bookkeeping point of view, but that is beyond the scope of this hearing. I have pored over them. As I say, I simply cannot be sure that they are genuine and establish what, if anything, is owed by Mr Agam to OAIP. While there is much that OAIP can point to regarding past dealings and the conduct of business, I am still very unsure as to the exact amounts involved and do not believe this can be resolved other than through a full defended hearing with evidence called. There is a serious issue to be tried in this respect.

Are the terms and conditions of the contract between Mr Agam and OAIP established?

[55] An even more fundamental issue is what were the terms and conditions of the agreement between Mr Agam and OAIP, particularly as to payment, storage, passing of title, and interest?

[56] Mr Moon deposes that OAIP has a set of standard commercial terms. He concedes those terms have changed over time. He accepts Mr Agam has never signed a copy of the terms and conditions. However, he deposes that to the best of his recollection, he gave Mr Agam a printed copy of the then current terms during a meeting in Mr Agam's Paris apartment in 2016 at the start of the project. However, he accepts he has no written record of that. The three-page terms and conditions of supply are attached to his affidavit.

[57] On the other hand, Mr Agam says that he never agreed to the terms and conditions and neither did he place any orders under those terms. He deposes that the terms and conditions, which he had never previously seen, were attached to the disputed invoices, I presume in February 2024. In Mr Agam's view, the terms and conditions were provided in an attempt to justify the charges in the disputed invoices. Mr Agam considers them to be highly unfair and he says, "even preposterous". He deposes that he would never have agreed to use OAIP's services in the first place under any of the disputed terms.

[58] For instance, in his view, the terms and conditions introduced for the first time, a requirement to pay interest at 2.5 per cent monthly, and an establishment fee of three per cent charged every six months on the total amount due from the buyer.

[59] Mr Agam also says that storage charges for "Secure Storage, no sunlight, Climate controlled" (for the amount of USD 664,155.54) were never agreed to and neither, in Mr Agam's view, have they been substantiated. However, I note that Mr Agam allegedly requested OAIP to store his artworks for a significant time. Nor does Mr Agam dispute he requested OAIP to set up the signing studio or that it was intended that OAIP be paid a commercial fee for that service. Mr Moon says that his agreed fee was USD 2,500 per day of operation.

[60] Mr Agam also disputes what he describes as “numerous third-party invoices” for costs that OAIP says it has incurred on his behalf. However, in Mr Agam’s view OAIP has never provided supporting evidence for those costs and he did not agree to pay them. He points, for instance, to weekly rental costs between November 2022 and February 2023 for a number of unexplained items including dehumidifiers, security cameras, chairs, desks, vacuum cleaners, water coolers and mini fridges. These rental invoices total USD 64,795.09. There is also USD 109,716.00 charged for insurance and short-term signing studio hire for approximately four months between November 2022 and February 2023.

[61] Mr Agam goes even further and points to cl 14.4 of the purported 2016 terms and conditions which irrevocably assigns the intellectual property created by OAIP, especially when designing and creating artworks in lenticular or 2D or 3D processes at the buyer’s request, to OAIP. No professional artist, Mr Agam deposes, would agree to “such preposterous copyright terms”.

[62] The prevailing terms and conditions cannot be resolved by close attention to the affidavit evidence. This is the more so given Mr Moon’s concession that he has no record of any written terms and conditions ever having been passed to Mr Agam, at least not until the final wash-up account of 29 February 2024.

[63] There is then a substantial and significant dispute regarding what terms and conditions governed the business relationship. Upon reflection, I reach the view that only a substantive hearing with the calling of evidence can resolve this issue. Thus, there is a serious question to be tried in this respect also.

[64] I had already reached this conclusion when Mr Agam filed further affidavit information which, on its face, raised more significant concerns.

[65] That further affidavit is from a digital forensic expert. In brief, his conclusion is that the 2016 terms and conditions attached to Mr Moon’s affidavit were created or last edited in 2023 or 2024. In Mr Glover’s submission the digital forensic expert’s evidence may well vindicate Mr Agam’s “suspicions as to the authenticity of the Annexed Terms, in that those terms were created recently rather than in 2016”.

[66] While I was finalising this decision, Mr Geiringer filed a memorandum in response. In his view it would be wrong for the Court to consider the new expert evidence. There is no time for Mr Moon to retain his own expert in reply. In any case, there may well be an innocent explanation as to changing the file name.

[67] I reiterate that I had already reached my conclusions regarding the need for evidence concerning the terms and conditions under which Mr Agam and OAIP entered into business. I will not take the new information into account. This affidavit evidence from a digital forensic expert simply confirms, not that confirmation is required, that there is a serious issue to be tried regarding the nature of the terms and conditions of the parties' contractual business relationship.

Artificer's lien?

[68] The thrust of Mr Geiringer's argument was that the terms and conditions of the parties' business agreement could not be seriously disputed, and the invoices were genuine and reliable. Therefore, OAIP was entitled to an artificer's lien over the artworks in its possession.

[69] Indeed, in Mr Geiringer's submission, the real focus of whether there is a serious issue to be tried turns on OAIP's lien over the artworks. In his view the existence of a lien was unarguable and justified rescission of the interim injunction, therefore opening the door for the sale of Mr Agam's artworks.

[70] Put another way, Mr Geiringer's submission (in the double negative), is that there is no arguable case in these circumstances that there is not a lien entitling OAIP to sell the artworks.

[71] Given my conclusion that the terms and conditions of the agreement and the amount owing are far from straightforward and are, in themselves, serious questions that need to be tried, strictly speaking, Mr Geiringer's argument does not arise.

[72] Nevertheless, if I am wrong about those previous conclusions, it is worth briefly setting out his argument. In fact, I would have concluded, if necessary and contrary to Mr Geiringer's argument, that there were two further serious questions to

be tried: first as to whether OAIP has an artificer's lien over the artworks and a consequent right of sale under CCLA; and second whether such a lien and the asserted sale right trumps Mr Agam's protections provided by the Copyright Act 2004.

[73] The worker's or artificer's lien is of long-standing legal provenance. According to *Garrow and Fenton's Law of Personal Property in New Zealand*, such a lien pre-dates modern notions of contract, and arises from the relationship between the parties rather than being specifically conferred by contract.⁷ The text refers to the statements in *Tappenden v Artus* that the common law lien of an artificer is of very ancient origin, dating from a time when remedies by action upon contracts not under seal were still at an early and imperfect stage of development.⁸ The learned authors of *Law of Personal Property in New Zealand* note that a bailee for work to be done upon a chattel has a lien on it for their charges for the labour and skill expended upon it (for example, printers on books they have printed).⁹

[74] Indeed, Mr Geiringer, in a trip back in time of over two hundred years, referred to *Blake v Nicholson* where a printer was commissioned to print a commentary on the Bible.¹⁰ In that case, Lord Ellenborough CJ noted:¹¹

I think the defendant had a lien for the whole balance, the work being an entire word in the course of prosecution, upon the same principle that a tailor, who is employed to make a suit of cloaths, has a lien for the whole price upon any part of them.

[75] Mr Geiringer could not point to any 21st century case applying this principle to the work of printing and production of artworks from a digital file using computer modelling. But by parity of reasoning, Mr Geiringer argued that work done to produce the lenticular pieces including preparing computer models of Mr Agam's design and the creation of physical pieces of work, can be likened to the work of a printer in the old days, and the work of a tailor. Thus, he submitted OAIP clearly has a common

⁷ Roger Fenton *Garrow and Fenton's Law of Personal Property in New Zealand* (7th ed, LexisNexis, 2010) at [7.13].

⁸ *Tappenden v Artus* [1964] 2 QB 185 (CA) at 194.

⁹ Fenton, above n 9, at [7.13]. See also the comments by Courtney J in *Horizon Pacific Group Ltd v NZNet Internet Services Ltd* HC Auckland CIV-2009-404-7597, 11 December 2009.

¹⁰ *Blake v Nicholson* (1814) 3 M & S 167, 105 ER 573.

¹¹ At 573 (emphasis added).

law possessory artificer's lien, conferring on OAIP a right to retain the created "goods"—that is, the artworks.

[76] Mr Geiringer further submitted that although the common law does not give the holder of an artificer's lien the right to sell the chattel in issue, absent an order of the Court, the CCLA most certainly does. In his view, under s 341 of the CCLA, a person entitled to an artificer's lien has a right to sell the relevant goods at auction if payment has been outstanding for two months or more. The subsequent sections (ss 342–344) govern how the sale is to be carried out, and how proceeds are to be distributed.

[77] In his view, this s 341 right takes priority over the rights conferred by ss 16(1)(b) and 31 of the Copyright Act 1994. Those rights, respectively, give Mr Agam the exclusive right to issue copies of his work to the public, and mean that any issue of copies to the public is a "restricted act" under s 16.

[78] Further, Mr Geiringer submits that two provisions in the Copyright Act itself, make clear the priority of lien in this case. First, s 66 which provides that doing an act authorised by another enactment (here, the sale is authorised by the CCLA) does not infringe copyright. Second, s 255 provides that nothing in the Copyright Act affects any right or privilege of any person under any other enactment (here, the right of sale under the CCLA).

[79] Despite Mr Geiringer's cogent argument regarding the artificer's lien, and OAIP's apparent rights which arise, I would nevertheless have held that in this respect also there is a serious issue to be tried. In reaching this conclusion I adopt many of Mr Glover's arguments.

[80] An artificer must be given possession of tangible goods on which to do work. Mr Glover contends that there is a serious argument as to whether Mr Agam's digital files, which are intangible and cannot apparently be physically possessed, and what flows from them, can be the subject of a lien. My preliminary view would be that, to bring the law into the 21st century, computer files sent to an artificer from which tangible artworks are produced, and the resulting works themselves, could well

constitute “goods” sufficient to establish the existence of a lien. However, I would need much more detailed evidence as to the processes required and what exactly Mr Agam sent to OAIP and what exactly it did to produce each work. Generally, I accept that the common law has been slow to extend the concept of common law liens and has taken a cautious approach. In any case, the interim injunction stage is not the forum to develop such novel law.

[81] I also accept that on the evidence, OAIP does not seem to have “improved” the property provided by Mr Agam, as is required for the creation of a lien.¹² There was a suggestion by Mr Geiringer in his submissions that OAIP suggested amendments or improvements to the digital design. This would be material to establishing a lien. More evidence, properly tested, is required.

[82] There is also a question as to whether the contract between the parties envisaged the artworks being shipped to Israel before Mr Agam was obliged to pay for them. This is in dispute. But there is something in Mr Glover’s arguments that where the arrangements necessarily entailed OAIP parting with the artworks prior to payment, OAIP cannot be entitled to a lien.

[83] In my view, Mr Glover is also right to suggest the artificer’s lien, if it exists in this case, could not and should not extend to costs outside the costs of production and improvement of the artworks. The mere maintenance and storage of the artworks, and any interest and insurance costs, have traditionally been considered out of scope for an artificer’s lien given the cases he referred to.¹³ This, too, is a serious issue to be considered.

[84] Just as there are serious questions to be tried regarding the existence of a common law artificer’s lien at all, so too there are serious questions as to the applicability of the asserted right of sale under s 341 of CCLA.

¹² *Horizon Pacific Group Ltd v NZNet Internet Services Ltd*, above n X, at [10]–[14].

¹³ *Sheianov v Sarner International Ltd* [2020] EWHC 1214 (QB), [2020] All ER (D) 100 (May) at [56] and [71]–[73]; and *Southrans Ltd v Gilbert Engineering Ltd (in liq)* HC Auckland CP155/95, 16 September 1999.

[85] First, as to whether the digital computer files are goods, as defined in CCLA rather than intangible intellectual property; and whether the work to produce those tangible artworks satisfies the s 341 wording of OAIP having “done work *on* goods in *[OAIP’s] possession*”. This is not the occasion to resolve those questions.

[86] Secondly, Mr Glover strongly submits that Mr Agam’s Copyright Act protections cannot be comprised or attenuated by an asserted CCLA sale right arising from the lien.

[87] Mr Glover submits that Mr Agam is the owner of the artworks and the copyright in those works and their sale would infringe his copyright. Mr Glover submits that OAIP’s retention of the artworks, therefore, amounts to the tort of conversion given that Mr Agam has been demanding the artworks be returned since at least January 2024. Mr Glover is of the view that there is just no basis to conclude the rights of a lien holder override the Copyright Act.

[88] The interplay between the Copyright Act and CCLA is a significant question, and one which neither party could produce relevant authority. In my view, it would be inappropriate to resolve this important issue at the interim injunction stage.

[89] To the extent that the application for rescission turns on the existence of a lien and sale rights, I would conclude that while there is substance in Mr Geiringer’s argument, he cannot establish there is no arguable case that there is not a lien.

[90] Therefore, as I have it, there are at least five seriously arguable questions:

- (a) What exact amount, if any, is owed by Mr Agam to OAIP?
- (b) What terms and conditions governed their contractual relationship?
- (c) Does OAIP have an artificer’s lien over Mr Agam’s artworks it possesses?
- (d) If so, does the CCLA confer on OAIP a right to sell those artworks?

- (e) Does any such right of sale trump Mr Agam's protections under the Copyright Act?

[91] And this is to say nothing of Mr Agam's tortious cause of action of conversion of his artworks by OAIP, which is set out in his statement of claim. I heard no preliminary argument on this point—presumably because conclusions as to the five questions above will resolve that question.

Third issue: does the balance of convenience favour maintaining the interim injunction?

[92] As to the balance of convenience analysis, this is a broad question with a wide ambit.

[93] The first thing to say is that I cannot ignore the conduct of OAIP in attempting to sell many of the artworks in its possession without notice to Mr Agam. On its face, this risks major devaluation of his brand by flooding the market with his artwork at one time. And it is unfair to existing owners of his art, the value of which would drop. I have no detailed evidence on this point, but it seems for the purposes of this interlocutory issue a straightforward enough assumption.

[94] I also accept that Mr Agam wishes, not unreasonably in my view, to independently inspect his artworks to ascertain their current condition. In light of the opposing contentions of the parties, I cannot establish why this has not happened.

[95] And in the balance of convenience analysis, I accept that OAIP still retains significantly valuable artworks and to that extent has a form of valuable security.

[96] Neither can I understand why OAIP has taken so long to resolve its outstanding accounts, given that some of them relate to unpaid production costs dating back to 2017. More detailed evidence may make the position clear but, on my assessment, OAIP does not exactly have clean hands in this respect. All this points towards continuation of the interim injunction.

[97] On the other hand, as I mentioned to counsel during argument, the one concern I have, and which is not easily ignored, is Mr Moon's evidence that OAIP will face significant financial hardship given the parties cannot resolve the underlying fee dispute. OAIP has no other significant assets that can be used to pay existing creditors, and no current income stream.

[98] OAIP is required to repay a loan of NZD 1,788,438.09 to Fifo Capital Limited Partnership (FIFO). The loan falls due on 19 December 2024—in just a few days' time. OAIP does not have available funds to repay the loan in full, or any significant part of it, unless it is paid by Mr Agam or is at least able to sell some of the prints.

[99] This information came late in the piece in an affidavit filed with the Court dated 14 November 2024. It is said OAIP incurred the debt to meet the costs of producing the artworks in issue and providing the other services requested by Mr Agam.

[100] As I understand Mr Moon's evidence, this loan represents a significant short-term existential threat to OAIP. I am told that an extension cannot be negotiated.

[101] I am not helped by the fact that OAIP has not yet formalised financial statements for the years ending both 2023 and 2024. But this is, in part, said to be caused by this dispute which has had an overwhelming impact on OAIP's financial position in relation to those two financial years.

[102] Also, it is clear that OAIP has other debts and ongoing costs including rent, insurance and staff costs. OAIP has also been served with a statutory demand in the sum of GBP 40,000 relating to a debt owed under a costs judgment in the jurisdiction of England and Wales. It is clear that the repayment of the FIFO loan is the major, but not only, challenge for OAIP. To the best of Mr Moon's knowledge, OAIP will require an additional NZD 460,000 to cover ongoing costs and to manage all debts to avoid OAIP's liquidation during the next six months (that period being an estimate of the shortest time by which a Court may be able to hear and resolve the substantive issues).

[103] In short, I accept Mr Moon’s evidence that OAIP has no regular income, is meeting its ongoing costs through a credit facility with significant monthly interest costs and with a balloon payment of NZD 1,778,438.09 imminent.

[104] Mr Moon deposes that he, himself, has no significant personal debts. His dwellinghouse is owned by a family trust and is mortgage free. However, both he and his family trust are guarantors for the debts owed by OAIP to FIFO.

[105] In these circumstances the balance of convenience becomes even. There will be very significant consequences for both parties either way. Mr Agam’s artworks will devalue and his reputation will suffer if the interim injunction is lifted, as some sort of “fire sale” of his works will be inevitable. If the injunction is continued, Mr Moon faces the prospect of losing his business.

[106] Where, as here, the rival considerations are equally poised, the more appropriate it will be to have regard to the relative strengths of the cases of the parties.¹⁴ But even that is of little help, as I would regard the two cases as relatively even, with strong and seriously arguable positions on both sides. At the least it can be fairly said that neither argument is clearly stronger than the other.

[107] All in all, the balance of convenience is delicately poised.

[108] I have come to the view that the balance of convenience favours (but only just) preserving the status quo. However, given the potentially serious consequences for OAIP, it is appropriate that continuation of the injunction is made conditional on the provision of security for Mr Agam’s undertaking as to damages.¹⁵ He resides on the other side of the world. He has provided little detailed financial information to support his undertaking, both in relation to the undertaking as to damages and for OAIP’s costs. The need for such security is particularly so given that Mr Agam is domiciled in Israel and is of advanced years.

¹⁴ See *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 at 142.

¹⁵ I accept that I have the power to impose such a condition under r 7.45 of the High Court Rules 2016. In any case, this Court has an inherent jurisdiction to make such an order: *IRS International Pty Ltd v ContainerCo (NZL) Ltd* [2024] NZHC 2266 at [20].

[109] I also accept Mr Geiringer’s general submission that of OAIP’s total claim, approximately USD 1.7 million is outstanding in respect of printing and crating the artworks alone. These claims seem the strongest of the disputed amounts. In other words, while the result of a substantive hearing may be that Mr Agam owes nothing to OAIP—it is more likely that at least some of the disputed invoices will be upheld.

[110] Mr Geiringer submits that while such security will not enable OAIP to meet its financial obligations, it will provide significant comfort to creditors that money will be available promptly once quantum is determined. Mr Geiringer submits this may well enable OAIP to delay enforcement. Mr Glover’s response is that “comfort to creditors” is not an appropriate reason to make the order proposed by Mr Geiringer.

[111] In these circumstances and given what I accept is a lack of evidence currently supporting Mr Agam’s undertaking, it is appropriate that he provides security in the sum of NZD 2 million. In my view, that is fair and just between the parties. Effectively, it is Mr Geiringer’s fall-back position and I accept it. This step is something that I foreshadowed at the hearing. Mr Glover opposed it. He did not have instructions about it. I suggested that he obtain instructions in the meantime.

[112] I indicated that I was prepared to hear the parties, if necessary, on or before 5.00 pm 18 December 2024, by telephone conference as to how and when this payment could be made and on what terms and conditions. I have now done so. The security is to be paid into an agreed interest-bearing trust account by 5.00 pm 17 January 2025. I am conscious of the approaching Christmas vacation in New Zealand, and that NZD 2 million is a very significant amount to raise in a short period. There the money would remain until further order of this Court.

Fourth issue: should orders as to confidentiality and non-publication be made to protect Mr Agam’s reputation and art works?

[113] Mr Agam seeks confidentiality and non-publication orders over a very small section of material filed in these proceedings to date. [Redacted].

[114] [Redacted].

[115] The orders are sought in reliance on the Court’s inherent jurisdiction and on r 5(2) of the Senior Courts (Access to Court Documents) Rules 2017.

[116] I accept that the Court can exercise its inherent power to order suppression and forbid publication of particulars in civil proceedings in the interests of justice.¹⁶

[117] The leading case is the Supreme Court’s decision in *Erceg v Erceg*.¹⁷ Arnold J highlighted the general principle of open justice:

[2] The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been described as “an almost priceless inheritance”. The principle’s underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. ...

[118] The Court held that a party seeking orders prohibiting publication needs to “show specific adverse consequences that are sufficient to justify an exception to the fundamental rule”.¹⁸ The standard required to be met is a high one. Any departure from the general principle of open justice should only be in limited circumstances and only to the extent necessary to serve the interests of justice.¹⁹

[119] The Court adopted Kirby P’s explanation for this stringent approach who, in *John Fairfax Group v Local Court of New South Wales*, said:²⁰

A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice.

[120] OAIP opposes the orders sought. It correctly submits that the bar for suppression is high. It also argues that such orders should not be made where they would be futile as here, [Redacted]. Accordingly, they want the request for

¹⁶ *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA); *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441.

¹⁷ *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 (footnotes omitted).

¹⁸ At [13].

¹⁹ At [3].

²⁰ At [14], citing *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA) at 143.

suppression dismissed, with costs. If it is maintained, they say it should be subject to a proper application scheduled for a separate hearing.

[121] I did not hear detailed argument on this matter. There was not time available. I cannot make a meaningful decision in these circumstances. In the interim, I order that there be no publication or dissemination of the specific commercially sensitive details that have been redacted from this judgment. This order is to continue until final disposition of the proceeding or further order of this Court.

[122] This matter should be the subject of proper argument and set down as part of the next hearing of this matter.

Conclusion

[123] The application to rescind the interim injunction is dismissed.

[124] I order that the injunction continue until completion of the substantive hearing of this matter. That order is subject to the condition that Mr Agam pay NZD 2 million as security for his undertaking as to damages on or before **17 January 2025**. This is to be paid into an interest-bearing trust account as agreed between the parties, and not to be otherwise dealt with, without express order of the Court. In the event of non-payment, the interim injunction lapses. However, if the parties can agree to another constructive solution, an appropriate consent memorandum can be filed in this Court setting out that arrangement.

Becroft J