

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE

CIV-2024-404-2341
[2025] NZHC 1498

BETWEEN

AVRAHAM YAACOV AGAM
Plaintiff

AND

JONATHAN ANDREW MOON
First Defendant

OUTER ASPECT IP LIMITED
Second Defendant

Hearing: 23 May 2025

Counsel: KT Glover and O Zambuto for Plaintiff
F Geiringer and D Nilsson for Defendants

Judgment: 11 June 2025

JUDGMENT OF BECROFT J

*This judgment was delivered by me on 11 June 2025 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

What this application is about and the result

[1] Mr Avraham Agam is the plaintiff in substantive civil proceedings against Mr Jonathan Moon and his company Outer Aspect IP Ltd (OAIP). Mr Agam first filed his statement of claim on 10 October 2024. His most recent amended statement of claim was filed on 5 March 2025. The dispute centres around Mr Agam's extremely valuable artwork which I discuss further below.

[2] On 23 September 2024, before a statement of claim was filed, Mr Agam applied for and was granted a without notice interim injunction by Wilkinson-Smith J.¹ That injunction prevented the defendants from selling or offering for sale over 2,500 of Mr Agam's artworks which they had produced using their sophisticated computer technology, and which were (and are) still in their possession.

[3] It also prevented them from approaching, contacting or otherwise dealing with galleries or art dealers in connection with attempts to sell the artworks; and restraining Mr Moon and his company from creating any further copies of the artworks.

[4] The defendants withheld the artworks because they said Mr Agam had not paid them for their work in producing them. Mr Agam disputed this, maintaining he owed nothing more. Mr Agam feared the artworks might be sold before resolution of the dispute. This would devalue their worth. In effect he feared a "fire sale".

[5] Subsequently, on 18 October 2024, the defendants applied for the rescission or variation of the interim injunction. If rescission was not granted, the variation sought was to make the injunction subject to terms requiring the payment of security for costs and in support of Mr Agam's undertaking as to damages.

[6] That application came before me on 14 November 2024, and I released my decision on 18 December 2024.² I refused to rescind the injunction.³ However, I added a condition that Mr Agam was to provide security for his undertaking as to damages in the sum of NZD 2 million into a trust account. It was to be paid by 17

¹ *Agam v Moon* [2024] NZHC 2749.

² *Agam v Moon* [2024] NZHC 3907.

³ At [123].

January 2025. While I did not put it as such at the time, counsel seem agreed that this amounted to a variation of Wilkinson-Smith J's injunction. Therefore, the effect of my judgment was to continue Wilkinson-Smith J's injunction but with a significant variation.

[7] The evidence before me at the time of that application was that OAIP had an outstanding loan to Fifo Capital Limited Partnership (Fifo) of over NZD 1.7 million falling due for repayment that month. OAIP would face liquidation, and Mr Moon bankruptcy, if they could not sell some of the artwork to recoup their costs, allowing them to repay the loan. I was however told that payment of security for damages would likely reassure the lender, which would not enforce its loan to OAIP.⁴ Accordingly, I decided that the NZD 2 million condition was appropriate.

[8] At Mr Agam's request, I granted leave immediately after the injunction decision for him to appeal it.⁵ The defendants cross appealed. Mr Agam did not seek a stay of my judgment at that time.

[9] The NZD 2 million was not paid as required. The injunction therefore lapsed.

[10] The hearing in the Court of Appeal has been delayed for several months. Counsel advise it has been rescheduled twice. It is now scheduled for the end of July 2025.

[11] In late April, Mr Agam, learning that some of the "crown jewels" of his artworks held by OAIP might be sold very soon, applied for several remedial orders. This included an application to rescind my order that the interim injunction lapse if the NZD 2 million was not paid by 17 January 2025. He said that order had been "improperly obtained" on the basis of false or misleading evidence.

⁴ I held that there was a serious issue to be tried. I also held the balance of convenience, while finely balanced, favoured the granting of an injunction but that there must be payment of NZD 2 million, effectively as security. I was informed that this would be sufficient reassurance for Fifo not to enforce its loan and begin liquidation proceedings. The consequences for the defendants were so catastrophic (in a business sense) that damages would not be an appropriate later remedy even if the defendants were successful at the substantive hearing.

⁵ *Agam v Moon* [2024] NZHC 3916.

[12] I heard the application at short notice, as I later describe. I have decided there are insufficient grounds to rescind the injunction. My reasons follow.

The background facts leading to the interim injunction

[13] There is no need for me to set out the detailed facts leading to my order. They are all set out in my substantive judgment. It is sufficient to repeat the early paragraphs of that judgment as follows. Hopefully, this removes the need for too much cross referencing and explains the context of this ongoing and hard-fought dispute:

[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

...

[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.

Subsequent developments leading to this hearing

[14] In his March 2025 amended statement of claim, Mr Agam clarified and expanded his claim. Also (amongst other things), for the first time he included in the claim a further 844 of his artworks which had been previously sent to OAIP from the USA.

[15] By April 2025, Mr Agam, his son Mr Ron Agam, and his daughter, Ms Orit Agam, had received information that a small number of artworks (including some of the 844 artworks not part of the original claim) were about to be sold. OAIP, for its part, was candid that it was preparing to sell some of the artworks to secure an income to pay its creditors. OAIP advised Mr Agam that the sales needed to happen soon. If not, OAIP’s primary creditor, Fifo, would exercise its rights including by taking possession of all prints in OAIPs possession, or seeking to enforce against Mr Moon’s family home. Mr Agam also learned that a small number of the 844 artworks had already been sold.

[16] On 29 April, Mr Agam sought a series of further, remedial orders. They are, to say the least, comprehensive. Very briefly, the orders sought were:

- (a) rescission of my order; or, in the alternative to rescission;
- (b) a stay;
- (c) delivery-up to Mr Agam of digital files and injunction preventing use of the digital files or material derived from them;

- (d) delivery-up to Mr Agam of certain artworks or a preservation order placing them in custody of the Court or other injunctive relief;
- (e) preservation of other artworks in the custody of the Court;
- (f) disclosure of information;
- (g) orders requiring any proceeds for insurance claims in relation to the artworks to be held on trust for Mr Agam in New Zealand pending resolution of the substantive claim; and
- (h) granting leave to Mr Agam to apply for further or ancillary orders.

[17] The matter came before Andrew J on 8 May 2025 in the Duty Judge List. Understandably, he could not sensibly deal with all the applications in the short time allocated. He arranged for the matter to be brought back before me for an urgent half day fixture on 23 May. He issued brief timetabling orders requiring, first, Mr Agam and then the defendants, to file further affidavits (if required) and submissions in advance of the hearing.

[18] The next day Mr Glover, for Mr Agam, filed a memorandum seeking urgent reconsideration of the timetabling orders, and particularly the order of filing. Through no fault of counsel, the memorandum was not put before Andrew J, despite repeated requests that a judge urgently consider it. Pending judicial intervention, Mr Glover did not file as required by the timetabling, and consequently neither could Mr Geiringer who acts for the defendants. I accept Mr Glover's reasons for not doing so—that is he was waiting for the Court's reconsideration as he was told by Court staff would occur.

[19] When I became seized of the matter on 22 May, I arranged for an urgent telephone conference. Counsel agreed that, given the lack of submissions, only Mr Agam's application for rescission could be meaningfully argued the next day. Submissions on that single issue were urgently filed late that night and the next morning.

[20] During that telephone conference, I strongly urged the parties to reach agreement to preserve the situation until the Court of Appeal resolution. In his submissions, Mr Glover addressed this suggestion:

The Court appears to have an instinctive desire for the parties to reach agreement. With respect that is not possible at this point in time, and your Honour will need to determine the dispute in accordance with the relevant law. The outcome is regrettably binary, but that is not a reason to find against Mr Agam. Mr Agam should not be expected to co-operate with the sale of his artworks which this Court has already found to be seriously arguable as an infringement of his rights, or criticised for standing on his rights. He has nothing to gain from helping Mr Moon to sell Mr Agam's property – the sale proceeds would all go straight to the defendants' creditors. Mr Moon's property being in trust means that it is protected against claims from creditors such as Mr Agam if the plaintiff succeeds at trial.

[21] I remain strongly of the view that this is a matter which cries out for constructive settlement between the parties—at least until the Court of Appeal decision so that their respective positions can be protected. I accept that the defendants have presented at least four, so far fruitless, options for resolution until the substantive matter can be determined. As is his right, Mr Agam remains of the view that what has been offered fails to protect his position. This is particularly so if he is completely successful in his claim—so that he is entitled to an unconditional return of all his artworks without any further payment of what he says are the accounts illegitimately rendered by OAIP.

Rescission?

The law

[22] Mr Agam's application is made under r 7.51 of the High Court Rules 2016 (HCR) which provides:

7.51 Order may be rescinded if fraudulently or improperly obtained

- (1) A Judge may rescind any order that has been fraudulently or improperly obtained.
- (2) The Judge may grant any further relief by way of costs that the interests of justice require.
- (3) This rule does not limit any other remedies of a party who has been adversely affected by an order that has been fraudulently or improperly obtained.

[23] Mr Glover relies on the “improperly obtained” ground as opposed to fraud. The principles that guide the exercise of that power were discussed in some detail in *Elvidge v ASB Bank Ltd*.⁶ There is no need for me to set them out at this stage.

[24] Before I turn to the merits of the application, there are two brief preliminary matters to address.

Jurisdiction

[25] First, there was some discussion about jurisdiction at the hearing. That arose because of debate about what was the “order” in r 7.51 which Mr Agam was seeking to have rescinded. In short, there was a question of whether I could rescind the NZD 2 million condition without also rescinding the injunction itself. That discussion included whether the payment condition was an order itself; or a condition of the injunction order; or whether there were two orders—the injunction and the payment order.

[26] On reflection, because my “order” was simply to vary the original injunction so as to make it conditional on payment of NZD 2 million by a specified date, I am satisfied that I have jurisdiction to rescind that variation order as a whole. The effect of that would be to reinstate, or at least continue, Wilkinson-Smith J’s unconditional injunction. This is because the order varying it to make it conditional on payment, (non-fulfilment of which has brought about its lapse), would be rescinded if Mr Agam’s application is successful.

A backdoor appeal?

[27] Second, I was concerned that Mr Glover’s rescission application was a backdoor appeal of my decision, prompted by the Court of Appeal delay.

[28] Relying on *Elvidge*, Mr Geiringer argued that r 7.51 cannot “be used as a chance to have a second bite” and should not be “used as a substitute for an appeal or review”.⁷

⁶ *Elvidge v ASB Bank Ltd* [2015] NZHC 44.

⁷ *Elvidge v ASB Bank Ltd*, above n 6, at [134(a) and (b)].

[29] However, Mr Glover convinced me that his application was properly brought. The argument he raises properly fits within the “improperly obtained” arm of r 7.51. His argument focusses on the process by which the order was obtained. This is distinct from a merits-based appeal of my decision which will be for the Court of Appeal. If unsuccessful, he respectfully advises he will likely then proceed with the alternative stay of the proceedings application made on 29 April.

[30] Having concluded there are no issues with these preliminary points, I turn to consider whether my order should be rescinded.

Factual background

[31] The false or misleading information allegedly provided by Mr Moon is as follows. It takes a little explaining.

[32] Mr Agam’s first affidavit is dated 17 October 2024. This is after the original ex parte injunction had been obtained.⁸ In it, he referred to a total of 3782 artworks which were the subject of his claim.⁹ However, at that time, it appears he did not mention a further 844 quite separate artworks of his which had been printed in the USA by a third party. (I adopt the parties’ descriptor of these 844 artworks as the “held artworks”). These held artworks had been sent to OAIP, through Mr Ron Agam. This was done so that his father could sign them when he visited New Zealand from late 2022 through to early 2023 when he was to inspect and sign the artworks produced and held by OAIP. The held artworks were not, at that stage, part of Mr Agam’s claim, and did not become so until March 2025.¹⁰

[33] Mr Agam had previously made various requests in 2024 for the return of the held artworks. There was an exchange of correspondence. There was an ongoing dispute about the amount owing to Mr Moon in connection with them. In July of 2024

⁸ I understand that being based in Israel he was not able to give instructions for his affidavit, nor have it filed in time. Others provided affidavits in support.

⁹ [redacted]

¹⁰ I record that there is significant dispute about the reimbursement due to OAIP for ‘handling’ these held artworks. Mr Agam says the agreement was for reimbursement of only the shipping costs. Mr Moon says that unpacking, attending to any alterations required, repacking the artworks and storage among other things were all expressly included.

Mr Moon wrote to Mr Ron Agam claiming USD 234,478. He also said that he had a right to sell the held artworks under the Contract and Commercial Law Act 2017.

[34] On 18 October 2024, after the ex parte injunction was obtained, Mr Moon completed an affidavit in which he affirmed that the 3,782 artworks were the “only pieces of designs developed with Mr Agam in OAIP’s possession.”

[35] In Mr Glover’s view, this wording was careful and was presumably intended to exclude reference to the held artworks, on the basis they were artworks “not developed in conjunction with OAIP”. Mr Glover accepts Mr Moon’s affidavit, with the benefit of hindsight, is “technically” correct.

[36] Next, both Mr Ron Agam, and his father, replied to Mr Moon’s affidavit.

- (a) In his 29 October 2024 affidavit, Mr Ron Agam specifically mentioned the 844 held artworks. He described how it was they came to be sent to OAIP. Mr Ron Agam noted that none of the held artworks had been listed in Mr Moon’s affidavit, despite Mr Agam saying he repeatedly told Mr Moon that they belonged to his father.
- (b) Similarly, Mr Agam, himself, in his affidavit of 29 October 2024 noted that Mr Moon did not mention “844 of my artworks that my son, Ron, sent to him for my review, and which he is also withholding in spite of no monies being owed to him on their production”.

[37] Mr Moon provided a further affidavit in reply dated 6 November 2024. In it, he addressed the held artworks as follows. This is the basis for Mr Glover’s argument that my order was improperly obtained. I have italicised the words that form the basis of Mr Glover’s argument:

Prints discussed in Ron Agam’s affidavit

[10] The affidavit of Ron Agam dated 29 October 2024 discusses 844 prints of designs by Yaacov Agam printed by a different printing service provider, as well as 74 prints of designs by Ron Agam.

[11] *I confirm that the prints referred to in that affidavit are in OAIP's possession and control.* However, they are separate from the ones discussed in my first affidavit. The reason for this is that they do not form part of the prints produced as part of the project that OAIP started with Yaacov Agam in 2016, and are therefore not subject to the invoices disputed in Yaacov Agam's claims.

[38] Although Mr Moon provided a further affidavit on 14 November 2024, this did not correct or otherwise alter his previous evidence in respect of the held artworks.

[39] In about April 2025, Mr Agam became aware that the held artworks were being offered for sale. Through his solicitors, investigations were carried out.

[40] It is now accepted by the parties that in August 2024, Mr Moon had travelled to the United States with a number of the held artworks with a view to selling them. There is some doubt over the exact number—it is somewhere between 49 and 86.

[41] In September 2024, OAIP entered into an arrangement with Heritage Auctions, an auction house in Dallas, Texas, for the sale of those held artworks. It is alleged that in doing so, Mr Moon confirmed to the Texan auction house that he “had title and the right to sell” the held artworks.

[42] I understand that it is also accepted that 15 of those held artworks have now been sold. It may be, although this is not (exactly) agreed, that one of the “held artworks” was sold on or about 14 November 2024, and another two were sold within a week later. The 14 November 2024 date is important. That was the very day the previous application was before me for argument as to rescission or continuation (on conditions) of the injunction.

[43] It seems there is an ongoing dispute about the number of artworks that have been sold. The plaintiffs, relying on an email from Heritage Auctions, contend that at least 20 have been sold. The defendants only accept 15.

[44] In his further affidavit, on 8 May 2025, Mr Moon, explaining this now obvious inconsistency in his earlier evidence, affirmed:

The plaintiff has now accused me of giving false evidence about those prints in my 18 October 2024 affidavit. I do not accept that. In that affidavit, I said that the prints were in the second defendant's possession and control, but were outside the scope of the proceeding. I believed that to be correct. They were not referred to in the original statement of claim, or included in the injunction that was the subject of the defendants' application at that time. The purpose of my statement was to make that clear to the Court.

[45] In respect of that explanation, Mr Glover submits it is not immediately apparent what is meant by the word “that” in the sentence “I believed that to be correct”. However, I take the view that Mr Moon meant the whole previous sentence was true.

Was my order “fraudulently” or “improperly” obtained?

[46] Against that background, I have to consider whether my order was “fraudulently or improperly” obtained. Mr Glover relies primarily on the “improperly” obtained arm of r 7.51.

[47] In fact, the distinction between an order “fraudulently” obtained on the one hand, and “improperly” obtained on the other, may not always be clear. There is not necessarily a bright line between them.

[48] There is no need for me to go into that distinction here. In the past, Judges have avoided attempting to define the phrase “improperly obtained”. This was the approach in *Hutchinson Bros Ltd v Auckland City Council*¹¹ where Chilwell J simply said, “the Court can recognise it when it happens. There was never any question of fraud in this case”.

[49] In *Nand v Williams (No.3)*¹² the Master Kennedy-Grant noted that the discretion to rescind reflected the inherent jurisdiction of the Court to prevent “the intentional or innocent misuse of the Court’s own processes, and in particular to correct errors which might otherwise perpetuate a miscarriage of justice”. He regarded “fraudulently” as synonymous with intentional misuse, and “improperly” as synonymous with innocent misuse.

¹¹ *Hutchinson Bros Ltd v Auckland City Council* HC Auckland M184/88, 30 May 1988.

¹² *Nand v Williams (No.3)* HC Auckland CP 429/97, 24 November 1998.

[50] In *Yang v Ko*,¹³ the Judge set out a series of principles applicable to the exercise of that discretion which Associate Judge Bell developed in *Elvidge*. However, again, the distinction was a little unclear in *Yang* because after noting the intentional/innocent divide, the Judge went on to say “A key factor in the enquiry into whether the order was improperly obtained is whether the party obtaining it *knowingly* ignored a legal obligation”.¹⁴ That rather seems to suggest that the “improperly obtained” branch of the test can expand to include conduct that is not “innocent” and is deliberate.

[51] Here Mr Moon’s duty in affirming his affidavit was to provide true and correct information/evidence to the best of his knowledge and belief. Mr Glover firmly contended that Mr Moon’s affidavit of 6 November 2024 was either false or, at the very least, a half-truth.

[52] In Mr Glover’s submission, the ordinary meaning and intended implication of Mr Moon’s affidavit was that the Court and Mr Agam could be reassured about the held artworks because they “hadn’t gone anywhere and would not be going anywhere”. That, in fact, was palpably not the case. Furthermore, being the person who had travelled to the United States with the artworks and who left them with the auction house in Dallas, Mr Moon demonstrably knew his evidence was false (which in my view suggests fraud).

[53] Mr Glover developed his submission. He said that while OAIP might technically have retained “control” of the held artworks—in the broader sense of that word—they were not in OAIP’s “possession” (in the ordinary sense of the word) as they were overseas and in a different jurisdiction. The word “and” in the phrase “possession and control” is important, and in his view meant the evidence was false, or at the least misleading.

[54] Mr Geiringer submitted that the reply evidence was not false. 86 of the held artworks were in the United States but they were still in OAIP’s control. For instance, on payment of costs owing to Heritage Auctions, OAIP was within its rights to direct their return to New Zealand. I accept that submission as far as it goes.

¹³ *Yang v Ko* HC Auckland CIV-2005-404-4583, 31 July 2007.

¹⁴ At [24(c)].

[55] Mr Geiringer also argued that an article does not need to be in a person’s actual physical possession for the person to “possess it”. I accept “possession” can be a quite complicated legal concept.

[56] For that reason, and given Mr Moon’s explanation of his evidence recorded at [44] above, I am reluctant to conclude that Mr Moon’s statement was deliberately false.

[57] As to whether the evidence was a half-truth (such that the affidavit was not true and correct), Mr Glover relied on the discussion in *Elvidge*. In that case, the Court quoted with approval from *Spencer Bower on Actionable Misrepresentation*:¹⁵

A half truth may be a misrepresentation. To state a thing which is true only with qualifications known to, but withheld by the representor, is to say something which is false.

[58] Mr Glover suggested that accurate evidence by Mr Moon would have been:

The Held Artworks are not the subject of the current interim injunction application. OAIP will be taking steps to sell some of them. 86 of those works were sent to the United States in August 2024, and 49 of them have been left with Heritage Auctions in Dallas, Texas for sale by consignment. They are in the process of being listed for sale and sold by Heritage Auctions. I entered into the sale agreement in September 2024 in which I confirmed that OAIP had right and title to each of the works. OAIP will not be giving Mr Agam or Ron Agam prior notice of those sales or reserve prices, and will not provide details of the sales or account to Mr Agam for the proceeds. The remaining 37 works are in an undisclosed location in the United States, but are not in the possession of OAIP given that we do not have premises there.

[59] This draft paragraph, although more comprehensive than might have been necessary, makes Mr Glover’s point nicely. I accept the suggested paragraph, would have represented full disclosure. It would have been candid and completely transparent. It would have been “the whole truth”. In my view, at the very least, Mr Moon’s evidence in respect of the held artworks can fairly be described as a “half-truth”.

¹⁵ *Elvidge v ASB Bank Ltd*, above n 6, at [165], citing KR Handley *Spencer Bower & Handley on Actionable Representation* (5th ed, LexisNexis, London, 2014) at 47–48.

[60] In my view the words “possession and control”, particularly the word “possession”, are the problem. While I acknowledge Mr Geiringer’s argument as to the technical meaning of possession, there is no need here to explore its many faceted meanings. I am clear that Mr Moon was not using the word as a lawyer or law professor. He used it deliberately to convey that the held artworks were in New Zealand in proximity to him.

[61] In reaching that conclusion, I accept Mr Geiringer’s submission that the pre-commencement injunction, and the proceeding itself, were, at the time, limited to the prints that OAIP had produced. I also accept that Mr Agam had at no time provided a comprehensive list of those prints.

[62] For that reason, I accept it was important for Mr Moon to address the point raised in Mr Agam and Mr Ron Agam’s affidavits as to the held artworks and to make clear that the held artworks were quite separate from the other artworks which were the subject of the claim. If Mr Moon’s intention had *only* been to make clear that the held artworks were not covered by Mr Agam’s proceedings, he could have said that in as many words. He did not need to also say they were in OAIP’s “possession and control.” However, having elected to provide evidence about that matter, Mr Moon had a duty to ensure his evidence was true and correct. I accept Mr Glover’s submission that Mr Moon failed to comply with that duty.

[63] Mr Geiringer also submitted that “to the extent that the use of the word ‘and’ instead of ‘or’ is said to have changed the meaning of the evidence in any material way, that was not intended. I do not accept that argument. In my view, given that the held artworks were being sold, or prepared for sale, at the very time of the injunction hearing before me, Mr Moon intended to provide the sort of reassurance to Mr Agam that the paintings weren’t going anywhere—just as submitted by Mr Glover.

[64] I also note that in oral argument, I suggested to Mr Geiringer that whatever else could be said, in respect of the held artworks, Mr Moon did not tell “the truth, the whole truth and nothing but the truth”. In response, Mr Geiringer submitted that the promise in the affidavit (here an affirmation), placed a lesser obligation of truth telling on Mr Moon than the oath a witness takes before giving evidence in Court. I am not

sure if Mr Geiringer, on reflection, would want to maintain that submission. In my view, there are not gradations of truth.

[65] Without getting into an existential debate as to the nature of truth, when it comes to factual matters being presented to a Court, I consider that the obligation as a sworn witness or as the deponent of an affidavit is the same obligation. It is to tell the truth. The truth is the truth. It cannot be that there are “hierarchies of truth-telling” depending on the form of the promise made by the person providing the factual material. I am not attracted to Mr Geiringer’s proposition. It would water down the obligations of a person swearing or affirming an affidavit. That would be to begin a slide down a slippery slope and would place courts in an impossible situation. The promise to tell the truth is solemn and absolute.

[66] That said, I unhesitatingly accept Mr Geiringer’s assurance from the bar that, as counsel, he knew nothing about this factual situation at that stage; and that it was not until April or May that he discovered the real situation about the held artworks. I am told that Mr Geiringer then immediately, and entirely responsibly, undertook on behalf of the defendants that there would be no further sale of the held artworks. That undertaking was confirmed in Court and will last until the determination of the substantive issues involving the parties.

[67] All in all, I am satisfied that Mr Moon’s statement that he had possession and control of the held artworks was not true and correct to the best of his knowledge and belief. I consider he stated this deliberately.

[68] It is a little unclear as to whether this would reach the threshold for fraud. However, given Mr Glover did not rely on this, I do not need to decide it. In any case, it is certainly a half-truth, and to that extent, certainly falls within the concept of “improper”. That is, in affirming his affidavit, Mr Moon did not tell the whole truth regarding his possession and control of the held artworks.

[69] In my view, this is separate from the parallel obligation not to mislead the Court.¹⁶ However, I accept the duties may overlap to some extent. Mr Moon has fallen short of that obligation also. For that reason, also, the “improper” arm of the rule is also established.

Improperly “obtained”?

[70] However, in my view, Mr Geiringer is on much stronger ground when he submitted that the misleading evidence, did not have, and would not have had any material effect on the order that I made.

[71] Counsel agreed that the word “obtained” in the rule indicates that a linkage is required between the improper conduct and the Court’s order. The word “obtained” in the rule means causation is required. Mr Geiringer relied on *Elvidge* in emphasising that conduct which did not materially influence the Court’s decision to grant the relevant order falls outside r 7.51.¹⁷

[72] Counsel disagreed as to the exact test that I should apply. Either I should consider whether the misleading evidence played a material role in my decision, that is, “Would I have reached a different conclusion had I known the full facts regarding the held artworks?” An alternative test was as at now, knowing of the misleading information, should the Court take a different approach? In these circumstances I favour the first approach, although the difference is a little artificial. In any case, here it does not matter.

[73] The real principle, as Mr Geiringer also noted, is that if the Court is satisfied that the original order was improperly obtained, it has a wide discretion in respect of relief. The focus of the Court will be to do justice between the parties. Where the Court believes that the original relief would have been appropriate irrespective of the alleged fraud (or false/misleading information), no relief is generally appropriate. At

¹⁶ *Elvidge v ASB Bank Ltd* at [162].

¹⁷ *Elvidge v ASB Bank Ltd*, above n 6, at [134(i)]; and *Harbour City Security Ltd v Allied Security Ltd* [2021] NZHC 952 at [88]–[89].

other times, a minor adjustment may suffice. In some cases, the severity of the misconduct may warrant complete rescission.¹⁸

[74] Mr Glover submits that the absence of the true evidence must have had an impact on the outcome of the case and, in particular, the payment order that was made. Mr Glover says, bearing in mind that the Court's decision was essentially a "line call", the Court would not have regarded Mr Moon as being someone with clean hands. The Court would not therefore have considered him as being entitled to sympathy and, in Mr Glover's words, "assistance from the Court". Although I would not have put it that way, I understand what he means.

[75] However, I do not accept the thrust of Mr Glover's submission. When assessing the balance of convenience, the court was required to undertake a balancing exercise. I was certainly influenced by the reality that OAIP and Mr Moon faced catastrophic consequences if at least some of the disputed accounts were not paid. Damages would not be an adequate remedy for either of the defendants in that case. That is why I imposed the payment condition in order for the injunction to continue. Perhaps that can be described as an entitlement to sympathy or assistance, but if so it was proper—a factor in the necessary balancing test—just as was Mr Agam's need for the return of his paintings. But, even knowing of the true position as to the held artworks, I would still have been concerned as to the plight faced by Mr Moon and his company if the injunction was granted.

[76] In short, the Court would not have taken a fundamentally different approach had the misleading information been known. In my view, the defendants did not "obtain" the condition I imposed on the basis of Mr Moon's false or misleading evidence. The held artworks were not part of the claim at the time. They were not referred to in the submissions by either party or in my judgment. They were of peripheral relevance at best. To that extent the degree to which the Court was misled, and its importance, is much less significant.

¹⁸ *Elvidge v ASB Bank Ltd*, above n 6, at [134(j)].

[77] Had I been informed of the true situation, the most I would have done, would have been to allow an amendment to the statement of claim in order to include the held artworks. If asked, as I would have been, I would have extended the injunction to cover them also.

Another ground for rescission?

[78] Mr Glover also sought to rely on a further aspect of misleading evidence which was not set out in his 29 April application. It will be remembered the rescission application was confined to the misleading information about the held artworks.

[79] This additional ground (in summary) was that Mr Moon's evidence regarding the reasons for OAIP's (parlous) financial situation, and it being caused by non-payment of accounts by Mr Agam, was at the least misleading and perhaps false. Mr Glover submitted the situation was in fact quite different and, if known to the court at the time, would have resulted in a materially different outcome when the balance of convenience was analysed. He pointed to three areas of concern.

[80] First, in Mr Glover's view, there was evidence that Mr Moon had conducted his business affairs poorly in the past and that it was Mr Moon's bad management—not any unpaid accounts rendered to Mr Agam—that are the root cause of OAIP's predicament. Mr Glover maintained that about 12 years ago, a company Mr Moon was involved in had been liquidated and he had been subsequently declared bankrupt. In this process it was alleged that Mr Moon had re-located some of the secured assets of the company and then sold them, just prior to liquidation. Mr Glover said that the dispute with Mr Agam was "history repeating itself".

[81] Second, Mr Glover also pointed to information detailed in Ms Orit Agam's affidavit, obtained from some former employees of OAIP. Those people assured Ms Agam, she deposed, that OAIP's serious financial position were not due to the costs of producing her father's artworks. Rather, that Mr Moon had a practice of overcharging clients with increasingly inflated accounts and was a poor businessman. In their view, the treatment experienced by Mr Agam was entirely typical of the way Mr Moon operates his business.

[82] Third, Mr Glover pointed to a series of Facebook posts/photographs showing Mr Moon in the Mediterranean, with his newly engaged partner who was sporting an apparently very expensive diamond ring. Mr Glover said there was ample grounds to infer that Mr Moon was living the “high life”, the life of luxury, and that was the real reason for OAIP’s parlous financial position.

[83] I pay no attention to all this evidence for two reasons.

[84] First, it was not relied upon in the initial application. Mr Geiringer has had no chance to respond to it. It would not be fair to the defendants for me to use it.

[85] Second, and more importantly, much of it is hearsay, rumour and innuendo which is not a proper basis upon which to make a decision. I put it all to one side. For instance, the material about Mr Moon’s past business “failings”, if that is what they were, is simply insufficient from which to draw any conclusions in this case. Also, Mr Geiringer classified the so-called information from former employees as “rank hearsay” and inadmissible. I agree. And the Facebook posts can prove nothing of relevance to this case.

Conclusion

[86] I rule that Mr Agam’s application for rescission cannot succeed. I accept there was false and/or misleading evidence but, in these particular circumstances, it was not material. Had I known of it, the result would have been the same, or, at most, the injunction would have been varied to include the held artworks. Either way, I would still have imposed the NZD 2 million payment.

[87] I cannot help but conclude with two observations. First, Mr Moon’s affidavit evidence about the held artworks does not impress me. He was, at best, economical with the truth. His promise required him to be truthful in all respects. In my view, he fell short of that obligation.

[88] Second, and for that reason, costs should *not* be reserved. My preliminary view is that Mr Agam should be entitled to costs on a 2B scale basis for this application. His application was a fair one to bring. The grounds for the application were entirely

of the defendants' making. Mr Moon does not have "clean hands". His hands should not, therefore, be held open to receive a costs award, even if he is the "successful" party. This was not an irresponsible application by Mr Agam. My initial view is that this is one of those rare cases where costs should not follow the event.

[89] On that basis, I encourage the parties to agree as to costs for this application. If the parties cannot agree, Mr Glover should file submissions as to why costs should be awarded, even though his client is the "unsuccessful" party. They should be filed within **14 days** of the receipt of this decision. Any reply should be filed **14 days** after receipt of those submissions by Mr Geiringer.

[90] Memoranda should be limited to three pages in length. I will then make the decision on the papers.

[91] To be crystal clear, I am not attracted to the idea that costs should be reserved, unless the parties so agree.

Becroft J