

NOTE: ORDER OF THE HIGH COURT SUPPRESSING COMMERCIALLY SENSITIVE INFORMATION UNTIL FINAL DISPOSITION OF THE PROCEEDING OR FURTHER ORDER OF THE COURT REMAINS IN FORCE. SEE [2024] NZHC 3907 AT [121].

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA77/2025
[2025] NZCA 510**

BETWEEN	AVRAHAM YAACOV AGAM Appellant
AND	JONATHAN ANDREW MOON First Respondent
AND	OUTER ASPECT IP LIMITED Second Respondent

Hearing: 29 July 2025

Court: Courtney, Powell and Cull JJ

Counsel: P J K Spring and H G Holmes for Appellant
F E Geiringer and S G T Ma Ching for Respondents

Judgment: 2 October 2025 at 11 am

**JUDGMENT OF THE COURT
[Redacted]**

- A The application for an interim injunction is granted.**
- B The appeal is allowed. The order that continuation of the injunction is conditional on the appellant paying NZD 2,000,000 as security for his undertaking as to damages is set aside.**
- C The cross-appeal is dismissed.**

D The respondent must pay the appellant costs for one standard application and one standard appeal, each on a band A basis, together with usual disbursements.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] Yaacov Agam is an internationally recognised artist and a pioneer of the kinetic art movement. His works include lenticular art—that is, art that gives an impression of movement, change and/or depth depending on the viewer’s perspective.¹ Mr Agam’s lenticular art includes lenticular editions of some of his paintings, as well as one-of-a-kind lenticular art.

[2] Each piece of lenticular art starts life as a digital design. Technical processes are needed to give the digital design physical form. Between 2016 and 2022 the necessary technical services were provided by Outer Aspect IP Ltd (OAIP), a technology company whose sole director is Jonathan Moon. The relationship between Mr Agam and OAIP broke down following a visit by Mr Agam to New Zealand between late 2022 and early 2023. In late 2023 and early 2024 OAIP rendered five invoices to Mr Agam totalling USD 3,652,497.46. Mr Agam disputed the invoices.

[3] In April 2024, Mr Agam learned that Mr Moon had approached galleries requesting a valuation and exploring a potential sale of artworks still in OAIP’s possession. Mr Agam had instructed counsel for the invoice dispute, who advised Mr Moon that neither he, nor OAIP, were authorised to sell Mr Agam’s work.

[4] In March, May and June 2024, OAIP rendered three additional invoices totalling USD 860,136.54. Mr Agam disputed these invoices. In September 2024, Mr Agam learned that OAIP was planning to sell a large number of the pieces it held to cover the amounts it claimed were owing. Mr Agam obtained a

¹ The use of lenticular printing creates works also known as “agamographs”, named after Mr Agam.

pre-commencement, interim injunction restraining Mr Moon and OAIP from taking steps to sell the artwork or create copies of it.²

[5] OAIP and Mr Moon applied to rescind the injunction or, alternatively, to vary it to require Mr Agam to pay security for his undertaking as to damages. They also applied for an order for security for costs. Becroft J accepted that there was a serious question to be tried and declined to rescind the injunction, but made continuation of the injunction conditional on Mr Agam paying NZD 2,000,000 into a trust account as security for his undertaking as to damages.³

[6] Mr Agam appeals.⁴ He says that the Judge wrongly assessed the balance of convenience and erred in his assessment as to the overall justice of the case.

[7] Mr Moon and OAIP cross-appeal.⁵ They say that the Judge failed to consider their assertion that the injunction was improperly obtained, erred in finding that there was a serious question to be tried and in his assessment of the balance of convenience. In addition, they complain that the Judge failed to determine their application for security for costs.

[8] The issues arising are whether the Judge erred in:

- (a) declining to consider whether the interim injunction was improperly obtained (cross-appeal);
- (b) concluding that there was a serious question to be tried (cross-appeal);
- (c) assessing where the balance of convenience lay in varying the terms of the interim injunction (appeal); and

² *Agam v Moon* [2024] NZHC 2749 [injunction decision]. Mr Moon and OAIP were served on a “Pickwick” basis (see *Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd* [1972] 1 WLR 1213 (Ch)) but were unable to respond before the orders were made.

³ *Agam v Moon* [2024] NZHC 3907 [judgment under appeal] at [124].

⁴ Shortly after the substantive decision was delivered, the Judge granted Mr Agam’s oral application for leave to appeal: *Agam v Moon* [2024] NZHC 3916.

⁵ Leave was granted in *Agam v Moon* HC Auckland CIV-2024-404-2341, 17 February 2025 (Minute of Becroft J).

(d) failing to determine the application for security for costs (cross-appeal).

[9] The granting of an injunction involves the exercise of a judge's discretion, which is amenable to appeal on the ground that the judge made an error of law, took account of an irrelevant consideration, failed to take account of a relevant consideration or was plainly wrong.⁶ However, whether there is a serious question to be tried is a matter for judicial evaluation rather than discretion. As a result, if the appellate court disagrees with the first instance judge, it will carry out its own assessment on that aspect.⁷

Application for interim relief in this Court

[10] The day before the hearing of the appeal, Mr Agam applied for interim relief to prevent OAIP selling a group of selected pieces of artwork by auction the following weekend. We granted this application and delivered a results judgment with the reasons to follow.⁸ The reasons for our decision will be evident from our reasoning in the substantive appeal and cross-appeal so we do not explain them separately.

Some general background

The process of production

[11] OAIP developed and owns the technology that was used to print Mr Agam's three-dimensional digital designs since about 2011. To start with, other entities undertook this work under licence from OAIP. In 2016, Mr Agam and OAIP agreed the production of Mr Agam's works would be undertaken by OAIP directly. The terms on which this work was to be done are in contention. It suffices to say at this point that there is no agreed record of the terms. We return to this issue later.

[12] Production of the lenticular art was an iterative process. Mr Agam provided OAIP with his designs, from which OAIP technicians would prepare an animated digital preview. Mr Agam would review this and, if necessary, request modifications. Sometimes this would require personal consultation between Mr Agam and the OAIP

⁶ *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

⁷ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [13].

⁸ *Agam v Moon* [2025] NZCA 384 [results judgment].

technician. These sometimes occurred in Israel, where Mr Agam lives, and sometimes in Paris. Once Mr Agam was satisfied with the digital version of the piece, he would request that OAIP print a physical proof for viewing. The proof might be modified again or approved as it was. Proofs were either shipped to Mr Agam or were presented at the next in-person meeting.

[13] Production of pieces could only be undertaken with Mr Agam's express authority. If Mr Agam was satisfied with the proofs, he would authorise production, including the dimensions and number of editions to be printed. Mr Agam's written authority for the production of pieces was required before printing and a record kept of the printed works, including photographs. The final pieces were then crated for storage and shipping. Payment for final production costs was due after shipping and delivery.

Invoices paid

[14] According to Mr Moon, OAIP produced a total of 9,122 pieces, most of which were completed before 2020, with a further six pieces completed in 2022. Of these, 5,346 were shipped to Mr Agam in Israel and OAIP continue to hold 3,782 pieces.

[15] Between June 2017 and July 2022, OAIP invoiced Mr Agam for a total of USD 1,513,418.87, which Mr Agam paid. Some of the invoices were for technicians' time. Some were for a deposit for the cost of production and some were for the cost of actual production. Invoices related to production of individual pieces referenced by the number of the pieces of a particular design and their size. Each size was invoiced on the basis of a unit price multiplied by the number of the pieces produced. Some of the later invoices were for packaging, storage, freight and insurance. The bulk of the invoiced cost related to production of the artworks.

[16] Progress towards the shipping of the remaining pieces stalled in 2020. On Mr Moon's account, this was because Mr Agam no longer wanted the pieces shipped to Israel but did not provide alternative instructions. In April 2022, OAIP rendered an invoice for USD 436,228 for the cost of printing and airfreighting 136 large pieces. Mr Agam paid this invoice. In July 2022 OAIP invoiced Mr Agam USD 28,505 for a further six large prints, which Mr Agam paid.

[17] Mr Agam and Mr Moon then agreed that Mr Agam would come to New Zealand to sign the remaining prints. This was expected to be a costly exercise; Mr Moon provided a scoping document showing the facilities and services and that would be needed and OAIP invoiced Mr Agam USD 74,000 as a deposit on these costs, which Mr Agam paid.

Invoices disputed

[18] Mr Agam, who was then 94 years old, came to New Zealand in November 2022, accompanied by his son and daughter. The process took some time, largely because of Mr Agam's age. The family did not leave until March 2023.

[19] There was disagreement over how much more Mr Agam should pay OAIP for the signing project. Mr Moon provided "draft" invoices, which Mr Agam's daughter queried, including requesting copies of third-party invoices. These were not forthcoming.

[20] Between November 2023 and May 2024, OAIP rendered the eight disputed invoices which total USD 4,512,634. The invoices were accompanied by contractual terms, which Mr Agam says he had never seen or agreed to. The invoices were:

- (a) Invoice 3289 dated 19/11/23: USD 100,784.99 for high security storage.
- (b) Invoice 3291 dated 30/11/23: USD 3,112,162.92 for "Optical Effect Lenticular Art Projects [Completion], all outstanding costs from 27 December 2017 until Nov 30 2023". This invoice was accompanied by a very lengthy line-by-line narration, to which we return later.
- (c) Invoice 3292 dated 31/12/23: totalling USD 56,518.75 for high security storage (USD 15,930.42) and "Artwork Project Capital Advances" (USD 40,588.33).
- (d) Invoice 3294 dated 09/02/24: totalling USD 276,469.61 for high security storage (USD 21,069.08); "Daily Artwork Project

Capital Advances” (USD 14,414.78); interest on invoices 3289 (USD 6,042.21), 3291 (USD 135,466.94) and 3292 (USD 1,392.60); and an interest charge establishment fee (USD 98,098).

- (e) Invoice 3297 dated 29/02/24: totalling USD 106,561.16 for high security storage (USD 14,902.52); “Daily Artwork Project Capital Advances” (USD 10,195.82); interest on invoices 3289 (USD 2,317.56), 3291 (USD 71,567.44) and 3292 (USD 1,299.76); and recovery disbursements including legal costs (USD 6,278.06).
- (f) Invoice 3300 dated 31/03/24: totalling USD 372,328.76 for “GST Gover[n]ment Tax”.
- (g) Invoice 3302 dated 31/05/2024: totalling USD 381,288.88 for high security storage (USD 39,054.88); “Daily Artwork Project Capital Advances” (USD 26,720); interest on invoices 3289 (USD 6,290.52), 3291 (USD 194,254.48) and 3292 (USD 3,527.92); recovery disbursements including legal costs (USD 13,357.00); and an interest charge establishment fee (USD 98,084).
- (h) Invoice 3306 dated 30/06/24: totalling USD 106,518.90 for high security storage (USD 15,416.40); “Daily Artwork Project Capital Advances” (USD 10,547); and interest on invoices 3289 (USD 2,483.10), 3291 (USD 76,679.40) and 3292 (USD 1,392.60).

[21] Mr Agam did not accept that OAIP’s invoices were payable and, in strong terms, required the artworks to be returned to him. OAIP did not return the artworks. To the contrary, in mid-2024, Mr Agam became aware that OAIP had prepared a tender document for the sale of 2,547 pieces which it intended to sell to meet the disputed invoices.

The procedural history

Wilkinson-Smith J grants the interim injunction

[22] As noted, when Mr Agam discovered the proposed sale of the artworks, he applied for a pre-commencement, interim injunction restraining Mr Moon and OAIP from taking steps to sell the artwork or create copies of it until the rights to the artworks had been finally determined or agreed. The application was made without a supporting affidavit from Mr Agam or a statement of claim. There was, however, an affidavit from a law clerk employed by Mr Agam's solicitors (Ms Caughey) annexing copies of the disputed invoices and correspondence between the parties. Counsel filed a memorandum which set out both OAIP's and Mr Moon's position and Mr Agam's response.⁹ The relevant aspects of the parties' respective positions evident from the memorandum and the attached correspondence can be summarised as follows:

- (a) OAIP relies on terms of trade that it says Mr Agam agreed to as supporting the invoices; Mr Agam says he first saw the terms in November 2023.
- (b) OAIP claims to have provided services to Mr Agam and incurred expenses in doing so; Mr Agam has asked for evidence of the costs which has not been provided.
- (c) OAIP says that Mr Agam has invoiced it USD 4,640,593.10¹⁰ associated with printing and storing the works; Mr Agam says [redacted], which has inflated the claim for insurance and storage costs.
- (d) OAIP says that its terms of trade entitle it to sell the artworks to recover the amount owed; Mr Agam does not accept that the terms relied on apply.

⁹ This was said to be supported by Mr Agam's affidavit which, as noted, had not yet been drafted.

¹⁰ In fact the amount referred to in the amended statement of claim is slightly less—USD 4,512,634—which is also the figure stated in the subsequent notice of sale issued by OAIP on 24 July 2025.

- (e) OAIP says that it is a bailee of the artworks and entitled to sell them because Mr Agam has abandoned them and/or is insolvent and/or has the right to do so under the Contract and Commercial Law Act 2017 (CCLA). Mr Agam says that he has asked for the artworks to be returned, is not insolvent and denies that OAIP has any right to sell or otherwise dispose of the works.

[23] Damages were said not to be an adequate remedy because the proposed sale of the artworks would put the works beyond Mr Agam's reach and effectively predetermine the dispute before the matter could be tried. Furthermore, it would also risk the works being sold at an undervalue, which would have an adverse reputational effect on the value of existing and future works, [redacted].

[24] Wilkinson-Smith J granted the injunction on 23 September 2024.¹¹

Becroft J declines to rescind the interim injunction

[25] Mr Agam filed a statement of claim on 10 October 2024, pleading two causes of action—infringement of copyright by Mr Moon and OAIP in seeking to sell the artwork and for an enquiry into the amount actually owed to OAIP on a quantum meruit basis. He filed an affidavit on 17 October 2024 in which he made the same assertions as had been made in counsel's memorandum and in the statement of claim.

[26] On 18 October 2024, OAIP filed its application to rescind the injunction or, alternatively, to vary it to require Mr Agam to pay security for his undertaking as to damages and, in addition, an order for security for costs. The application was advanced on the grounds that (1) the injunction was improperly obtained as a result of material non-disclosure, (2) the statement of claim did not raise a serious question to be tried and (3) the balance of convenience favoured OAIP because of its financial situation.

[27] The application for rescission came before Becroft J in urgent circumstances on 14 November. OAIP claimed to face immediate and significant financial hardship

¹¹ Injunction decision, above n 2.

as a result of Mr Agam's failure to pay the disputed invoices and to have no means of meeting its liabilities other than by securing payment from Mr Agam or selling the artwork. It also complained that Mr Agam had not provided any information as to his ability to meet the undertaking for damages he had given.

[28] In a decision delivered on 18 December 2024, Becroft J declined to rescind the injunction. However, he ordered that continuation of the injunction was conditional on Mr Agam paying NZD 2,000,000 as security for his undertaking as to damages into an interest bearing trust account by 17 January 2025, with the funds not to be dealt with without express order of the Court.¹² The basis for this order was, essentially, OAIP's claim to be in serious financial difficulty and dependant on payment of the disputed invoices to pay overdue loans.¹³

[29] Mr Agam did not seek a stay of Becroft J's judgment and did not pay the security pending the hearing of his appeal. The injunction lapsed.

Mr Agam amends his pleadings and applies for a stay

[30] In March 2025, Mr Agam filed an amended statement of claim. Amongst other causes of action, he pleaded four causes of action in copyright infringement under ss 30, 31 and 36 of the Copyright Act 1994. For this, Mr Agam sought declarations regarding his ownership of the copyright in the artworks and a permanent injunction preventing OAIP and Mr Moon from dealing with the works, together with other ancillary orders and damages. OAIP and Mr Moon have not filed a statement of defence to either the statement of claim or the amended statement of claim. Nor has OAIP counterclaimed for the amount owing.

[31] In April 2025, Mr Agam became aware that OAIP intended to sell a selected group of the artworks. He applied unsuccessfully to rescind the order requiring him to pay security.¹⁴

¹² Judgment under appeal, above n 3, at [123]–[124].

¹³ At [110]–[111].

¹⁴ *Agam v Moon* [2025] NZHC 1498.

[32] A few weeks later he applied for a stay of the order requiring him to pay security. By then the artworks were said to be in the hands of an auction house in the United States, ready for sale. On 30 June 2025, Becroft J made the following order on an “interim interim” basis until the stay application could be heard:¹⁵

- (a) The (net) proceeds of any sale of any or all of the 16 artworks, currently scheduled for auction with the United States art agent, and which may be paid to Mr Moon and Outer Aspect, are to be deposited by the defendants in an interest-bearing solicitor’s trust account until further order of the Court.

[33] The Judge expressly declined to make any order preventing the sale of the 16 artworks in question and made his order on the basis of assurances given by counsel for Mr Moon and OAIP. Those assurances included [redacted], or works not manufactured by OAIP, and not to sell more than five per cent of the artworks.¹⁶

Mr Agam applies to this Court for an “interim interim” injunction

[34] On 24 July 2025, a few days before the hearing of this appeal, OAIP’s lawyers sent a notice of sale of goods under ss 342 and 343 of the CCLA advising of its intention to offer for sale specified artworks by auction, with bidding to open on 4 August 2025. The amount said to be owed was USD 4,512,634. In subsequent correspondence, OAIP’s position was explained on the basis that Mr Agam had failed to apply earlier for a stay of Becroft J’s decision and that genuine efforts had been made to agree on a suitable sale process that would see some funds released.

[35] In response to OAIP’s notice of sale, Mr Agam applied to this Court for an “interim interim” injunction preventing OAIP from selling or otherwise dealing with the artworks. As noted, that application was granted.¹⁷

¹⁵ *Agam v Moon* [2025] NZHC 1748 at [22].

¹⁶ At [24]–[25].

¹⁷ Results judgment, above n 8.

Was the injunction improperly obtained? (cross-appeal)

The issue in the High Court

[36] OAIP complained that, not only did Mr Agam obtain the injunction without providing an affidavit, his counsel advised the court that a draft affidavit had been provided when, in fact, no draft affidavit had actually been prepared at that time. [Redacted]. Finally, it was said that Mr Agam had failed to disclose OAIP's claim to common law and statutory rights to sell the artwork to satisfy the debts.¹⁸

[37] Mr Agam's counsel resisted all these allegations. He emphasised the urgency of the situation and the fact that the threshold for rescission of a without-notice injunction based on non-disclosure is high, which, he submitted, was not met in this case.¹⁹

[38] The Judge dealt with this issue as follows:

[37] ... In my view, it is a somewhat profitless exercise to resolve [the question of material non-disclosure]. 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. ...

[39] The Judge then set out counsel's respective submissions before concluding:

[46] I have some sympathy for [OAIP'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. ...

¹⁸ Judgment under appeal, above n 3, at [39]–[41].

¹⁹ At [43]–[45]. Mr Agam's counsel relied on *Allen v Commissioner of Inland Revenue* (2004) 21 NZTC 18,718 (CA); *Jennings v Crown Prosecution Services* [2005] EWCA Civ 746, [2006] 1 WLR 182; and *Green Way Ltd v Mutual Construction Ltd* [2021] NZHC 1704.

Appeal

[40] In this Court OAIP reprised, at some length, the complaints that there had been inadequate investigation of the facts before applying for the interim injunction, that Wilkinson-Smith J's attention had not been drawn to facts adverse to Mr Agam and that no information had been provided in support of the undertaking as to damages. The material facts said not to have been disclosed included the fact that OAIP had, for some years, provided technical services to Mr Agam without problem and for which Mr Agam had paid on invoice, [redacted].

[41] Mr Geiringer, for OAIP and Mr Moon, submitted that Becroft J erred in not considering these issues and, instead, had wrongly confined himself to considering whether, on the information available to him, the injunction should continue at all or on varied terms.

[42] We are satisfied that there was no error in the way Becroft J approached this issue. It is true that a plaintiff who fails to make appropriate disclosure when applying for an injunction without notice is at risk of having the injunction discharged on a subsequent review. However, given that an application to discharge an injunction proceeds on a de novo basis, discharge is not inevitable and will depend on seriousness of the non-disclosure.²⁰ In *Rae v Commissioner of Police*, this Court reviewed the law on this issue and held that whether an injunction obtained without notice might be discharged for non-compliance depended on the circumstances of each case, and the relevant considerations included whether the applicant acted in good faith and the significance of the missing information.²¹

[43] In the present case we do not accept that there was conduct by or on behalf of Mr Agam that would have justified discharging the injunction. Counsel referred to a draft affidavit when, as it transpired, that affidavit had not yet been drafted. But the circumstances were, unquestionably, urgent, and Mr Agam was elderly and living in a

²⁰ See *Rae v Commissioner of Police* [2023] NZCA 4, [2023] NZAR 17.

²¹ At [47(a) and (b)] citing *Green Way v Mutual Construction*, above n 19; *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 (EWCA Civ); *Jennings v Crown Prosecution Service*, above n 19; and *Malabu Oil & Gas Ltd v Director of Public Prosecutions* [2016] Lloyd's Rep FC 108 (EWHC). Other cases reviewed were *Allen v Commissioner of Inland Revenue*, above n 19; and *Mudajaya Corporation Berhad v Keng* [2019] NZHC 1436.

location and circumstances which made it difficult to produce an affidavit. The affidavit was filed less than a month later and was consistent with the assertions made in counsel's memorandum. Further, the material annexed to Ms Caughey's affidavit provided an adequate background and OAIP's claim to be entitled to sell the art was fairly represented. There was no need for greater detail.

[44] The Judge carefully reviewed the basis for the injunction and was satisfied that there were no grounds for discharging it. We agree with his assessment.

A serious question to be tried? (cross-appeal)

The issue in the High Court

[45] OAIP had argued that there was no serious question to be tried, either as to whether Mr Agam owed money to it or whether OAIP was entitled to sell the artworks to cover the amounts owed. However, this argument depended significantly on the terms of trade OAIP said applied. A substantial part of the amount claimed is said to be claimable under the terms of trade (for example, the interest and "Daily Artwork Project Capital Advances"). The right to sell the prints was said to exist either at common law, under the CCLA or by virtue of the terms of trade, which provided that the intellectual property in the artworks belonged to OAIP.

[46] The terms of trade were contained in a document headed "Terms and Conditions of Supply Outer Aspect IP Ltd 'The Company'" which had been annexed to some of the disputed invoices. Mr Moon claimed that, to the best of his recollection, he had provided OAIP's standard terms and conditions to Mr Agam in 2016. However, Mr Moon also accepted that the terms had changed over time, and he had no record of what he gave Mr Agam in 2016.

[47] Mr Agam maintained that the arrangements were made orally and he was never provided with, nor agreed to, any printed terms and conditions. Moreover, the printed form contained provisions that Mr Agam described as "preposterous" and which he never would have accepted. In particular, cl 14.4 provided:

All intellectual property in, and relating to, the artworks produced shall from creation vest exclusively to [OAIP] ... By this clause you irrevocably assign

to [OAIP] all present and future right, title and interest in all intellectual property in, and relating to, the artworks. ...

[48] In addition, the terms provided for OAIP to charge interest on outstanding amounts at two and a half per cent monthly, with a three per cent establishment fee on the total amount due charged every six months.

[49] As to the amounts owing, the Judge said, initially, that:

[54] ... 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. ...

but later, he said:

[109] I also accept [Mr Moon and OAIP’s counsel’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.

[50] The latter conclusion seems to have been based on a document prepared for the purposes of the appeal (marked “O” and annexed to Mr Moon’s first affidavit) which shows an analysis of the printing and crating costs claimed as 1,912,340 and 5,410 respectively (presumably in USD, since the invoices are rendered in USD), so totalling USD 1,917,750. The printing costs for one of the items—136 “Large Originals”—is shown as reduced by USD 218,114 for payment received in April 2022. This left a total owing of USD 1,699,636.

[51] The Judge considered that there was “a substantial and significant” dispute over the terms and conditions governing the relationship which could only be resolved in a substantive hearing.²²

[52] Even leaving the terms and conditions aside, the Judge saw a serious question as to whether OAIP had any right—whether statutory or at common law—to sell

²² Judgment under appeal, above n 3, at [63].

the artworks.²³ OAIP had asserted that right under the common law artificer's lien and the CCLA, both of which it said trumped the protections provided by the Copyright Act. The Judge considered that, while there was an argument that an artificer's lien, which arises where possession of tangible goods has been given for work to be done on them, could arguably apply to computer files, much more detailed evidence would be required before the common law could be extended in that way.²⁴ Likewise, there was a serious question as to whether the digital computer files are goods for the purposes of the CCLA and, if so, whether it could be said that OAIP had done work on them so as to acquire a right of sale under s 341 of the CCLA.²⁵

Appeal

[53] In this Court, OAIP accepted that there was a serious question to be tried over the terms of the contractual arrangements. It also accepted that there was a serious question to be tried over the precise amount owed by Mr Agam. But it maintained that it was clear that at least USD 1,000,000 is owed and that it is entitled to sell at least the 16 pieces it had proposed to sell in June 2025. We do not accept either of those propositions.

The amounts owing

[54] The state of the invoices makes it impossible to determine how much Mr Agam owes. Moreover, even though OAIP has been aware of the issues relating to the invoices, it has made no effort to provide any better information to support them, either directly to Mr Agam or in the form of further evidence. Some of the significant problems are as follows.

[55] The “wash-up” invoice 3291 dated 30 November 2023 for USD 3,112,162.95 is supported by a line-by-line narration running to 21 A3 pages. It contains charges dating back to February 2018, including for printing. There is no explanation as to why these charges were not included in the invoices rendered closer to the time (which totalled more than USD 1,000,000 and which Mr Agam paid).

²³ At [71].

²⁴ At [80].

²⁵ At [84]–[85].

[56] The earlier invoices did not indicate that they covered only part of the charges relevant to the subject prints and it is not possible to tell the extent to which the charges in the wash-up invoice might relate to services that Mr Agam has already paid for. For example, Mr Moon has said that an invoice rendered to Mr Agam on 12 April 2022, which included a charge totalling USD 407,728 for 136 “Large 4D Lenticular Prints” (which Mr Agam paid), was for part payment of the printing of the 136 “Large Originals” on 1 October 2018 in the wash-up invoice. But the 12 April 2022 invoice does not contain anything to suggest that it was part payment only. While the document “O” shows a credit for payment of USD 218,114 in April 2022, that is much less than what Mr Agam was invoiced for and paid in April 2022.

[57] [Redacted].

[58] [Redacted].

[59] Another aspect of the narration that is not clear are the entries for “Artwork Project Capital Establishment Fee” as charged:

1 January 2019	USD 68,636.50
1 January 2020	USD 63,381.98
1 January 2021	USD 57,872.35
1 January 2022	USD 54,923.54
1 January 2023	USD 26,013.28
31 December 2023	USD 40,588.33
1 January 2024	USD 26,793.67

It is not clear from the evidence what this fee is actually for.

[60] Likewise, there are weekly charges beginning for the period 1 January 2019 for “Artwork Project Capital Advances Costs”. The charges increase periodically, though not in any apparent pattern. They do not appear on any of the earlier invoices which Mr Agam paid. Mr Agam, through his daughter, has expressly challenged the charges, but there is no explanation as to what they are for, nor why the charges only started in 2019.

[61] There are weekly charges for “weekly insurance and secure storage”. Despite Mr Agam requesting copies of third-party invoices and despite Mr Moon asserting that

OAIP's current annual premium is NZD 20,820, no insurance invoice has been provided.

[62] The numerous charges from late 2022 to early 2023 relate to the costs associated with Mr Agam's visit to New Zealand to sign the prints. The charges cover costs that one might ordinarily expect, such as studio hire, set-up, cleaning and art supplies, but also numerous other costs that seem doubtful as properly charged (at least in the normal course of business), such as Mr Moon's ferry trips from Waiheke Island and coffee and food for staff. It is just not possible to determine on the information before us the extent to which amounts that are properly claimable exceed the USD 74,000 that Mr Agam paid in advance.

[63] Also unexplained is the reason these locally incurred costs are being charged out in USD. There is no conversion from NZD shown nor any apparent basis on which these costs should be charged in USD.

[64] Finally, the disputed invoices 3294, 3297, 3302 and 3306 for USD 276,469.61, 106,561.16, 381,288.88 and 106,518.90 respectively include charges for overdue interest on the previous disputed invoices. Self-evidently, OAIP's right to claim this interest depends both on proving its entitlement to do so under the relevant terms and conditions (which it accepts it cannot do at present) and proving that all the amounts on which interest is claimed are properly charged (which it cannot do for the reasons just outlined).

[65] This list is non-exhaustive, but it suffices to show that, in our view, the Judge erred in accepting that approximately USD 1,700,000 was owing by Mr Agam to OAIP.²⁶ OAIP is presently unable to show that this is the case.

OAIP's right to sell the prints

[66] OAIP maintains that it is entitled to sell the prints to cover the money owing either under the terms of its contract with Mr Agam or by virtue of the common law artificer's lien or as an unpaid seller under the CCLA. Since we cannot be satisfied

²⁶ At [109].

whether, or how much, money might be owing by Mr Agam, OAIP would not be entitled to sell the prints at present. It is therefore unnecessary to consider this issue in any detail. We are, however, far from convinced that any of these rights are, in fact, available to OAIP.

[67] First, for the reasons already discussed, OAIP has not established the terms of the contract between it and Mr Agam so it cannot assert a contractual right at this stage.

[68] Nor do we see a basis, at least in the context of the present appeal, on which OAIP could demonstrate that it has a common law artificer's lien. An artificer's lien is a long-standing equitable remedy that arises where a person has been requested to carry out work on a good, has not been paid for the work, remains in possession of the good, and the work has improved the good.²⁷ If the right to an artificer's lien can be established, the goods may be sold pursuant to s 341 of the CCLA, which relevantly provides:

- (1) This section applies if—
 - (a) a person (A) has done work on goods in A's possession and, as a result, A is entitled at law to a lien on the goods for any amount; and
 - (b) the amount remains unpaid for 2 months or more after it should have been paid.
- (2) A may sell the goods by auction.
- ...

[69] Mr Geiringer suggested that s 341 does not require the party claiming the lien to have improved the goods. However, the terms of s 341 are clear that a right of sale only arises once the entitlement to a lien is established. That would require OAIP to show that it has improved the goods of which it has possession.

[70] Mr Geiringer also argued that OAIP's work could be regarded as analogous to traditional forms of improvement in the sense of OAIP taking a drawing and turning it into a print. The difficulty is that the intangible digital design is not, on the current state of the law, a good that is susceptible to improvement.

²⁷ *Dinmore Meatworks Pty Ltd v Kerr* (1962) 108 CLR 628 (HCA) at [3].

In *Your Response Ltd v Datateam Business Media Ltd*, Moore-Bick LJ explained that:²⁸

[16] ... the essential nature of a common law artificer's lien ... is a right to retain possession of goods delivered to [the claimant] for the purpose of carrying out work on them. Although the right to exercise such a lien has been recognised in a wide variety of cases ... the claimant was unable to identify any case in which a right to exercise a lien over intangible property has been recognised. The reason is not difficult to find: whereas it is possible to transfer physical possession of tangible property by simple delivery, it is not possible to deal with intangible property in the same way. ... I do not think that the concept of possession in the hitherto accepted sense has any meaning in relation to intangible property.

[71] Even less convincing is OAIP's argument that it is an "unpaid seller" of goods for the purposes of s 119 of the CCLA. OAIP says that the prints were produced pursuant to an agreement to sell future goods and it therefore has a right under s 174 to sell them. On the evidence presently before the Court, the nature of the relationship between OAIP and Mr Agam was not one of buyer and seller. To the contrary, it appears, even on Mr Moon's own account, that the process to produce the artworks was highly collaborative—Mr Moon described it as "iterative". Mr Agam provided digital designs and either instructed or conferred with OAIP's technicians. After this process, OAIP would provide samples or "proofs" for review, following which Mr Agam would give his production orders and OAIP would print each piece and prepare them for delivery.

[72] We accept Mr Spring's submission that this does not describe a relationship in the nature of a sale of goods, but rather something more akin to a contract for work, labour and materials provided by OAIP.²⁹

[73] Moreover, as the Judge identified, OAIP's assertion that rights under the CCLA "trump" rights arising under the Copyright Act is a novel question unsuitable for determination in the context of an application to discharge an interim injunction.³⁰

²⁸ *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2014] 3 WLR 887.

²⁹ See *Clay v Yates* (1856) 156 ER 1123 (Exch) at 1125 per Pollock CB.

³⁰ Judgment under appeal, above n 3, at [80].

The balance of convenience (appeal)

The Judge's view

[74] The Judge identified the competing factors affecting the balance of convenience. On the one hand: OAIP had attempted to sell the artworks without notifying Mr Agam and the proposed sale risked devaluing Mr Agam's brand, and was also unfair to the owners of existing pieces. Mr Agam wished, not unreasonably, to inspect the artworks to ascertain their condition. Since OAIP still had possession of the works, it had a form of valuable security. OAIP had taken a long time to resolve its outstanding accounts and "[did] not exactly have clean hands in this respect".³¹

[75] On the other hand, on Mr Moon's evidence, OAIP would face significant financial hardship as a result of the current dispute. It had a loan of NZD 1,788,438.09 falling due on 19 December 2024, which it incurred to meet the costs of producing the artwork in issue and could not repay without selling the prints or receiving payment from Mr Agam. OAIP also other debts and ongoing costs which it could not meet within the time it would take to have the substantive claim determined. It had no other assets and no current income stream. Mr Moon's home was owned by a family trust which had no debt and of which Mr Moon was a guarantor.³²

[76] The Judge regarded the balance of convenience as even, on the basis that there would be significant financial consequences for both parties either way. He also considered the strength of the respective cases as relatively even, with neither clearly stronger than the other.³³ He concluded that:³⁴

[108] ... 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. 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

³¹ Judgment under appeal, above n 3, at [93]–[96].

³² At [97]–[104].

³³ At [105]–[106].

³⁴ Footnote omitted.

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.

[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. ...

[77] The Judge recognised that requiring Mr Agam to provide security at a level that would cover the amount owing would not enable OAIP to meet its obligations, but accepted that it would provide comfort to creditors and might enable OAIP to delay enforcement.³⁵

Appeal

[78] Mr Agam's essential complaint is that, in assessing the balance of convenience, the only factors the Judge identified as favouring OAIP were OAIP's claims that at least some money (up to USD 1,700,000) was likely to be owing and that it was facing financial hardship as a result of debt incurred in meeting the costs of producing the artwork, but that neither of these claims were supported by the evidence. Mr Spring submitted that, in these circumstances, there was no logical basis on which to make an order requiring Mr Agam to pay NZD 2,000,000 by way of security to support his undertaking as to damages.

[79] We have already indicated that the evidence provided by OAIP to date does not support its assertion as to what is owing. It is not possible to say how much Mr Agam will ultimately be found to owe, if anything.

[80] As to OAIP's financial position, we do not think it was necessary for OAIP to show that the company's debt was related to the work it had done for Mr Agam. However, that was how the argument was advanced and the evidence does not support it. Mr Moon says that since the COVID-19 pandemic, OAIP's work for Mr Agam has been the company's only real source of income and that it has continued to incur ongoing costs for storage, staff, insurance and operating the studio. These costs have been financed through loan facilities secured over the company's assets and

³⁵ At [110].

guaranteed by his family trust and, as at November 2024, NZD 1,788,438.09 was payable by 19 December 2024.³⁶

[81] However, although Mr Moon produced emails from the financier confirming the amount owing under the facility, the loan facility agreement itself has not been produced. The Financing Statement Details filed with the Companies Office show the date of registration of the security as 19 June 2023, which post-dates most of the production work. The description of the collateral includes “all accounts receivables and all receivables from the Ministry of Education”, suggesting that the loan was provided, at least in part, in relation to a contract with the Ministry of Education, and that Mr Agam’s works have not been OAIP’s only real source of income.

[82] Therefore, the evidence did not support OAIP’s assertions that Mr Agam owed USD 1,788,438.09, nor that OAIP’s own debt related to the work done for Mr Agam. Yet these factors clearly influenced the Judge’s assessment of the balance of convenience, and to a significant degree. We also note that, while acknowledging that an order requiring Mr Agam to pay security would not enable OAIP to repay or refinance its loan, the Judge nevertheless accepted the submission made by OAIP’s counsel that the payment would “provide significant comfort to creditors that money will be available promptly once quantum is determined ... [which] may well enable OAIP to delay enforcement”.³⁷ There was, however, no evidence that this was the case. The emails OAIP had produced from the financier recording the amount owing by OAIP contained nothing to indicate whether payment of further security by Mr Agam would have any effect on OAIP’s position.

[83] We therefore consider that the Judge erred in giving weight to these factors. Leaving them aside, the balance of convenience strongly favoured Mr Agam. The extent to which the amounts invoiced for will be shown at trial to be owing is unknown. There are serious issues over the terms of trade that apply, including whether OAIP is entitled to claim the level of interest that makes up a substantial

³⁶ In an earlier affidavit, Mr Moon put the figure at NZD 1,900,000 but in his affidavit of 14 November 2024, he explained that OAIP had made payments in order to avoid enforcement action for failing to pay interest on time, though it was not in a position to actually repay the loan or a significant part of it.

³⁷ Judgment under appeal, above n 3, at [110].

portion of the amount claimed. Damages would not be an adequate remedy, given the reputational risk associated with the sale of works in these circumstances. OAIP still has possession of the artworks, which effectively provides security.

[84] In these circumstances we consider that the Judge did err in making continuation of the injunction conditional on Mr Agam paying security to support the undertaking as to damages.

The application for security for costs (cross-appeal)

[85] OAIP and Mr Moon had sought, as an alternative to Mr Agam providing NZD 2,000,000 security for his undertaking as to damages, security for costs in the usual way. The basis for seeking security was that Mr Agam is based overseas and has no known assets in New Zealand. The Judge did not specifically address this aspect of the application, presumably because he had already determined to order the payment of security to support the undertaking as to costs.

[86] Under r 5.45 of the High Court Rules 2016, security for costs may be ordered where (relevantly) a plaintiff resides out of New Zealand or there is reason to believe they will be unable to pay the costs of the defendant if unsuccessful in their proceeding. If that threshold is met, the decision to order security for costs is a discretionary one, to be made if the Judge considers that it is just in all the circumstances.³⁸

[87] For the reasons we have already discussed, we are satisfied that the threshold would not have been met and, even if it had, that it would not have been appropriate to order security for costs in this case. Mr Agam may live overseas but OAIP has possession of valuable artworks which, ultimately, can be sold. There is, therefore, no reason to think that OAIP's and Mr Moon's costs would go unpaid if they prevail at trial.

³⁸ High Court Rules 2016, r 5.45(2). See also *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

Result

[88] The application for an interim injunction is granted.

[89] The appeal is allowed. The order that continuation of the injunction is conditional on the appellant paying NZD 2,000,000 as security for his undertaking as to damages is set aside.

[90] The cross-appeal is dismissed.

[91] The respondent must pay the appellant costs for one standard application and one standard appeal, each on a band A basis, together with usual disbursements.

Solicitors:

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