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 & Others
as listed in the Notice of Appeal
Respondents

RESPONDENTS' SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 Where the respondents as Missouri plaintiffs continue to seek relief governed by the law of Missouri, and the Queensland court doubts the availability of Missouri relief different from Queensland relief, on the balance of probabilities, but without excluding the possibility of Missouri relief being available in Missouri, can it be said that nothing could be gained by any of the respondents as Missouri plaintiffs over and above that which they could gain as Queensland cross-claimants?

3 Given the circumstances of this case, including the proper institution of the Missouri proceedings and the negative declaratory nature of the much later Queensland proceedings, would the continuation of the Missouri proceedings be vexatious or oppressive in the sense of being productive of serious and unjustified trouble and harassment or seriously and unfairly burdensome, prejudicial or damaging?

4 Does the appellants' delay in seeking an anti-suit injunction preclude the exercise of any discretion in their favour?

Part III: Notice under sec 78B of the *Judiciary Act 1903*

5 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Filed on behalf of the Respondent
ADDRESS FOR SERVICE
Cleary & Lee Pty Ltd Lawyers
4 Grasmere Court, Mount Lofty
TOOWOOMBA QLD 4350

21st November 2019
Tel 0418 153 405
Email patnunan@hotmail.com
Ref: Patrick Nunan

Part IV: Statement of material facts

6 As to para 12 of the Appellants' Submissions (**AS**), the firm name "Partnership 818" under which the First Appellant (sic) in these proceedings traded at all material times designated those parties in the Missouri proceedings, until the names of each of them were substituted as defendants in Missouri, as noted in AS [22]. A change in nomenclature – it not being suggested ever that steps taken by or against the defendant named as Partnership 818 in the Missouri proceedings were not taken by or against the corporations who are the first appellants in these proceedings (eg AS [19], [20]).

7 As to AS [13], the precise findings at trial and on appeal concerning choice of law are that Queensland law is likely rather than certain as the *lex causae*, and that the possibility exists of a different outcome on that issue, and of a mixed outcome (CAB 27 TJ [104], CAB 30, TJ [111] CAB 32 TJ [121], CAB 66 CA [41]).

8 As to AS [14], the trial judge's attribution of Count 1 in the Missouri claim as pursuant to sec 75 of the *Trade Practices Act* (CAB 10 TJ [23]) and the President's adopting of that attribution (CAB 60 CA [6]) may be compared with the form of the Missouri claim (AFM 119-121) and argument at trial concerning the nature of the Missouri relief claimed (AFM 47-48 [38]-[43]). The latter differed from possible Queensland relief in relation to the identity of claimants and the scope of compensable loss (and see AS [16]).

9 As to AS [15] and [17], when the *forum non conveniens* motion was dismissed and on appeal, in March 2010, Lambert Leasing had not joined any other parties to the Missouri proceedings, and had offered appropriate undertakings in relation to potential Queensland proceedings (AFM 210.12). There was no attempt made by the appellants at trial to explain whether consideration was given to seeking an anti-suit injunction at that time (Lambert not seeking to join any other party to the Missouri proceedings until July 2010), nor if so why no such injunction was sought in Queensland at that time.

10 As to AS [17], the respondents' arguments in Missouri when resisting Lambert Leasings' *forum non conveniens* application were directed to the doctrine in Missouri which focussed on the position at the time suit was first filed (AFM 210.10 - 211.20).

Part V: Argument in answer to the appellants'

11 From their initiation, the Missouri proceedings have been apt to determine the question whether the appellants are liable to the respondents or any of them on the counts asserted in Missouri. The issues involved in that question are also the subject matter of the subsequent Queensland proceedings in which the appellants seek negative declarations as to that question of liability, nearly nine years after the Missouri proceedings were commenced

against them. The appellants do not allege that the Missouri proceedings were vexatious or oppressive in the *Voth*[1] sense, or anything like it, when they were commenced. It is the continuation of the rump, so to speak, of the Missouri proceedings after the other and American defendants have been removed from them that the appellants must show is vexatious or oppressive, in order for the appellants to succeed.

12 Essential context in which that claim must be judged includes the unavailability of proceedings in Queensland for the respondents by the time when the appellants eventually asserted that the Missouri proceedings supposedly became vexatious or oppressive. It also includes the giving of undertakings by the appellants in order to remove that fatal objection to the anti-suit injunction they sought against the continuation of Missouri proceedings to conclusion. The giving of those undertakings by the appellants in their Queensland negative declaratory proceedings, like the Queensland proceedings as a whole, was plainly a step taken in order to advance arguments intended to prevent the continuation of the Missouri proceedings.

13 The reasons of the majority in *CSR v Cigna* at 189 CLR 400-402 deciding to stay the New South Wales proceedings in that case are informative of the present situation. There is a possibility, albeit not a probability, that Missouri choice of law may provide relief where none would be available in Queensland, or more favourable relief than would be available in Queensland. That is, the possibility of more and better relief in Missouri is not available in Queensland. The timing and nature of the Queensland proceedings characterize them as themselves oppressive in the *Voth* sense: *CSR v Cigna* at 401.9. See also *Henry v Henry* (1996) 185 CLR 571 at 591-593; cf *TS Production v Drew Pictures* (2008) 172 FCR 433 at 443 [33], 447 - 449 [55]-[60].

14 The distinct questions whether local proceedings should be stayed or whether foreign proceedings should be restrained are related, as explained in *CSR v Cigna* at 189 CLR 397-398. But determination that the local proceedings are not clearly inappropriate in the *Voth* sense does not dispose of an application for an anti-suit injunction against the conduct of related foreign proceedings.

15 Hence the significance of grounding the relevant notion of vexation or oppression in the principles of equity, stressed in *CSR v Cigna* at 189 CLR 392-395. Before dealing with the equitable jurisdiction which is the basis of the claim for an injunction in this case, some perspective applicable to this case can be obtained by considering the inherent self-protective

---

[1] *Voth v Manildra Flour Mills* (1990) 171 CLR 538, adopting *Oceanic Sun Line Special Shipping Co v Fay (1988) 165 CLR 247*; see *CSR v Cigna Insurance Australia* (1997) 189 CLR 400-401

jurisdiction which is the other avenue by which anti-suit injunctions may be sought: *CSR v Cigna* at 189 CLR 390-392. Here the sequence of the rival proceedings may be critical, especially when, as in this case, many years separate their respective commencements. There is no question of a "pending"[2] Queensland proceeding the integrity of which is in need of protection[3] when the Missouri proceedings were commenced, or for nearly nine years thereafter, during which time the eventual Queensland plaintiffs fully participated as Missouri defendants (albeit by an innocuous misnomer with a firm name). It is thus seen that the inherent self-protective jurisdiction to grant anti-suit injunctions is scarcely to be considered in this case, if at all, bearing in mind that the injunction was first sought in the very Queensland process in question. There was no substantive process or proceeding for the protection of which the anti-suit injunction was necessary.

16 As to the equitable jurisdiction, the paradigm case is when the "bringing" of legal proceedings[4] involves unconscionable conduct or the unconscientious exercise of a legal right. The present case is in one category of this jurisdiction, when the foreign proceedings are alleged to be, "according to the principles of equity, vexatious or oppressive": *CSR v Cigna* at 189 CLR 393.2. That is the key expression glossed in *Voth*, as noted in paras 3 and 11 above. The first of the authorities cited by this Court in explaining this equitable jurisdiction, *Carron Iron Co v Maclaren*[5], spoke of the situation where there is "pending" local litigation and a party to it "institutes proceedings abroad", as one which in general would be considered as "vexatious". That is the opposite sequence of the present case.

17 Another key component of the *Carron Iron* equity is that the local litigation in vindication of which an anti-suit injunction against rival foreign proceedings is sought should be one "in which complete relief may be had". A more modern framing of that component, authoritative in this Court, is "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": *CSR v Cigna* at 189 CLR 393.6. The nature of the rival proceedings in this case, in this regard, is addressed further below.

18 Assuming for the sake of the present argument that there is such complete correspondence, it does not follow that the later local proceedings, by their institution and that correspondence, render the earlier foreign proceedings vexatious or oppressive. Rather, given

---

[2] *CSR v Cigna* at 189 CLR 392.1
[3] *National Mutual Holdings v The Sentry Corporation* (1989) 22 FCR 209 at 232.8
[4] *CSR v Cigna* at 189 CLR 392.3
[5] (1855) 5 HLC 416 at 437 [10 ER 961 at 970]

the local plaintiffs' familiarity as foreign defendants with the nature of both sets of proceedings, before they instituted proceedings as local plaintiffs, it is difficult to avoid casting them as the party responsible for the vexatious or oppressive conduct. At least, that would appear *prime facie* so. And there is nothing to counter that initial appearance, which in this case derives substance from the sequence of the respective commencements of proceedings, the long interval between them, and the designed function of the Queensland proceedings, in their negative declaratory form, as a foundation for an anti-suit injunction.

19 The argument at AS [45]-[56], including reliance on *Aerospatiale*[6] with its very different forensic history from this case, proves too much. In effect, it would permit late manoeuvres to render a local proceeding apparently equivalent to long pending foreign proceedings, as if such delay in seeking an anti-suit injunction counted for nothing in the exercise of the discretion whether to grant it. This would be absurd in cases where, as here, decisions to offer appropriate undertakings or terms in order to produce that apparent equivalency between the rival proceedings was always a matter of choice for the party eventually seeking the anti-suit injunction.

20 It is not as if *lis alibi pendens* were a sufficient ground for the exercise of this equitable jurisdiction, let alone as a fact that favours continuation of later local proceedings by restraining the continued conduct of earlier foreign proceedings. This Court made so much clear in *CSR v Cigna* at 189 CLR 395.2.

21 In a case without the requisite "complete correspondence" between the rival proceedings, the purpose of the equitable jurisdiction "to serve equity and good conscience" is not engaged. That is, the availability of relief in the foreign proceedings "not shown to be available" in the local proceedings is sufficient to take the foreign proceedings outside the category in which its co-existence may properly be viewed as vexatious or oppressive, in the established meaning of those terms: *CSR v Cigna* at 189 CLR 395.4.

22 In one sense, there is no correspondence of the requisite kind between the Missouri claims for damages by the respondents and the Queensland artificial claim for a declaration of non-liability by the appellants. The latter, with its lack of specific foundational facts for the negative declarations, does not in substance mirror, by way of illustration, the Missouri claim based on a failure to inspect the aircraft before placing it into the stream of commerce (AFM 123.30).

23 It may well nonetheless be (cf AS [57]-[62]) that sufficient correspondence for the purposes of the principles at hand is supplied by the capacity of the respondents to institute

Queensland cross-claims for damages – and the appellants' undertakings are calculated to aid them to assert that practical equivalence. That may be doubted, on the other hand, given the world of difference, in forensic terms, between being Missouri plaintiffs close to final trial and Queensland cross-claimants in not at all the same position.

24 As a matter of policy and principle, the better view is that material procedural and logistical differences resulting from the sequence of rival proceedings and the interval between their commencements are not irrelevant to evaluating whether there is the requisite "complete correspondence". In other words, the "complete relief" in *Carron Iron* terms might not satisfactorily rest only on the formal terms of prayers for the grant of judicial remedy, but should also at least consider the significance in a particular case of the imminence of a decision. "Relief" is a concept involving completion. In this case, given the sequence of and the interval between the rival proceedings, responsibility for this practical disparity is wholly at the feet of the appellants – a matter which either prevents there being "complete correspondence" or powerfully tends against the discretionary injunction.

25 The facts found on the basis of expert evidence as to Missouri law, relating to jurisdiction, procedure and choice of law, noted in para 7 above, do not permit the application for an anti-suit injunction to be regarded as one securely based on an inevitable application of Queensland law (including Commonwealth statutes, of course, as well as the common law of Australia) rather than the possible application of relevant Missouri law. Furthermore, it has been suggested in this Court that finding that the application of forum law is a "fairly arguable" outcome is preferable to a problematic determination of the applicable *lex causae*: *Oceanic Sun Line* at 165 CLR 266.5.[7]

26 It would not be appropriate, for the purposes of an application such as that brought by the appellants, to determine the applicable substantive law which would fall for decision by the Missouri court in the absence of an anti-suit injunction granted by this Court on appeal from the Queensland court. At most, it can be said that the odds are against the respondents, but that is a position from which parties still frequently succeed. No summary dismissal has been sought in Missouri focussing on a supposedly untenable claim for some or all of the issues to be decided under Missouri law. The existence of the chance of these substantive differences (both as to eligible claimants and as to the scope and quantum of damages) between the Missouri and Queensland proceedings prevents the requisite complete correspondence between them, or complete relief being obtainable in both of them. The

---

[6] [1987] 1 AC 871

[7] See *Voth* at 171 CLR 556 and *CSR v Cigna* at 189 CLR 400 fn 133

appellants did not establish, and the courts below did not find, that the unexcluded possibility of success for the respondents in their Missouri choice of law arguments was not "fairly arguable". The appellants' arguments at AS [42]-[44] do not address this aspect of the matter.

27 The difference in the present case between the relief claimed in the Missouri proceedings and that available in putative Queensland cross-claims is, doubtless, not as stark as the unavailability of treble damages under the Sherman Act which was decisive (on the basis of the former Australian choice of law rules) in *CSR v Cigna* at 189 CLR 395.4. However, to borrow from another legal discourse, the difference argued in para 24 above is the very kind of legitimate juridical advantage for the respondents suing as Missouri plaintiffs, which should deny the availability of the relevant equity to ground an anti-suit injunction against them continuing their Missouri proceedings.

28 As to AS [63]-[81], it leaves unexplained why the appellants should not have sought an anti-suit injunction, had they been so minded, before Lambert Leasing had joined other American entities and while Lambert Leasing was willing to submit to Queensland jurisdiction.

Part VII: Time estimate

29 The respondent would seek no more than two hours for the presentation of the respondent's oral argument.

21st November 2019

Bret Walker
Phone (02) 8257 2527
Email maggie.dalton@stjames.net.au

Gerard Mullins
Phone (07) 3236 1882
Email gerrymullins@qldbar.asn.au

Counsel for the respondent