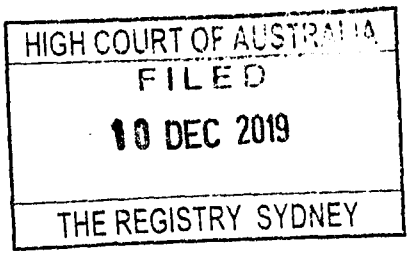
IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY No. B56 of 2019

BETWEEN: MACKELLAR MINING EQUIPMENT PTY LTD ACN 010 398 428
AND DRAMATIC INVESTMENTS PTY LTD ACN 059 863 204
T/AS PARTNERSHIP 818
First Appellant

JANET ELIZABETH WRIGHT AS REPRESENTATIVE OF THE ESTATE OF
LESLIE ARTHUR WRIGHT (DECEASED)
Second Appellant

and



TRAD THORNTON and
OTHERS NAMED IN THE NOTICE OF APPEAL
Respondents

APPELLANTS' SUBMISSIONS IN REPLY

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Part I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

Part II: REPLY

2. **Issues**: Given the approach in the Respondent's submissions (**RS**), the central areas of dispute reduce to three questions. First, where there is a finding on the balance of probabilities that local law will apply to proceedings in a foreign forum, does a residual *possibility* that foreign law may be applied lead to the conclusion that there is no equivalence between local and foreign proceedings, in the *Cigna* sense? Secondly, presuming the remedies available in the Queensland and Missouri proceedings are substantively equivalent, do "procedural and logistical differences" (RS [24]) between the proceedings on the facts lead to the conclusion that there is not "complete correspondence" in the relief available in the proceedings? Thirdly, should anti-suit relief have been refused here on the basis of delay? Each should be answered in the negative.

3. **Areas of agreement**: Significantly, it would seem that the Respondents do not contest the possibility that proceedings which were not vexatious or oppressive when commenced may *become* vexatious or oppressive by reason of later events (see RS [11], RS [16], cf AS [45]-[52]). Further, in relying upon the trial judge's reasons at TJ [104] CAB 27, [111] CAB 30 and [121] CAB 32 in their submissions at RS [2], [7], [25] and [26], the Respondents must be taken to accept that the Court of Appeal erred at CA [42] CAB 66 in concluding that such reasoning of the trial judge did not constitute a reason for her refusal of the injunctions (cf AS [59]).

4. **Ground 1**: The Respondents do not support the Court of Appeal's reasoning for discounting the significance of the finding that Australian law would govern all issues at CA [71] to [73] CAB 72 to 73 (see AS [60] and [61]).

5. Rather, the Respondents contend that in a case where it has been found that Australian law is, on the balance of probabilities, to govern all issues in the foreign proceeding, in applying the test in *Cigna* "that foreign proceedings are to be viewed as vexatious or oppressive only if there is nothing which can be gained by them over and above what may be gained in local proceedings" and that "they are vexatious or oppressive if there is a complete correspondence between the proceedings," the *bare possibility* that the foreign Court might apply foreign law is enough to conclude that something "legitimate" is to be gained in the foreign proceeding (RS [25] and [26]).

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6. In support of that case the Respondents rely upon the reasoning of Gaudron J in *Oceanic Sun Line*.[1] The Respondents thereby conflate the law governing applications to stay domestic proceedings with that governing the grant of anti-suit injunctions which is, of course, contrary to settled authority.[2] They also overlook that Gaudron J joined in the majority judgment in *Henry v Henry* in which the passage upon which the Respondents rely was disapproved in its application to the stay of local proceedings.[3]

7. The logic of the Respondents' analysis is that in every case in which foreign substantive law provides a substantive advantage to plaintiffs and there remains a *bare possibility* that foreign substantive law would be applied, an anti-suit injunction cannot issue; no matter how tenuous the contention that that foreign law would be applied and a fortiori no matter how tenuous the factual and legal connections the matter otherwise have with the chosen foreign forum. Presumably, such a bare possibility that foreign substantive law might be applied would remain in almost every case, given the potential for foreign courts to err in the application of their own choice of law principles. Such a far-reaching restriction on the availability of anti-suit injunctions would frustrate the ability of such injunctions to prevent unconscionable conduct or the unconscientious exercise of a legal right.

8. The trial in this case was conducted on pleadings in which issue was joined on whether the proper law to be applied in the Missouri proceeding was Australian or Missouri law.[4] The availability of an anti-suit injunction was determined as a separate question by way of final relief. At trial the Appellants called Professor Waters whose "detailed" evidence directly addressed the choice of law questions concluding that Queensland law would be applied to all issues (TJ [111] CAB 30). That evidence was uncontradicted.

9. The highest the Respondents' case rose was where Professor Waters was asked in cross-examination whether her opinion that Queensland law would be applied to all issues would change if she made the assumption that the Appellants had put the aircraft into the stream of commerce in Missouri. She thought that would not matter "because all of the other factors point to the application of Australian law".[5] Further, the assumption was contrary to the facts as found (TJ [13] CAB 17). In any event, the follow-up question is the only basis in the evidence for the statements at TJ [111] and [121] CAB 30 and 32

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[1] *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 266.5.
[2] See, for example, *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 390-391.
[3] *Henry v Henry* (1996) 185 CLR 571 at 589.7.
[4] Appellants' Supplementary Further Material (**ASFM**) pages 20 and 37 Statement of Claim (**SOC**) and Further Amended Defence (**FAD**) [67(h)].
[5] AFM p 374.32-33.

upon which the Respondents rely to assert the existence of the possibility of the Missouri Court applying Missouri law to some issue: "You would certainly accept it is arguable before a Missouri Court?" ... "Everything's arguable. Sure."[6]

10. Contrary to the reasoning at TJ [121] CAB 32 and CA [41] CAB 66, the Reasons of Judge St Eve in the Illinois Court were completely consistent with Professor Waters' opinion.

11. **Ground 2:** The Respondents do not seek to support the Court of Appeal's reasoning which is the subject of Ground 2 of the appeal at CA [54], [55] CAB 69 and [71] to [76] CAB 72 to 74 but instead contend:

(a) *first*, the Appellants' proceedings in Queensland are themselves oppressive. The contention appears to be that those proceedings are liable to be stayed (RS [13] and [18]);

(b) *secondly*, that the Appellants' claim in Queensland for declarations of non-liability is artificial and lacking specific foundational facts such that it is not a mirror of the questions of liability of the Missouri proceeding (RS [22]);

(c) *thirdly*, that there is not a complete correspondence between the Missouri and Queensland proceedings because a remedy in Missouri is imminent while that is not the case in Queensland (RS [24] and [27]);

(d) *fourthly*, that relief should be denied to the Appellants because by March 2010 Lambert Leasing had given appropriate undertakings in relation to potential Queensland proceedings and the Appellants, by not seeking anti-suit relief at that time had, by voluntary choice, delayed relief such that they should not be permitted to interfere with a continuation of the long running Missouri proceedings (RS [9], [19] and [28]).

12. In so contending the Respondents fail to point to a difference of *substance* (cf. AS [39]-[41]). Further, the first contention, namely that the Queensland proceeding for negative declarations is itself vexatious or oppressive, is not open in this Court. There was no pleading or submission to that effect at trial. To the contrary the question of permanent anti-suit injunctions was heard separately and in advance of other questions in the proceeding, on the application of the Respondents (CA [13] CAB 61) and the Court of Appeal based its decision upon there being no finding, and no contest, as to the propriety of the Queensland proceeding (CA [45], [46] and [48] CAB 67 to 68).

13. The second contention – that the proceeding for negative declarations is artificial and lacking in specific foundational facts – is incorrect. The proceedings in Queensland are

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[6] AFM p 374.35-36. The Respondents correctly accepted at trial that the uncontested evidence was that Australian law would be applied to all issues. AFM 381.40-44.

being conducted on pleadings. Those pleadings identify the specific factual enquiry upon which the liability of the Appellants asserted by the Respondents turns:[7] did the lessor of an aircraft have a duty to ensure that an *enhanced* ground proximity warning system was installed in the aircraft when a ground proximity warning system was already installed, in circumstances where the installation *and use* of an enhanced system was a matter for the operating airline/lessee. Those pleadings show why this is one of those cases where a defendant alleged to have been negligent appropriately takes upon itself the burden of proving the absence of negligence causative of loss.

14. Further, the submission at RS [19] that the Appellants proferred undertakings "in order to produce" equivalency between the local and foreign proceedings should not be accepted: first, because the objective effect of the undertakings is to address injustice which might arise in circumstances where the continuation of long running foreign proceedings is enjoined; secondly, the submission that the Appellants' proffering those undertakings *for that purpose* was not a case pleaded or run at trial and is not now open; and thirdly, that case is in any event inconsistent with the evidence that the Appellants proffered similar undertakings as conditions of dismissal in the 2015 *forum non conveniens* application in Missouri, a proffer which was still on foot at the relevant time (see AS [19], [20]).

15. The third contention – that a remedy in Missouri is imminent – is not supported by the facts as found. At CA [52] and [57] CAB 68 and 69 the Court of Appeal explained that the relevant finding was that the Missouri proceedings had reached a stage of readiness that permitted it to be fixed for trial and for that, and other reasons, the application to re-open was refused. That is an insufficient basis upon which to conclude that relief in Missouri is imminent. Further, this Court does not know the recent history but the fact that the present appeal is still being heard is sufficient to show that the Missouri proceeding's trial date of 15 July 2019 (TJ [38] CAB 13) has passed without a trial.

16. Conversely, the issues as defined by the Queensland pleadings falsify any contention that a remedy for the Respondents in Queensland is *not* imminent: (a) The Respondents admit that the Queensland Supreme Court has already determined the quantum of damages incurred by dependant relatives as a result of the air crash in respect of six deceased

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[7] SOC and FAD [48] to [63] ASFM 16-19, 34-36 and Reply [8], [11] and [12] AFM 13-15.

passengers;[8] (b) The Missouri claimants in respect of the pilots are parents and a brother of the pilots – i.e. non-dependants – and any cross-claim by them would be liable to summary dismissal;[9] (c) That leaves a minority of Respondents where all that is known is that for some unexplained reason they have been unable to admit the fact otherwise found by the trial judge that proceedings were brought in Queensland which settled.[10]

17. In their fourth contention the Respondents contend that anti-suit relief ought to have been sought in the short period in 2010 in which Lambert Leasing had given appropriate undertakings to submit to the Queensland jurisdiction and before cross-claims were filed. The Respondents do not have a finding in their favour on delay (CA [91] CAB 77) and there is no Notice of Contention. Indeed, the submission that an anti-suit injunction was not warranted prior to January 2016 was not "seriously controverted" in the Court of Appeal (CA [87] CAB 77). In any event, the fourth contention fails on the facts. While the Respondents rely upon their submissions to the Missouri Court on the question (AFM 210.12), Lambert Leasing's submissions in which the undertakings were proffered show that they were only ever proffered as conditions of dismissal of the Missouri proceedings by the Missouri Court.[11] The Missouri proceeding against Lambert Leasing was not dismissed until the settlement in 2016. No party could ever have obtained an anti-suit injunction from an Australian Court in favour of Lambert Leasing in that short window, nor indeed before the 2016 settlement. Further, the case being in equity's exclusive jurisdiction,[12] there was no free standing jurisdiction to refuse relief on the basis of delay,[13] and the Respondents did not plead or run a case of laches.

Dated: 9 December 2019

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[8] SOC and FAD [30] ASFM pages 10-11 and 32. Damages incurred by dependant relatives by reason of the deaths of six of the passengers were assessed following contested hearings in the Supreme Court of Queensland. Any issue of quantum which might be heard again must be ready for trial.

[9] AFM 117 [8] and [10] and 126 [1]. The Respondents concerned are Respondents 1-3, 5-46 and 60.

[10] Respondents 4 and 47-54 plead that they do not know whether proceedings for damages resulting from the passengers' deaths have been brought in Australia (FAD [29] ASFM 32). In fact, those proceedings were brought and settled (TJ [18] CAB 9).

[11] ASFM pages 64 and 76.

[12] *National Mutual Holdings Pty Ltd v The Sentry Corporation* (1989) 22 FCR 209 at 232; M Douglas, "Anti-Suit Injunctions in Australia" (2017) 41(1) *MULR* 66 at 92-93.

[13] Heydon, Leeming & Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (5th ed, 2015) at [38-010]-[38-025], [38-055]-[38-065], concluding that mere delay does not constitute laches. See, for example, *Crawley v Short* (2009) 262 ALR 654 at [163]-[164]; *Sze Tu v Lowe* (2014) 89 NSWLR 317 at [414]-[415].