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

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Part I: CERTIFICATION

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

Part II: ISSUES

2. Within the principles of *CSR v Cigna* (1996-1997) 189 CLR 345, where the Queensland court made a finding on the balance of probabilities that Australian law would govern all issues on the claim for damages if it were brought or continued in the Missouri court, does that establish that "*nothing could be gained by any of the Respondents in the [Missouri] proceedings over and above that which could be gained in local proceedings*" and that "*complete relief*" was available in the proceedings in Queensland?

3. In determining whether anti-suit relief should be granted, was the Queensland Court required to consider the question of vexation and oppression at the time when the Respondents chose to continue prosecuting the Missouri proceedings after all foreign parties had been removed from them; the Queensland proceedings were on foot; undertakings were offered to protect the Respondents; and directions were made enabling the Respondents to file a cross-claim in the Queensland proceedings?

Part III: SECTION 78B NOTICES

4. No notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: DECISIONS BELOW

5. This is an appeal from the decision of the Queensland Court of Appeal in *Mackellar Mining Equipment Pty Ltd v Thornton* [2019] QCA 77; 367 ALR 171 (**CA**), which dismissed an appeal from the decision in *Mackellar Mining Equipment Pty Ltd v Thornton* [2018] QSC 186; 341 FLR 226 (**TJ**).

Part V: STATEMENT OF FACTS

6. **The aircraft crash:** The First Appellant, as a partnership of two companies, owned a Fairchild Metro 23 aircraft, VH-TFU (**Aircraft**), which was leased to Lessbrook Pty Limited trading as Transair (**Transair**) (CAB 8 TJ [9]).

7. The Second Appellant is the widow of the chief pilot of Transair which operated the Aircraft pursuant to an Air Operator's Certificate issued by the Civil Aviation Safety Authority under the *Civil Aviation Act 1988* (Cth) (CAB 8 TJ [9]). The Aircraft was operated in Queensland from June 2003 pursuant to an Australian Certificate of Airworthiness (CAB 8 TJ [9] and [13]) subject to the regime created by that Act (CAB 17 TJ [62]).

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8. On 7 May 2005 the Aircraft crashed on the side of a mountain on approach to Lockhart River Aerodrome on a scheduled flight between Bamaga and Cairns. The 13 passengers and 2 crew on board the aircraft were killed. The Respondents are relatives of 12 of the deceased passengers and the 2 deceased pilots (CAB 8 TJ [10]-[11]).

9. The accident was investigated by the Australian Transport Safety Bureau and the deaths of those onboard were the subject of a coronial inquiry in Queensland (CAB 9 TJ [14]). All of the witnesses who can give evidence and the remaining evidence are in Australia (CAB 17 TJ [62]).

10. **Australian dependency claims:** All the Respondents are ordinarily residents of Australia and all but one are Australian citizens and all but two are Queensland residents (CAB 8 TJ [11]).

11. Dependency claims were brought against Transair in respect of deaths of the passengers pursuant to the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (**CACL Act**) as applied as a law of Queensland.[1] Damages were assessed by the Supreme Court of Queensland following contested hearings in six cases[2] and in six other cases resolved by agreement[3] (CAB 9 TJ [18]; AFM 85-86). One case failed because it was commenced out of time. Damages assessed and awarded were for compensable losses incurred by all dependents of each deceased passenger (CACL Act s.35(6)). In cases in which damages were assessed for more than $500,000, damages awarded were capped at that amount (CAB 9 TJ [17]; AFM 85-86).

12. **The Missouri proceeding:** In May 2008 the Respondents commenced proceedings in the Circuit Court of Greene County, Missouri against Lambert Leasing, a US corporation which had sold the aircraft to Partnership 818, and against a defendant named as "Partnership 818"[4] (CAB 8 TJ [12], 60 CA [5]).

13. On the balance of probabilities, Australian law would be applied in the Missouri proceeding against the Appellants (CAB 27 TJ [104]; 66 CA [41]).

14. The claims in Missouri are claims under s 75AD of the *Trade Practices Act 1974* (CAB 10 TJ [23], 60 CA [6]) and in negligence (CAB 11 TJ [26], 60 CA [6]). On both causes

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[1] By *Civil Aviation (Carriers' Liability) Act 1964* (Qld).
[2] The contested proceedings were in the interests of the first, fifth to eleventh, thirteenth to eighteenth, twenty-first, twenty-fourth, twenty-fifth, twenty-eighth to thirty-seventh, thirty-ninth to forty-second and forty-sixth respondents.
[3] Settlements were reached in claims for damages by the fourth, forty-seventh, forty-eighth and fiftieth to fifty-third respondents.
[4] Note: no attempt was made to sue the First Appellants personally until the events of February 2017, referred to at paragraph 22 below.

of action Australian law provided for damages arising from the death to be recoverable by or on behalf of the relatives of decedents.[5]

15. Lambert Leasing cross-claimed against four other American corporations as well as against Airservices Australia. Further cross-claims were then filed against the Appellants (CAB 11 TJ [29]; CAB 60 CA [8]).

16. The Missouri proceeding is for compensatory damages. There was no issue that, whether Missouri or Queensland law on damages applied, the Respondents who had been dependent on deceased passengers or pilots had a claim for loss of support, household and other services (CAB 31 TJ [114]). However in the assessment of damages, Missouri law would allow two heads of damage which are not available under Queensland law: (a) for "mental anguish, sorrow and grief" not alleged to amount to nervous shock or mental harm and (b) for emotional distress and trauma, severe physical injuries and conscious pain and suffering of the deceased passengers and pilots immediately prior to death (CAB 31 TJ [114]; AFM 47 [38]-[40]; 120-121 [6] and [7]).

17. The Respondents resisted dismissal of the Missouri proceeding on a *forum non conveniens* motion brought by Lambert Leasing on the basis that Lambert could not be sued in Australia (AFM 209-213). The Missouri Courts refused to dismiss the proceeding and dismissed appeals from that decision, each without reasons (AFM 178 to 185).

18. The Missouri proceeding was removed to the US Federal Court on the application of Airservices Australia and was stayed pending the outcome of proceedings commenced by the Respondents in Illinois against US defendants for damages as a result of the deaths of the passengers and pilots in the accident (CAB 11 TJ [29]) and which had been transferred to the US Federal Court in the Northern District of Illinois (CAB 9 TJ [19]; CAB 59 CA [4]). On 8 July 2014 the Federal Court summarily dismissed the Illinois claims and a subsequent appeal was unsuccessful (CAB 10 TJ [20]; CAB 59 CA [4]).

19. On 13 February 2015 Airservices Australia filed a motion in the Missouri proceeding for dismissal on the ground of *forum non conveniens*. Partnership 818 joined in that motion (CAB 11 TJ [30]; CAB 60 CA [8]; AFM 262-264) and consented to conditions of dismissal to submit to the jurisdiction of an Australian civil court, to toll any statute of limitation that might apply to actions in Australia for 120 days after dismissal by the US Court and to make available in actions in Australia any evidence and witnesses under

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[5] *State Compensation to Relatives Act* laws were applied to the *Trade Practices Act* claim by s 75AD(f). The *Supreme Court Act 1995* (Qld) ss 17-23D provided for compensation to relatives claims.

their possession, custody or control upon appropriate request by the Australian civil court (CAB 11 TJ [30], 60 CA [8], 74 CA [76]; AFM 251 fn 15, 262-263). The motion had not been determined by the time that Lambert Leasing entered into a settlement agreement with the Respondents which was approved by the US Federal Court on 9 December 2015 (CAB 11 TJ [30]; CAB 60 CA [8]). On 11 January 2016 Lambert Leasing indicated it would discontinue its cross-claims and on 21 January 2016 the five cross-defendants were dismissed from the Missouri proceeding. With that dismissal, the cross claims against the Appellants were also dismissed (CAB 12 [31], [32]).

20. The proceeding (including all pending motions: AFM 47 [35]) was remanded back to the Circuit Court of Greene County, Missouri on 21 January 2016 (CAB 12 TJ [32]; CAB 60 CA [9]) at which time:

(a) All parties to the proceeding were Australian (CAB 60 CA [9]);

(b) The claim was based upon the lease of the aircraft to Transair and the delivery of the aircraft to Transair both of which occurred while the Aircraft was in Australia (CAB 8 TJ [12], [13]);

(c) All damage was suffered in Australia (CAB 8 TJ [11]);

(d) The motion for dismissal of the proceeding on the ground of *forum non conveniens,* in which Partnership 818 had consented to conditions of dismissal (see paragraph 19) remained on foot.

21. Nothing occurred on the record in the proceeding in Missouri between January 2016 and 3 January 2017 when the Missouri Court noted a lack of recent activity and scheduled a review within 45 days (CAB 12 TJ [32]; AFM 378.27-31).

22. Following that listing, on 13 February 2017 the Respondents filed a petition seeking the appointment of next friends for the Respondents who were minors. A hearing of that petition occurred on 27 February 2017 at which the Respondents gave notice that the next step they proposed to take in the Missouri proceeding was to seek leave to amend their pleading to substitute each of the First Appellants for Partnership 818 as defendants in that proceeding (AFM 269.30-40; 319.45). On 2 March 2017 the Missouri Court made orders joining the next friends of the minor plaintiffs (CAB 12 TJ [33]).

23. **The Queensland proceeding:** On 6 March 2017 the Appellants commenced the proceeding in the Supreme Court of Queensland for negative declarations and anti-suit injunctions.

24. On 7 March 2017, and before the foreshadowed application to join the Appellants as defendants in Missouri had been made, let alone determined, an ex parte interim anti-suit injunction was granted. That injunction was extended a number of times and continued in force until trial (CAB 7 TJ [5]).

25. On 13 June 2017 the Queensland Court ordered that the Respondents were to file their defence and any counter claim by 23 August 2017. A defence but no counter claim was filed (CAB 30 TJ [110]). At that time Mr Wisner, the US Attorney with conduct of both the Queensland and Missouri proceedings (see paragraph 29 below) understood that the Appellants sought a trial of all issues, including damages, on the merits in Queensland (AFM 168.50 to 169.40).

26. On 1 December 2017 the Queensland Court ordered that the question of whether the Appellants were entitled to injunctive relief should be heard and determined separately from other questions in the proceeding (CAB 7 TJ [6]).

27. In their Reply filed on 26 October 2017, the Appellants had consented to use of the depositions and material produced in the Missouri proceedings in the Australian proceedings (CAB 29 TJ [107]; AFM 17[13(m)]). In their submissions before trial on 14 May 2018 the Appellants repeated an indication earlier given (on the first hearing on 7 March 2017) that they would undertake not to take any limitation defence in the Australian proceedings which could not have been taken in Missouri (CAB 30 TJ [107]; AFM 35-36 [59]; 39-40 [66(b) and (e)]). That mirrored the conditions of dismissal to which the Appellants had committed in the Missouri proceeding (see paragraph 20(d) above).

28. More detail of the steps taken in both the Missouri and Queensland proceedings is provided in the Appellants' Chronology filed with these submissions.

29. **The American Attorney:** Both the Missouri proceeding and the Queensland proceeding are being conducted in the names of the Respondents by the American Attorney Mr Floyd Wisner or his firm, Wisner Law Firm, pursuant to a Power of Attorney. Mr Wisner incurs all the costs and disbursements personally and will be repaid only if and when the Plaintiffs in Missouri win or receive a settlement. In addition to that repayment, Mr Wisner will be paid 30% of the settlement or verdict obtained by each of the Respondents. The Respondents have not incurred any costs in the conduct of the Missouri proceeding other than the possibility that one or two of the Respondents have paid their own fares to the United States to give a deposition. The Respondents' Australian solicitor, who is on

the record in this Court, is retained by Mr Wisner, and not by the Respondents (CAB 13-14 TJ [41]-[45]; AFM 351.46-352.33; 353.38-40).

30. On 11 August 2017 and 5 September 2017, Mr Wisner, appearing for the Respondents made submissions which, while cogniscant of complying with the interim anti-suit relief, were directed to encouraging the Missouri Court to move the Missouri proceedings toward trial (AFM 164.15-40; 166.40, 169.40, 266, 299).

31. The primary judge heard the anti-suit injunction application on 14-15 June 2018 and refused it on 23 August 2018. The Court of Appeal heard the appeal on 19 November 2018 and reconvened for a reopening application on 27 March 2019. It rejected both the appeal and reopening application on 7 May 2019. Within the judgment of the Court of Appeal, the reopening application is dealt with between CA [56] and [83]. As that application was rejected and there is no appeal against that decision, CA [56] to [83] are relevant to this appeal only to the extent that they contain additional reasoning supportive of the Court of Appeal's decision on the primary issue, which is found between CA [42] and [55].

Part VI: ARGUMENT

VI A. THE PRINCIPLES

32. **Features of the proceedings:** The Court of Appeal reasoned, on the balance of probabilities, that the Missouri proceeding, had "always borne" each of the following characteristics: (a) all parties are Australian [a finding that was correct only after Lambert Leasing and the American cross-defendants were removed in January 2016]; (b) all issues are governed by Australian law; (c) factual questions will be considered by reference to Australian civil aviation standards; (d) the claim is based on a transaction that took place wholly in Australia; (e) all of the damage alleged to have been suffered was suffered in Australia; (f) all of the lay witnesses are in Australia and two of them are elderly and unable to travel to the United States; and (g) the connection of the case to Missouri is, at its highest, slight (CAB 61-62 CA[17]; 68-69 [53]-[54]).

33. The Queensland proceeding and the questions of liability in the Missouri proceeding are each an exact mirror of the other (CAB 69 [55]). In Queensland, the Appellants seek a determination that they are not liable to the Respondents for loss or damage suffered as a result of the deaths of the passengers and pilots on board the Aircraft (CAB 7 TJ [3]). In Missouri, the Respondents sue to establish that exact liability.

34. It is now not in dispute that in the Queensland proceeding Australian law will govern all issues of liability and damages.

35. Compensatory damages are the only remedy sought in the Missouri proceeding and, as Australian law will be applied in that proceeding, the same damages will be available to or on behalf of the same persons. Only if Missouri law were to apply in that proceeding could the result be different.

36. **The test in *CSR v Cigna*** : In *CSR Limited v Cigna Insurance Australia Limited*[6] it was held that "*One well established category of case in which an injunction may be granted in the exercise of equitable jurisdiction is that involving proceedings in another court, including in a foreign court, which are, according to the principles of equity, vexatious or oppressive.*"[7] The plurality paraphrased Robert Goff LJ in *Bank of Tokyo v Karoon*[8] to the effect 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. The plurality identified that foreign proceedings will be regarded as vexatious or oppressive if there is *"a complete correspondence between the proceedings"* or *"if 'complete relief' is available in the local proceedings"*.

37. Resolution of this appeal turns on the application of that statement of principle and in particular on:

    (a) The content of the "complete correspondence" and "complete relief" to which the plurality referred;

    (b) Whether the test is open to be applied (i) solely at the time of the instigation of foreign proceedings, or (ii) additionally at the time of the hearing on the application for an injunction in respect of the continued prosecution of the foreign proceedings?

    (c) What significance is attached to the historical conduct of the foreign proceeding?

38. Each issue will be considered in turn.

39. **A question of substance**: The plurality's references in *CSR v Cigna* to: (a) what may be gained in local proceedings, (b) correspondence between the proceedings, and (c) complete relief, were to matters of *substance*, and to that which can be gained from the respective Court systems. The comparator to the foreign proceeding is not a particular local proceeding, but "*local proceedings*," or as Robert Goff LJ expressed the test *"the*

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[6] (1997) 189 CLR 345.
[7] At 393.
[8] [1987] 1 AC 45 at 60.

plaintiff in the foreign court could not obtain an advantage from the foreign procedure which he could not obtain in the English court."[9] That reflected the law as developed since *Peruvian Guano*[10] in which Jessel MR said it was not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff.[11] Jessel MR's statement was applied by the Privy Council in *Société Aerospatiale.*[12] In *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra*[13] the Singapore Court of Appeal applied that same test in reasoning that there was no legitimate reason for the Singapore defendant not to have filed a counter-claim in Singapore instead of commencing a Virgin Island proceeding and in those circumstances there was "no reason why the [defendant] should be allowed to continue pursuing the BVI proceedings in tandem with the Singapore proceedings".[14]

40. The authors of Nygh correctly observe that the Court's reasoning in *CSR v Cigna* is "*directed towards an advantage delivered by a substantive remedy as opposed to some mere procedural advantage available in the foreign forum*".[15] That statement accords with the plurality's reference to "complete relief" which was to that term as used by Lord Cranworth LC in *Carron Iron Co v McLaren.*[16] Lord Cranworth gave three examples of complete relief, each example dealing with the substance of the relief available in the two Court systems: first, *Harrison v Gurney* in which the English Court having appointed a receiver to execute a trust restrained Irish proceedings for the administration of that trust; secondly, *Beckford v Kemble* in which the English Court dealing with an application for an account on a mortgage restrained Jamaican foreclosure proceedings; and thirdly, *Bushby v Munday* in which Scottish proceedings for delivery up of a bond were restrained for reasons which included that the remedies available from the English Courts, should the plaintiff succeed, would be more complete.

41. Consistently with this, in *Société Aerospatiale* the Privy Council explained the test by reference to the practical utility of relief available in the foreign proceeding (execution against foreign assets; a party amenable only to the foreign jurisdiction) which utility

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[9] *Bank of Tokyo v Karoon* at 60.
[10] *Peruvian Guano Co v Bockwoldt* (1883) 23 Ch D 225.
[11] At 230.
[12] *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] 1 AC 871 at 894A.
[13] [2019] SGCA 42.
[14] At [95] and [96].
[15] Davies, Bell and Brereton: *Nygh's Conflict of Laws in Australia* (9th ed) p 231 [9.27].
[16] (1855) 5 HLC 416; 10 ER 961 at 970.

would not be available in domestic proceedings.[17] In *CSR v Cigna* itself the plurality applied a test focused on availability of a species of substantive relief: treble damages under the Sherman Act was not shown to be relief which was available in NSW proceedings, and therefore the foreign proceeding was not vexatious.[18]

42. **The significance of choice of law:** When a foreign plaintiff asserts a "*better damages and stronger liability scheme*"[19] under the foreign law than available in Australia as the substantial benefit to it in pursuing the foreign proceeding over an Australian proceeding, it will be necessary for the Court to determine which system of law will govern those questions if it is heard in either forum; likewise when foreign plaintiffs assert that there is not complete correspondence between the proceedings because some of the foreign plaintiffs have a claim under foreign law that they do not have under Australian law.[20]

43. The question of which law will be applied by the foreign Court is a question of fact.[21] In each case the questions for resolution by the Court on the ordinary civil standard of proof are those of substance: is complete relief available in Australian courts and is there complete correspondence between the proceedings?

44. In circumstances where the foreign plaintiffs seek, or are entitled to seek, in Australian courts the precise relief they seek in the foreign proceeding, a finding that the same system of law will govern both proceedings necessitates the conclusion that "*complete relief*" is available in the local proceedings and there is "*complete correspondence*" between the proceedings. This will, in turn, strongly point to the conclusion that "*there is nothing which can be gained from [the foreign proceedings] over and above what may be gained in local proceedings*" and, therefore, the foreign proceedings are vexatious or oppressive in the relevant sense.[22] This is consistent with the approach adopted by Brereton J in *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWCSC 724 at [74]-[76].

45. **When is vexation or oppression to be assessed**? The authorities support the proposition that the time at which the question of vexation and oppression is to be assessed may

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[17] At 894B.
[18] *CSR v Cigna* at 395.
[19] CAB 32 TJ [120].
[20] CAB 33 TJ [123].
[21] *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 370 [115] per Gummow and Hayne JJ. See also *National Mutual Holdings Pty Ltd v Sentry Corp* (1989) 22 FCR 209 at 226 per Gummow J; *United States Trust Co of New York v Australia and New Zealand Banking Group Ltd* (1995) 37 NSWLR 131 at 146 per Sheller JA.
[22] A finding that foreign proceedings are governed by the same system of law as local proceedings may not *preclude* the identification of juridical advantages but no such issue arises in this case.

include the time of the anti-suit application, in addition to any application based solely on the facts at the time the foreign proceedings were commenced.

46. Beginning with *Carron Iron Co*,[23] the Lord Chancellor expressly records at 436 "*[t]here is no doubt as to the power of the Court of Chancery to restrain persons within its jurisdiction from instituting or prosecuting suits in foreign court, whenever the circumstances of the case make such an interposition necessary or expedient*". The extension of the principle to injuncting the *prosecution* of disputes admits of the possibility that a proceeding may become vexatious or oppressive by reason of facts and circumstances arising following its institution.

10 47. In *Société Aerospatiale*, the Privy Council granted an injunction in respect of long-running proceedings in Texas, in favour of proceedings in Brunei. Both the Brunei and Texas proceedings were commenced in December 1981, but the Brunei proceeding was not served until a year later.[24] The anti-suit application was filed six years after the suit was filed in Texas. The Privy Council restrained continuation of the Texas proceeding on terms because they were *then* vexatious and oppressive. In doing so, they took into account *both* that a number of American entities had ceased to be parties in Texas because of a settlement[25] *and* because of developments in a contribution action in Brunei that occurred while the hearing for the injunction was occurring with the effect of strengthening the case for Brunei then being the natural forum[26] and rendering
20 continuance of the Texas proceeding seriously unjust and liable to restraint.[27]

48. Justice Lindgren followed and applied the reasoning in *Société Aerospatiale* in *Allstate Life Insurance Co*,[28] where his Honour held at 29: "*While the Privy Council [in Société Aerospatiale] rejected the Court of Appeal's conclusion that Texas had become the natural forum, it did so on the basis of the facts of the case and without suggesting that a forum which had not been the natural forum initially could not become it. Similarly, I proceed on the basis that the time at which the 'natural forum' is to be determined is the time of the hearing of the motion for anti-suit relief*" (emphasis added). As the reasoning and result in *Société Aerospatiale* show, the same is true of the time for the application of the test for vexation and oppression.

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[23] *Carron Iron Co v Maclaren* [1855] 5 HLC 416; 10 ER 961.
[24] *Société Aerospatiale* at 885E.
[25] *Société Aerospatiale* at 886D.
[26] *Société Aerospatiale* at 888G, 897H, 899H-900C.
[27] *Société Aerospatiale* at 902G.
[28] *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 1)* (1996) 64 FCR 1.

49. Returning to *Cigna* itself, the plurality explained 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*" (at 393). This statement of principle is wide enough to admit of consideration of the position at the time an application for an anti-suit injunction is brought. It may be that *initially* there is something which can be "*gained*" by the foreign proceedings "*over and above what may be gained in local proceedings*", but, due to a material change in circumstances, it later *becomes* the case (for example, by reason of the resolution of proceedings against certain parties), that there is nothing which can be gained, in the relevant sense. As such, nothing in the statement of principle in *Cigna* necessitates the confinement of the consideration of vexation or oppression solely to the time at which foreign proceedings are commenced. This is further confirmed by the emphasis the plurality placed on the by then well-settled principle that the category of cases in which an anti-suit injunction may be ordered are not closed: see at 392-394.

50. Finally, the point was made explicitly by Gordon J in *TS Production LLC v Drew Pictures Pty Ltd*[29], where her Honour noted that "*although there is nothing about the current state of the respective proceedings ... that shows any other fact or matter currently exists which would arguably alter this conclusion [that no anti-suit injunction should issue], of course, the position might change. If it does, application can then be made for appropriate relief: see eg Allendale 10 F (3d) at 433 (noting that a renewed request for injunctive relief could be brought if there were any change in the material circumstances).*"[30]

51. This statement, and its implication that a "*change in the material circumstances*" may result in an anti-suit injunction *becoming* appropriate where previously it was not, is correct as a matter of broader equitable principle, as well as according with the reasoning and result in *Société Aerospatiale*. It is well settled that a court's power, derived from the Chancery Court, to grant anti-suit injunctions is directed to restraining unconscionable conduct or the unconscientious exercise of legal rights. This power would be frustrated if it did not extend to making orders in restraint of foreign proceedings the continued *prosecution* of which amounts to unconscionable conduct or the unconscientious exercise

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[29] (2008) 172 FCR 433 at [67].

[30] See *Allendale Mutual Insurance Company v Bull Data Systems Inc* 10 F (3d) 425 (1993) at 433. To like effect, see *Pegasus Leasing v Cadoroll Pty Ltd* (1995) 59 FCR 152, where Lee and Tamberlin JJ held that the filing of a cross-claim and an amended defence pleading a limitation defence "*significantly change[d] the circumstances*" of proceedings brought in South Australia (see at 159), leading the Federal Court to grant a temporary anti-suit injunction in respect of the South Australian proceedings until the resolution of the Federal Court proceedings.

of legal rights, merely because the proceedings were unobjectionable *when commenced*.[31] In such circumstances, the mischief at which the power is directed would go unchecked.

52. Test the matter this way. If the time at which vexation or oppression is to be assessed were solely the time of *commencement* of the foreign proceedings, it would be possible to institute in a foreign forum a case which is Australian in every respect, save for the addition of a non-colourable foreign element, such as a cross-claim against a foreign party. In those circumstances, anti-suit relief in respect of foreign proceedings could be resisted at the outset by reference to that non-colourable element. Assume that element is later removed (for example, the cross-claim is settled, and no issue of contribution involving the foreign party could arise on the facts). Can it be contended that the initial inclusion of the non-colourable element would prevent anti-suit relief indefinitely into the future, even after its removal? Surely not. Such a result would be contrary to the fundamental principle that a court will restrain a plaintiff from pursuing foreign proceedings when to do so is "*necessary for the administration of justice*".[32]

53. **Historical conduct of the foreign proceeding:** A conclusion that the continuance of a foreign proceeding will be vexatious or oppressive will generally result in equity restraining a person over whom the local Court has jurisdiction from continuing to prosecute that proceeding. However, to impose such a restraint in a blanket fashion raises the risk of injustice as a result of steps that may have been taken in the earlier, unrestrained conduct of the foreign proceeding.

54. Consistent with the equitable jurisdiction being exercised, the domestic Court will attend to those risks by the imposition of appropriate terms on any relief granted. The principle was stated by Lord Cranworth LC in *Carron Iron Co*:[33]

> *"If a suit instituted abroad appears ill calculated to answer the ends of justice, the Court of Chancery has restrained the foreign action, imposing, however, terms which it has considered reasonable for protecting the party who was suing abroad."*

55. That was also the approach adopted by the Privy Council in *Société Aerospatiale*. In allowing the appeal the Privy Council granted the anti-suit injunction upon terms.[34]

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[31] For completeness, it should be noted that this is entirely consistent with the "*restrictive approach*" to anti-suit injunctions taken by the High Court in *Cigna*, as compared to the "*liberal approach*" taken by certain (but not all) US courts on such applications. See *TS Production LLC v Drew Pictures Pty Ltd* (2008) 172 FCR 433 at [62]-[63].
[32] See, *TS Production LLC v Drew Pictures Pty Ltd* (2008) 172 FCR 433 at [53] per Gordon J. For a recent example, *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] SGCA 42 at [49(a)].
[33] (1855) 5 HLC 416; 10 ER 961 at 970.
[34] At 902H-905.

56. That is not to exclude the possibility that in some cases the history of the conduct of foreign proceedings will be such that anti-suit relief should be denied altogether on the basis that no undertakings could suffice, but like the case in *Société Aerospatiale* that is not this case.

VI.B GROUND 1 – COMPLETE RELIEF AND CHOICE OF LAW

57. **Trial reasons:** Notwithstanding her correct finding that *"Queensland law is likely to be the law that applies in the Missouri proceeding"* (CAB 27 [104]), the trial judge went on to accept the Respondents' submissions that there is a *"better damages and stronger liability regime in Missouri"* (CAB 32 [120]), that it was *"certainly arguable that an assessment in Missouri would include a component for emotional distress suffered by the passengers in the moments before the accident which is not compensable in Queensland"* (CAB 32 [121]) and that *"not all the current parties in Missouri were entitled to make a claim in Queensland"* (CAB 33 [123]). The only way to understand these findings is that the trial judge was admitting of the possibility that a Missouri trial judge may take an approach which differed from her Honour on the Missouri choice of law question.

58. In so reasoning, her Honour failed to address the correct question which was an objective question of substance: did the relief available in the Missouri proceeding correspond with relief available to the same parties in proceedings in Queensland? Her Honour addressed a different and irrelevant question: did the range of possible outcomes of a trial in Missouri, including within the range the possibility of the Missouri judge erring, admit of a possible, albeit unlikely outcome, whereby Missouri law might offer something more?

59. **The Court of Appeal**: The Court of Appeal, after correctly observing that the trial judge had found that Queensland law would be applied in the Missouri proceeding, went on to construe her reasons as holding that the unlikely possibility that Missouri law might be applied to resolve some disputed issues did *not* constitute a reason for the refusal of the injunctions (CAB 66-67 [42]). How that construction can be placed on her Honour's reasons is difficult to fathom.

60. The Court of Appeal, in the middle of the reopening application, when enumerating the factors in favor of the grant of relief (at CAB 72 [71]) recognised as the third factor advanced by the Appellants *"The applicable law will be Australian and Australian civil aviation standards will have to be applied"*. The Court of Appeal dealt with that factor at CAB 72-73 [72]-[73], where it drew a sharp distinction in principle: such matters would *"weigh heavily when a court is asked to make orders on the ground of forum non*

conveniens" but *"on their own they cannot, in general, give rise to a conclusion that the person who prefers to litigate in a foreign jurisdiction is acting in such a manner that equity will intervene by injunction to restrain the exercise of undoubted legal rights"* (emphasis added). That distinction seems to be tied to the proposition that it would be "*invidious and objectionable*" for the Queensland Court to assess the capacity of the Missouri Court to come to grips with and apply Australian law: CAB 72 CA [72].

61. However, the significance of the finding on choice of law was not to inform an assessment of the reliability of any adjudication in Missouri upon Australian law. The true significance of the finding was in what it meant for the matter which was centrally in issue: was there complete relief available to each of the plaintiffs in the Missouri proceeding in the Queensland Courts? To come to a conclusion on that question, the Court of Appeal needed to make a finding of what relief was available to each of those plaintiffs in the Missouri proceeding. The choice of law finding of the trial judge, affirmed by the Court of Appeal, required that that question was to be answered by the application of Australian law, and that the answer be that complete relief was so available.

62. In summary, the Court of Appeal failed to address the critical question of whether or not there was something which could be gained from the foreign proceeding over and above what might be gained in proceedings in Queensland or whether *"complete relief"* was available in proceedings in Queensland.

VI.C GROUND 2 – CONTINUATION OF PROCEEDING UNCONSCIONABLE

63. **Trial Reasons:** Apart from the matters noted and critiqued at paragraphs 57 and 58 above, the trial judge does not seem to have grappled squarely with the arguments put to her as to why the Respondent's continuation of the Missouri proceedings was vexatious and oppressive, assessed in all the circumstances at the date of the hearing.

64. **The Court of Appeal:** The dispositive reasoning appears primarily between CAB 68-69 CA [53]-[55], but in the middle of the reopening application, there is further reasoning between CA [71]-[76] CAB 72-74, which needs to be taken into account.

65. The primary task which the Court of Appeal faced, consistent with the authorities referred to above, was to consider all of the circumstances concerning the Missouri proceedings as at the date of the trial judge's decision to evaluate whether the Respondents' continuation of them was vexatious and oppressive. Where the Appellants asserted that anti-suit relief would not have been justified at the date of the filing of the Missouri proceedings, but that there was now a material change in circumstances justifying that

relief, the Court needed to consider all the circumstances bearing on that alleged material change.

66. An initial problem with the reasoning in CA[54] is that it has foreclosed the full exercise necessary to answer those questions. As to the first sentence of [54], when the Court says that "[t]he problem with these submissions is that the Missouri proceedings have always borne those characteristics, and always had those consequences", that statement cannot be taken literally. The first feature which the Appellants had identified, as referred to in CA[53] and in turn CA[17], is that all of the parties were Australian. That feature did not come into existence until the removal in 2016 of Lambert and the American cross-defendants from the Missouri proceedings.

67. It was necessary for the Court to focus fully upon the circumstances in which this feature emerged, namely all of the parties' now being Australian, and the consequences of such change. It was not simply the removal of Lambert via the settlement which had occurred; nor was it accurate (as is stated in the second last sentence of CA [54]) that Lambert was the sole US party. The true position, as noted in paragraphs 15 – 19 above, is that, following Lambert's failure to obtain the dismissal of the Missouri proceeding against it, there was a chain of further cross claims generating a raft of additional non-colourable US elements to the Missouri proceeding (see also TJ[28], which notes that Lambert brought cross-claims against 5 parties, 4 of whom were US corporations).

68. The result of this is that at CA [54] the Court of Appeal has failed fully to take into account the circumstances in which anti-suit relief would almost inevitably have been unavailable prior to the settlement with Lambert, and conversely why that settlement and its consequential effects put such a radically different complexion on the Missouri proceeding.

69. Accordingly, when the Court says in CA[54] that "if the Missouri proceeding was neither vexatious nor oppressive between 5 May 2008, when it started, and January 2016, when Lambert Leasing was removed as a party, I do not see how the proceeding gained that character thereafter", it is not only not focusing on the relevant time – which is the date of the hearing before the trial judge – but it is not fully appreciating the reasons why it was not vexatious and oppressive earlier. Having not appreciated those reasons, the Court necessarily failed to focus on the true significance of the material change in circumstances.

70. As to the final sentence of CA [54] – "[n]obody has shown that Lambert Leasing could not have been made a party to proceedings here if the respondents had elected to sue in Queensland" – that appears to be a suggestion that perhaps anti-suit relief could have been obtained earlier because the Respondents could have been required in equity to bring their claim against Lambert in Queensland. If that is its tenor, the proposition has multiple problems: ***first***, as noted above, the question is not simply whether Lambert could have been sued in Australia, but whether the range of further cross-claims which Lambert wished to bring against US cross-defendants, and which some of those cross-defendants brought against the Appellants, were capable of being brought in Australia; ***secondly***, the finding is inconsistent with the later proposition at CA[87] in the incomplete observations on the delay argument ("the appellants' contention that an anti-suit injunction was not warranted until the proceedings were finaly constituted has not been seriously controverted and I will proceed upon the basis that that contention is right."); ***thirdly*** and in any event, as noted at paragraph 17 above, there had been an application to the American court for dismissal on *forum non conveniens* grounds which application was dismissed without reasons, as were appeals from that decision. It may be inferred that the dismissal was for the reason advanced by the Respondents:[35] that Lambert Leasing could not be sued in Australia because any cause of action was based on the sale by Lambert of the Aircraft, and Lambert's associated conduct, all of which occurred in Missouri, and because Lambert was not present in Australia. (CAB 59 CA [1]; 8 TJ [12]; AFM 209-213). It suffices to observe that the finding at CAB 69 CA [54], that nobody had shown that Lambert Leasing could not have been made a party to the Australian proceeding if the Respondents had elected to sue in Queensland, conflicted with the Respondents' position accepted by the Missouri Court.

71. That being so there was, until the settlement, relief available in the foreign proceeding (against Lambert Leasing) which was likely not available in proceedings in Queensland. Contrary to the finding at CA [54] that a further feature that the Missouri proceeding had "always borne" was that the "Respondents could recover all their remedies in Queensland" (CA [53]), that statement did not become true of the Missouri proceeding as a whole until the settlement with Lambert Leasing.

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[35] *Société Aerospatiale* at 887A is directly analogous.

72. In summary, while there are not only considerable difficulties with the reasoning in CA[54] and considerable tension between the various strands in it, the ultimate question required by the authorities - which is whether continuation of the foreign proceedings in all of the circumstances at the date of decision on the application for anti-suit relief is vexatious and oppressive - has not really been answered. The Court has never focused upon a proceeding with the characteristics accepted in CA [17] and [53] and asked whether the continuation of proceedings, once they exhibit *only* those characteristics, would be vexatious or oppressive. Nor do the additional reasons in CA [55] reflect a focus on the correct question.

10 73. In the reasoning on the reopening application, in the first sentence of CA [72] CAB 72 the Court of Appeal accepted that because all parties and witnesses are in Australia there will be trouble and expense involved in conducting a trial in Missouri. As a result of its error on the choice of law question – as addressed under Ground 1 - the Court at CA [72] and [73] proceeded without considering *why* it was that the imposition of that trouble and expense was not vexatious and oppressive in circumstances where there was nothing of substance to be gained by the Respondents in further prosecution of the Missouri proceeding.

74. The further reasoning at CA [74] CAB 73 concerning the "fundamental fallacy" in the Appellant's case is inconsistent with the unchallenged, and correct, finding by the trial
20 judge at TJ [107] CAB 30 that the Appellant had given a consent and undertaking protecting the Respondents in suit in Queensland.

75. The Court correctly reasoned that the Respondents' causes of action were statute barred in Queensland in January 2016. On that basis, the Court reasoned that it would have been "irrational" for the Respondents at that time to have discontinued in Missouri and commenced in Queensland.

76. Here the Court erred in two respects. First, there was error in confining the time frame to January 2016, as opposed to looking at all the circumstances up until the date of decision on the anti-suit application.

77. Secondly, the Court erred in holding that there was no evidence that the Appellants would,
30 if asked, have agreed not to take a limitation defence and that it could not be inferred that they would have done so. That reasoning conflicted with the facts stated at paragraphs 19, 20(d) and 27 above and could not stand with the unchallenged finding of the trial judge at CAB 30 TJ [107]. The Appellants had, from before the settlement with Lambert

Leasing, not merely suggested that the proceedings be abandoned and restarted in Queensland; they had on foot a motion seeking orders to that effect. Further the Appellants had offered, as a condition of dismissal, not to raise a limitation defence that was not available in Missouri.

78. Accordingly, at all times from 2015 until after the trial in Queensland, it was open to the Respondents to consent to the dismissal of the proceeding in Missouri subject to the conditions to which the Appellants had consented and to have recommenced in Australia without any impediment created by the statute of limitations. Instead, when the Missouri Court called up the matter as a result of inactivity, the Respondents elected to press on with the Missouri proceeding; first by taking the step to regularise the proceeding by the appointment of next friends for the minor plaintiffs and second by giving notice of their intent to join the First Appellants as defendants (cf paragraph 22 above). And once the Queensland proceeding was commenced, the Appellants repeated their offers, including as to limitation defences, to the Queensland Court.

79. There are similar problems with CA [75] where the Court said it would have been "quite another matter" had the Appellants, acting promptly after removal of Lambert Leasing, given two undertakings: first not to raise a time limitation defence and secondly to indemnify the Respondents against expenses which resulted from the discontinuance in Missouri and commencement in Queensland. This is to overlook the undertakings earlier offered in Missouri, and the fact that the Appellants formally made such offers in the Queensland proceeding by pleadings and submissions prior to trial (AFM 35-36 [59], 38-40 [66(a), (b), (e)]).

80. The further finding at CA [75], that up until March 2017 the Appellants "never volunteered to submit to an action in Queensland, much less offered to cooeperate in prosecuting such an action", suffers the same problems. It ignores what the Appellants had offered in Missouri. It confines the time frame in a way which ignores what was on offer in the Queensland proceedings, including the Appellants' undertakings proferred during the proceedings and the direction in June 2017 providing for the Respondents to file any cross-claim in Queensland (TJ [110] CAB 30).

81. The result is that what the Court describes in CA [75] as "entirely hypothetical," is in fact the very situation the Appellants, acting properly, had brought about to enable all claims in the larger controversy to be heard in Queensland.

VI D. CONCLUSIONS AND RELIEF

82. **The correct conclusion**: At the time of the trial before Lyons SJA, continued prosecution of the Missouri proceeding, including by the [foreshadowed] joining of the First Appellants personally as defendants, was vexatious and oppressive because:

(a) the circumstances demonstrated no real connection with Missouri or the United States;

(b) the evidence established that there was, since the settlement with Lambert Leasing, no relief available in Missouri which was not available in proceedings in Queensland (indeed the Respondents were offered an opportunity by directions to file a cross-claim that would allow them to seek such relief);

(c) the Appellants had offered undertakings to waive any limitation defence not available in the Missouri proceeding and to permit the use of any material produced on discovery in the US to be tendered in the Queensland proceedings; and

(d) continued prosecution in Missouri rather than in Queensland would result in the unnecessary costs of all witnesses having to travel from Australia to Missouri and the proof, by experts, of the content of Australian law.

83. **Injunction on terms:** Once that point was reached, all that remained was to address the terms to be imposed on the anti-suit injunction to protect the Respondents from any prejudice in being forced to cease litigating in Missouri. That was to be done in accordance with the principles and authorities referred to in paragraphs 53 to 56 above.

84. Two such terms were those expressly proffered by the Appellants (CAB 29-30 TJ [107]) and are reflected in the annotation proposed to the orders set out in section VII below. No issue was taken in the Court of Appeal as to the adequacy of those undertakings assuming relief were otherwise appropriate.

Part VII: ORDERS SOUGHT

85. Appeal allowed.

86. Set aside orders 2 and 3 made by the Court of Appeal on 7 May 2019 and in their place order:

1. Appeal to the Court of Appeal be allowed.
2. Set aside orders 2 to 7 made by Lyons SJA on 10 September 2018 and in their stead order that the Respondents and each of them be permanently restrained from taking any further step in proceedings 0831-CV05866 and 0831-CV05931 in the Circuit Court of Greene County, Missouri other than those steps which may be required to

have the proceedings dismissed or withdrawn; and that within 35 days of this Court's order the Respondents take the steps necessary to have those proceedings dismissed or withdrawn.

87. Order that the Respondents pay the Appellants' costs in this Court and the courts below.

88. If relief is granted, it is also appropriate for the record to note that the Appellants have, as a condition of obtaining the relief, offered the consents and undertakings referred to at para 107 of the primary judge as further reflected in the pleadings in Reply at paragraph 13(m) AFM 17 and the written submissions at trial at paragraphs 59, 66(a), (b) and (e) AFM 35-36 and 38-40.

10 **Part VIII: ESTIMATE FOR ORAL ARGUMENT**

89. The Appellants estimate that they will require up to 2 hours for oral argument in chief and 30 minutes in reply.

Dated 23 October 2019

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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
10 LESLIE ARTHUR WRIGHT (DECEASED)
Second Appellant

and

TRAD THORNTON and
OTHERS NAMED IN THE NOTICE OF APPEAL
Respondents

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ANNEXURE TO APPELLANTS' SUBMISSIONS
LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

CONSTITUTIONAL PROVISIONS

Nil.

STATUTES

1. *Civil Aviation (Carriers' Liability) Act 1959* (Cth), incorporating amendments up to Act No. 143 of 2001, as in force 7 May 2005.
2. *Civil Aviation Act 1988* (Cth), incorporating amendments up to Act No. 149 of 2004, as in force 7 May 2005.
3. *Trade Practices Act 1974* (Cth, incorporating amendments up to Act No. 45 of 2005, as in force 7 May 2005.
4. *Civil Aviation (Carriers' Liability) Act 1964* (Qld), incorporating amendments up to 1 July 2003, as in force 7 May 2005.
5. *Supreme Court Act 1995* (Qld), reprint dated 11 April 2005, as in force 7 May 2005.

STATUTORY INSTRUMENTS

Nil.