# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Mackellar Mining Equipment Pty Ltd & Ors v Thornton & Ors* [2018] QSC 186 |
| PARTIES: | **MACKELLAR MINING EQUIPMENT PTY LTD (ACN 010 398 428) AND DRAMATIC INVESTMENTS PTY LIMITED (ACN 059 863 204) TRADING AS PARTNERSHIP 818**<br>(First Applicant)<br><br>AND<br><br>**JANET ELIZABETH WRIGHT AS REPRESENTATIVE OF THE ESTATE OF LESLIE ARTHUR WRIGHT (DECEASED)**<br>(Second Applicant)<br><br>**v**<br><br>**TRAD THORNTON AND THE PARTIES LISTED ON THE ORIGINATING APPLICATION**<br>(Respondents) |
| FILE NO/S: | BS No 2252 of 2017 |
| DIVISION: | Trial Division |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 23 August 2018 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 14 June 2018 & 15 June 2018, further written submissions 10 July 2018 & 24 July 2018. |
| JUDGE: | Lyons SJA |
| ORDER: | **The application is dismissed. I will hear from the parties as to costs.** |
| CATCHWORDS: | PRIVATE INTERNATIONAL LAW – RESTRAINT OF PROCEEDINGS – OF FOREIGN PROCEEDINGS: ANTI SUIT INJUNCTIONS – GENERALLY – where the respondents commenced proceedings in Missouri in May 2008 – where the applicants in this matter sought declarations on liability and an anti-suit injunction in March 2017 – whether the proceedings in the United States are vexatious or oppressive –whether Missouri is the appropriate forum – whether the proceedings in Missouri are too far advanced – |

whether the application for an anti-suit injunction was made promptly

PRIVATE INTERNATIONAL LAW – CHOICE OF LAW – GENERALLY - where there is an issue as to whether Missouri law or Queensland law would apply to the proceedings – where there is a significant connection to Australia – where an assessment is required to consider what law would apply to the matter – whether Missouri law would apply – whether Queensland law would apply

*Civil Aviation Act* 1988 (Cth)

*Civil Aviation (Carriers' Liability) Act* 1959 (Cth)

*Restatement (Second) of Conflict of Laws* § 6, 6A, 145, 175, 178

*Revised Statutes of the State of Missouri* 537.080, 537.090

*Trade Practices Act* 1974 (Cth) s 75

*Uniform Civil Procedure Rules* 1999 (Qld)

Dicey, Morris and Collins, *The Conflict of Laws,* 15th ed (2012)

I. C. F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages,* 9th ed (2014)

*Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724

*Aggeliki Charis Compania Maritima S. A. v Pagnan S.p.A (The Angelic Grace)* [1995] 1 Lloyd's Rep 87

*Bell Helicopter Textron, Inc. v. Arteaga* 113 A.3d 1045 (Del. 2015)

*CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345

*Herold v Seally (No 2)* [2017] FCA 543

*Johnson v Avco Corp.,* No. 4:07-cv-1695, 2009 WL 4042747 (E.D. Mo 2009)

*Livingston v Baxter Health Care Corp.* 313 S.W.3d 717 (Mo. App. 2010)

*Toepfer International GmbH v Molino Boschi SRL* [1996] 1 Lloyd's Rep 510

*Thompson v. Crawford,* 833 S.W.2d. 868 (Mo. 1992) (*en*

*banc)*

*Thornton v. Hamilton Sundstrand Corp.,* No. 12 C 329, 2013 WL 4011008, at *3 (N.D. Ill. Aug. 6, 2013)

*Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3642

*TS Production LLC v Drew Pictures Pty Ltd* [2008] FCAFC 194

COUNSEL: A Sullivan QC and T Quinn for the Applicant
G R Mullins for the Respondent

SOLICITORS: Norton White Lawyers for the Applicant
Cleary & Lee Lawyers for the Respondent

**This application**

[1] In May 2008, the 61 respondents to this application instituted wrongful death proceedings in the Circuit Court of Greene County, Missouri against a number of defendants, including a number of United States ('US') based corporations, as well as the current applicants. The action arises out of an air crash near the Lockhart River in North Queensland on 7 May 2005 when a Fairchild Metro 23 Aircraft, operated by Transair, crashed on approach to the Lockhart River aerodrome, tragically killing all 15 people on board including the two pilots.

[2] The proceedings involving all of the US corporations were resolved by January 2016 and the only parties to the US proceedings which now remain are the current applicants who are Australian residents, companies or partnerships.

[3] On 6 March 2017, the applicants filed an Originating Application in this court seeking a number of orders including declarations that the applicants are not liable to the respondents for any loss or damage suffered as a result of the deaths of the passengers and pilots on board the aircraft. The applicants also sought what is commonly referred to as an "anti-suit injunction" to restrain the wrongful death proceedings in Missouri. This would require the respondents to take all necessary steps to have their claims dismissed or terminated. The basis of the application is that the proceedings in the US are in an inappropriate forum, given that all the parties are Australian based and that Queensland law will apply in the US proceedings.

[4] At the time the current application was filed there were no proceedings currently on foot in Australia.

[5] On 7 March 2017, an ex-parte interim injunction was granted by Douglas J, which was extended on 21 March and 27 April 2017. On 13 June 2017, it was extended until further order.

[6] On 12 October 2017, the respondents filed an application to vacate that interim injunction and an order for the determination, as a separate issue, whether the applicants are entitled to injunctive relief. On 1 December 2017, Dalton J made orders in relation to the determination of the separate question in relation to the injunctive relief. This is the hearing of that aspect of the application.

[7] The respondents resist the application on a number of grounds, including a failure by the applicants to establish that the US proceedings are vexatious or oppressive, which is the necessary prerequisite for an anti-suit injunction to issue. Furthermore, the US proceedings have been on foot for many years and a large amount of time and money has already been invested in those proceedings. In this regard it is argued that the applicants' delay in bringing the present application has been substantial, given that proceedings have been on foot in the US for over a decade.

[8] On 14 December 2017, the Missouri Court set the matter down for a 3 week jury trial which is now due to commence on 15 July 2019.

**Background**

[9] On 17 June 2003, Mackellar Mining Equipment Pty Ltd ("Mackellar Mining") entered into a business venture with Dramatic Investments Pty Limited, known as Partnership 818. The second applicant is the widow of the late Leslie Arthur Wright ("Mr Wright"), and is executor of his will. Partnership 818 was the owner of a Fairchild Metro 23 aircraft, (VH-TFU) ("the aircraft"). Partnership 818 leased the aircraft to Lesbrook Pty Limited ("Lesbrook"), which traded as Transair. Transair operated the aircraft pursuant to an Air Operator's Certificate issued by the Civil Aviation Safety Authority ("CASA") under the *Civil Aviation Act* 1988 (Cth) between aerodromes which included aerodromes at Bamaga, Lockhart River and Cairns in the State of Queensland. Mr Wright was the chief pilot of Transair.

[10] On 7 May 2005, in the course of a scheduled flight between Bamaga and Cairns, with a stop at Lockhart River, the aircraft crashed into the side of a mountain on approach to the Lockhart River aerodrome. The pilots at the time were Captain Brett Hotchin and Timothy Down. The aircraft was destroyed and all on board perished.

[11] The respondents are all relatives of 12 of the 13 deceased passengers and the two deceased pilots. All of the respondents are ordinarily resident in Australia. All but one are Australian citizens and all but two are Queensland residents.

[12] The aircraft was purchased by Partnership 818 from Lambert Leasing Inc. ("Lambert Leasing"). The applicants argue that the agreement was dated 9 May 2003 and was exchanged on or about 6 June 2003. The aircraft was flown from the US to Australia on or about 17 June 2003. The applicants argue that the sale of the aircraft was completed and property in the aircraft was transferred from the vendor to the purchaser pursuant to a Bill of Sale dated 26 June 2003, after the aircraft had been flown to Australia. The respondents argue, however, that the aircraft was purchased in Missouri, pursuant to a contract dated 9 May 2003, and the place of performance was Missouri.

[13] At the time of the accident, the aircraft was operated pursuant to a Certificate of Airworthiness issued by CASA on 4 July 2003, which was in force at the time of the accident. Transair leased the aircraft from Partnership 818 pursuant to a lease agreement dated 17 June 2003 and took possession of the aircraft after it arrived in Australia.

[14] The accident was the subject of an investigation by the Australian Transport Safety Bureau which published Reports dated 4 April 2007 and June 2009. The deaths of those on the flight were also the subject of a coronial enquiry by the State Coroner of Queensland in 2007 and the Findings of Inquest were published on 17 August 2007.

[15] It is uncontroversial that the accident occurred as the aircraft approached the Lockhart River aerodrome for landing. It impacted terrain in the Iron Range National Park on the north-western slope of South Pap, which is a ridge approximately 11 kilometres north-west of the Lockhart River aerodrome. Immediately prior to the accident, the aircraft was flying in cloud and was being operated under Instrument Flight Rules ("IFR") which required the operation of the aircraft by way of navigational instruments. The weather conditions at the time it approached the aerodrome did not permit an approach under the Visual Flight Rules ("VFR"). The approach to runway 12 at the Lockhart River aerodrome was undertaken as an Area Navigational (Global Navigational Satellite System) or RNAV (GNSS) approach.

[16] During the approach to the aerodrome, the aircraft descended below the minimum safe altitude specified for 12 RNAV (GNSS) approach to runway 12. At the point the aircraft passed waypoint LHRWF, it was travelling at an airspeed of 177 knots which was in excess of the airspeed specified in the operations manual of between 85-130 knots.

[17] The passengers were all on the flight being conveyed in the course of commercial transport operations and the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("CACL Act") applied. As a consequence of that Act, Transair was liable for any damage sustained by reason of the deaths of the passengers resulting from the accident, subject to a limit of liability of $500,000.

[18] Proceedings were bought against Transair for damages sustained by reason of the deaths by relatives of 11 of the deceased passengers in the Supreme Court of Queensland and two in the District Court of New South Wales. The husbands, wives and children of the deceased received judgments pursuant to those proceedings. In six cases, the amount of damages payable was determined by this Court and six others were resolved by agreement. The remaining proceeding was instituted out of time and was discontinued.

***The Illinois Proceedings***

[19] On 4 May 2007, proceedings had been commenced in the Circuit Court of Cook County, Illinois against US corporations by representatives of the estates of the passengers (apart from Dr Banks) and the representatives of the estates of the pilots. The defendants included Hamilton Sundstrand Corp. (who were said to have designed, manufactured and assembled the ground proximity warning system), Honeywell International Inc. (who allegedly sold the system), Matthew Hier (who was alleged to be the engineering manager for Hamilton Sundstrand Corp.) and M7 Aerospace LP (who allegedly designed, manufactured, assembled, tested and sold the aircraft). The other defendants included the alleged producer and seller of the charts which included instrument approaches to Lockhart River aerodrome (Jeppesen Sanderson Inc.), the Boeing CO (the alleged agent and principal of Jeppesen) as well as Lambert Leasing and SAAB Aircraft Leasing Inc. ("SAAB") (who allegedly sold the plane to Transair). Airservices Australia, the publisher of the chart of the Lockhart River Aerodrome, was later joined in the proceeding as a third party defendant and as a result that proceeding was removed to the US Federal Court in the Northern District of Illinois.

[20] There were a number of applications in that proceeding, including applications for summary judgment. On 8 July 2014, Judge Ellis of the Illinois Court granted summary judgement dismissing all the plaintiffs' claims in that proceeding. The appeal was unsuccessful.

***The Current Missouri Proceedings***

[21] On 5 May 2008, in proceeding number 0831-CV05866, the respondents had also commenced a proceeding in the Circuit Court of Greene County, Missouri against Lambert Leasing, Partnership 818 and Mr Wright for the recovery of damages as a result of the deaths of the passengers. By proceeding number 0831-CV05931, Leonard Hotchin, an additional relative of one of the pilots, commenced a proceeding in that Court on 6 May 2008, against the same defendants for damages as a result of the death of Brett Hotchin.

[22] In the Missouri proceedings, it is alleged that Lambert Leasing sold the aircraft to Partnership 818 pursuant to an agreement for which the place of performance was Springfield, Missouri where the aircraft was delivered to Partnership 818 and Mr Wright. It was also alleged that the aircraft was placed into the stream of commerce in Missouri. It is also alleged that on 17 June 2003, Duncan Mackellar inspected and took delivery of the aircraft on behalf of the applicants in Missouri and certified that Lambert Leasing had performed all actions required under the Purchase Agreement, except for release of the Warranty Bill of Sale and the removal of the aircraft from the Federal Aviation Administration ("FAA") aircraft registry. The aircraft was then subsequently transferred to Transair by Partnership 818 and Mr Wright.

[23] In the Missouri proceedings, it is alleged that at the time the aircraft left control of Lambert Leasing, Partnership 818 and Mr Wright it contained a number of defects and it is alleged that the accident was the direct and proximate result of one or more of those defects. Count 1 is a claim for strict products defects liability which is a statutory cause of action for injuries resulting in death pursuant to s 75 of the *Trade Practices Act* 1974 (Cth).

[24] The alleged defects were as follows:

(i) The subject aircraft did not contain an effective Ground Proximity Warning System (GPWS), Enhanced Ground Proximity Warning System (EGPWS) or other terrain collision warning system which would provide timely aural and visual warnings of approaching terrain;

(ii) The GPWS cockpit annunciators and other electronic displays were installed in the cockpit of the aircraft such that they were not in the proper field of view of the pilot and co-pilot;

(iii) The subject aircraft was not equipped with an autopilot;

(iv) The decision height for the radio altimeter indicator could only be set to an altitude from 0 to 990 feet;

(v) The digital display on the radio altimeter, when changing rapidly, made it difficult for the flight crew to readily determine whether altitude was increasing or decreasing;

(vi) The co-pilot's altimeter was confusing and resulted in misreadings;

(vii) The Global Positioning System ("GPS") did not display distance to the Missed Approach Point;

(viii) The moving map display on the GPS was of limited usefulness because of the vertical size of its LCD screen; and

(ix) The GPS did not provide any vertical advisory guidance.

[25] Count 2 in the Missouri proceeding made no allegation against Partnership 818 or Mr Wright.

[26] Count 3 alleges that Partnership 818 and Mr Wright:

(i) Owed the plaintiffs and the deceased passengers and pilots a duty to use reasonable care in inspecting the aircraft prior to accepting it and placing it into the stream of commerce; and

(ii) Negligently breached their duty by failing to discover the defective conditions alleged in Count 1 and/or by accepting the aircraft with knowledge of the defective and dangerous conditions, by failing to warn of the dangerous conditions and by failing to correct the defective and dangerous conditions.

[27] The applicants deny any allegation that the aircraft was defective in any material way and allege that the accident was caused by the negligence of the pilots.

[28] There have been numerous applications in the Missouri proceedings since 2008 including applications by Lambert Leasing in February 2009 for a Motion to Dismiss for lack of personal jurisdiction, forum non conveniens and failure to state a claim. A contested hearing was held on 15 October 2009 after material was filed by both sides. On 7 December 2009, Judge Conklin dismissed the applicant's application. The subsequent appeal to the Court of Appeal was denied on 23 March 2010.

[29] On 24 March 2010, the applicants filed Answers to the respondents' First Amended Petitions. On 29 July 2010, Lambert Leasing filed a third party petition to join M7 Aerospace LP, Airservices Australia Group, Honeywell International Inc., Garman Limited and Jeppesen Sanderson Inc. Cross-claims were then exchanged between defendants and cross-defendants and cross-claims were filed against Partnership 818 and Mr Wright. A number of motions were filed in those proceedings up until 2 October 2013 when the proceedings were removed to the Federal Court on the application of Airservices Australia. The proceeding was then conducted in the United States District Court for the Western District of Missouri. The Missouri proceedings were then stayed pending the outcome of the Illinois proceedings.

[30] After the Illinois proceeding was dismissed on 8 July 2014, Airservices Australia filed an application for dismissal on the ground forum non conveniens on 13 February 2015 in the Missouri proceeding in the US Federal Court. That was supported by Partnership 818 and Lambert Leasing with the filing of material up until June 2015, however the motion was never determined as Lambert Leasing entered into a settlement agreement with the plaintiffs. The application for the approval of the settlement was filed on 24 November 2015, approved by the Court on 9 December 2015 and final notices acknowledging receipt of settlement proceeds were filed on 28 December 2015.

[31] On 30 December 2015, the Court ordered that Lambert Leasing file a status report on or before 11 January 2016 indicating whether it intended to pursue its claims against the

remaining third party defendants. On 11 January 2016, Lambert Leasing filed a Status Report in the US District Court for the Western District of Missouri Southern Division indicating it would not pursue the third party claims.

[32] Accordingly, the third party defendants were dismissed from the Missouri proceedings on 21 January 2016 and the proceedings were remanded from the US District Court for the Western District of Missouri back to the Circuit Court of Greene County, Missouri. Since that date, the applicants have not activated or reactivated any application for dismissal of the respondent's claim on any basis in that jurisdiction. On 3 January 2017, the Court noted a lack of recent activity and scheduled a review within 45 days.

[33] On 13 February 2017, a petition was filed by a number of the current respondents seeking the appointment of a Next Friend for the plaintiffs who were minors.[1] On 2 March 2017, the Circuit Court of Greene County Missouri made orders joining each of the parties nominated in a petition, filed by the legal representatives of the respondents in the Missouri proceedings, as Next Friend to the various respondents named in the petitions.

[34] As previously stated, the current application for an anti-suit injunction was filed on 6 March 2017 and granted the next day, 7 March 2017, after an ex-parte hearing. Further interim injunctions were made on 21 March and 27 April 2017 which were extended until further order on 13 June 2017.

[35] The County Court in Missouri was advised of the Queensland orders and on 14 July 2017 the Court ordered that the parties attend a Status Conference. A Status Conference was held on 11 August 2017 and I note that the Docket Listing records the following entry:

> "Status provided and preliminary argument heard as to status and possible effect of pending orders from Court in Queensland. Counsel ordered to provide Court with caselaw and options to how this court may proceed by 08/23 or as agreed. Any motion to stay this case also to be filed by said date. Responses to such filings due by 08/30 or as agreed. Either party may request additional oral argument thereafter. Pull to review on 08/23."[2]

[36] The Court Docket Listing then records further activity on the file with correspondence filed, hearings rescheduled and briefs filed. On 29 September 2017, there is a further entry recorded on the Court Docket as follows:

> "After review of the parties' briefs and attachments, Court declines to make any findings that any orders of the Queensland Court have any preclusive effect on this Court. Court also declines to make any findings as to whether any party has violated said Orders."[3]

[37] A further scheduling conference was then set by the Court. On 14 December 2017, the Court Docket records the following:

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1 Exhibit 23: Affidavit of Patrick Nunan sworn 19 January 2018, "PTN-28", p 17 – 18; Exhibit 2: Affidavit of Keira Nelson sworn 6 March 2017.

2 Exhibit 23: Affidavit of Patrick Nunan sworn 19 January 2018, "PTN-28", p 18.

3 Exhibit 23: Affidavit of Patrick Nunan sworn 19 January 2018, "PTN-28", p 19.

> "Status provided to Court. Both counsel request scheduling conference be continued until after forthcoming hearing(s) and rulings by Queensland Court. The Court expresses its own concern regarding the age of this case and its duty to advance and manage its docket, as well as to schedule in sufficient advance an unusually lengthy trial. Therefore, over the objection of both counsel, the Court, on its own initiative, respectfully announces its intent to set this matter for jury trial commencing on 06/03/19, for three (3) weeks. The Court will also set an initial Pre-Trial Conference date, as well as a mediation deadline."[4]

[38] The trial date was subsequently rescheduled to commence on 15 July 2019. The case asserted by the respondents is that the aircraft was defective, particularly due to the absence of the additional equipment when it was sold in 2003, namely an EGPWS. It is argued this should have been installed in the aircraft. It is alleged that the defendants failed to advert to the absence of such additional equipment in the pre-purchase inspection of the aircraft in 2003 and also failed to equip the aircraft with that additional equipment. Therefore, when it was imported into Australia, the aircraft was in that defective condition and in that state it was leased by the first applicant to Transair, which then used the aircraft in its flight operations, including the fatal flight in 2005.

[39] Depositions have already been taken from 14 representatives of the respondents, some of whom who travelled to the US for that purpose. I accept that many of those depositions were taken in the Illinois proceedings but clearly, as the respondents' counsel has indicated, are also to be relied upon in the Missouri proceedings. Depositions have also been taken from Ian Mackellar, Duncan Mackellar and Douglas Witt of Partnership 818 as well as two employees of Transair, the operations manager of Bamaga Airport, a former Transair pilot, two employees of Airservices Australia, five employees of Jeppesen Sanderson, an employee of Lambert Leasing and five employees of Honeywell. Disclosure from the respondents has been completed to the extent that all relevant disclosed documents are in the possession of the applicants' US Counsel. Experts in the US have also been briefed.

[40] The essential issues in the 3 week trial therefore will be:

> (i) Whether the aircraft was defective because it was not equipped with the aeronautic safety components necessary for the safe operation of the aircraft; and
>
> (ii) Whether Partnership 818 and Mr Wright were negligent for failing to adequately inspect and/or properly equip the aircraft.

***Evidence of Patrick Thomas Nunan***

[41] Mr Nunan gave evidence at the trial and has sworn five affidavits in these proceedings.[5] Mr Nunan is a solicitor with Cleary & Lee Lawyers, based in Toowoomba and is both the Queensland agent of the Missouri lawyers as well as solicitor on the record in these particular proceedings.

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4 Exhibit 23: Affidavit of Patrick Nunan sworn 19 January 2018, "PTN-28", p 20.

5 Affidavits sworn 12 June 2017; 11 October 2017; 27 November 2017; 30 November 2017 and 19 January 2018 (Exhibits 18, 19, 20, 21, 23).

[42] The respondents (in these proceedings) are represented by Mr Floyd Wisner of Wisner Law Firm, in Missouri. Mr Nunan acts as the Queensland agent for this firm.

[43] Mr Nunan gave evidence that Mr Wisner is representing these parties pursuant to a power of attorney where he obtains a percentage of the settlement verdict that the defendants receive. He is incurring all the costs and disbursements personally and will only be repaid if or when the plaintiffs in Missouri win or receive a settlement. Mr Nunan said that he was fairly certain that the power of attorney agreement is with the firm, Wisner Law firm. Mr Wisner, to the best of Mr Nunan's knowledge, is not legally qualified in any Australian state.

[44] Mr Nunan confirmed that it is Mr Wisner instructing him in these proceedings, not the respondents, and that Mr Wisner has instructions from the respondents to oppose this application. In cross-examination, Mr Nunan said that Mr Wisner does defer to Mr Nunan in respect of procedural matters in Queensland or legal matters in Australia. It was Mr Nunan's evidence that there is a fair amount of communication between them both and that to a degree, he takes instructions from Mr Wisner as to how the respondents wish to proceed.

[45] With regards to costs, Mr Nunan gave evidence that in this particular case, the payments they have received have been in respect of the action QBE brought against some of the plaintiffs in the Missouri proceedings in NSW where they obtained an order for costs in favour of Cleary & Lee. They were paid in that regard, but otherwise, Mr Nunan is on an agreement with Mr Wisner and his firm on a no-win no-fee basis except for these proceedings in this court. Mr Nunan does not have a retainer, as such, from the respondents in these proceedings but does have a costs agreement with Mr Wisner. Mr Nunan also disagreed with the proposition put to him in cross-examination that "not one of the respondents has paid one cent…in Missouri to date, for disbursements or costs."[6] He said that some of the respondents may have paid for their own airfares to the US to give a deposition.

[46] Mr Nunan confirmed that Mr Wisner had sworn an affidavit in these proceedings, dated 17 November 2017 which dealt with his opinion on conflict of law issues but that it was not being relied on in any further in these proceedings.

***Evidence of John Neive O'Donoghue***

[47] Mr O'Donoghue is a solicitor and was formerly the solicitor for Transair. He knew Mr Wright from at least 1988 when the company was formed until his death until 2010. Mr Wright was the Managing Director of Transair. Mr O'Donoghue gave evidence that Mr Wright told him of his intention to go to the US and inspect the Fairchild Metro 23.

[48] Mr O'Donoghue was referred to his affidavit of 20 November 2017 and confirmed that whilst Alastair Mackellar is connected to Mackellar Mining, he is not Mr Mackellar's solicitor and only received instruction from him in his role as director of Transair.

[49] Mr O'Donoghue had dealings with Mr Mackellar in relation to other aircraft, and then the contract was brought in for this particular plane around mid-May. He had several discussions with Mr Mackellar and it was at least July before the financial aspect of the

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6 T 1-42: 22 – 23.

purchase was completed. The contract went through a number of iterations but in the same basic format, just with additions made from time to time.

[50] Mr O'Donoghue confirmed that Joanne Bisnath was the person connected to Lambert Leasing that he dealt with in the US. He stated that, as set out in his affidavit, on 6 June 2003, he had amended the description on the first page of the purchase agreement so that the purchaser was shown as Partnership 818. To the best of his recollection, Mr O'Donoghue confirmed that Mr Wright signed the purchase agreement on behalf of Partnership 818 in Mr O'Donoghue's office. It was agreed that there are no documents specifically annexed to the affidavit to record the extent of Mr Wright's authority to sign documents on behalf of Partnership 818. However, it was Mr O'Donoghue's understanding that Mr Wright had such authority.

[51] As set out in Mr O'Donoghue's affidavit, there was a series of exchanges of correspondence between Ms Bisnath and himself. In particular, there is an email from Ms Bisnath to Mr O'Donoghue on 7 June 2003, which Mr Mullins referred to in cross-examination. In this email she notes:

> "I want to bring up a few issues that have become apparent today that may cause a delay if Transair is planning to take delivery next week. 1) Worldwide Aircraft Services (WAS) in Springfield, Missouri, say they will not have all the components necessary for the aircraft ferry (specifically a GPS) for two weeks. WAS will notify Duncan directly regarding this issue."[7]

[52] Mr O'Donoghue stated that person referred to is Duncan Mackellar, the son of Alastair Mackellar who had been engaged by Partnership 818 to transport the aircraft from Missouri to Australia. Mr O'Donoghue did not know if Duncan Mackellar had been given authority to sign off on a Certificate of Technical Acceptance by Partnership 818.

[53] Regarding the work of Worldwide Aircraft Services ("WAS"), Mr O'Donoghue could not recall specifically issues relating to a GPS, but he did recall that there were engine issues and a propeller issue requiring work and that a GPS was certainly fitted.

[54] Mr Mullins referred Mr O'Donoghue to a WAS quote dated 14 May 2003, with a countersigned page to Mr Doyle on 16 May 2003.[8] Mr O'Donoghue did not recall the documents but accepted he would have seen the proposal at some point. The documents were difficult to read and Mr O'Donoghue was unable read them but stated that he had a conversation with Mr Wright about significant avionics that did have to be dealt with.

[55] Mr O'Donoghue was referred to paragraph 31 of his affidavit, where there is a reference to the events of 17 June 2003. Mr O'Donoghue received a fax from Ms Bisnath, indicating that they had received $500,000 in their bank account. The fax also attached a signed Certificate of Technical Acceptance. This was signed by Duncan Mackellar. Mr O'Donoghue confirmed that he had seen those documents and that, despite the document being hard to read, he can see a place for the signature of Duncan Mackellar and a heading of "Certificate of Technical Acceptance". Mr O'Donoghue confirmed that there was a Certificate of Insurance, issued on the same day but could not identify

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7 Exhibit 11: Affidavit of J N O'DONOGHUE sworn 20 November 2017, "JDOD-1", Document 12, p 48.
8 Exhibit 24(4).

the copy shown to him by Mr Mullins as it was too blurred. Mr O'Donoghue agreed that the period of insurance is from 16 June 2003. These documents were exchanged at the time.

[56] The money paid to SAAB was to be held in escrow until the completion of the sale. Lambert Leasing is a subsidiary of SAAB. It was transferred to a bank account in New York from an Australian Commonwealth Bank account. The finalisation of the sale was 15 July 2003.

[57] In cross-examination, Mr O'Donoghue agreed that there was never any doubt that the aircraft was going to be owned by Partnership 818 and leased to Transair as that was the whole purpose of the exercise. Originally Partnership 818 would comprise three parties, then it was just John Lewis' company and Alastair Mackellar's company. The lease to Transair was part of that arrangement.

[58] Mr O'Donoghue instructed lawyers to act on Mr Wright's behalf in the proceedings in Missouri. Mr O'Donoghue received instructions from Mr Wright that he passed on to the lawyers and indicated that the allegation Mr Wright had been served with was very much in dispute. Mr O'Donoghue briefly acted on behalf of Partnership 818 but his colleagues at the law firm he worked at received those direct instructions.

[59] Mr O'Donoghue continued to act for Mr Wright until Mr Wright passed away on 31 August 2010. After Mr Wright's death, he had occasional contact with Alastair Mackellar. Following Mr Wright's death, he continued to instruct the lawyer in the United States, Randy Scheer, who had acted for Mr Wright and Partnership 818 before Mr Wright's death. Mr O'Donoghue was requested to act by the insurers as he had the background knowledge of this transaction and what the transaction had been. He also received informal instructions from Mr Wright's wife (with whom Mr Wright had separated before his death). He did not continue to act on behalf of Mr Wright's estate, nor has he ever been instructed to act in relation to his estate. Mr O'Donoghue agreed with Mr Mullins' characterisation of his involvement in the matter following Mr Wright's death as acting "as an informal intermediary rather than a formal legal adviser to the estate."[9]

**Ongoing Connection with the USA**

[60] The applicants, in essence, seek an injunction to restrain the remaining wrongful death proceedings brought by the present respondent as plaintiffs in Missouri in which the applicants are the sole remaining defendants. The Missouri proceedings previously involved five US corporations but they are no longer parties and since January 2016 there have been no parties to the proceeding who were not Australians or Australian entities.

[61] The applicants argue that there is no ongoing connection with the US and accordingly the proceedings there should not continue in that forum as the only remaining parties are either Australian companies with Australian directors and shareholders or Australian residents. The applicants also argue that if the Missouri proceedings were bought to trial, a Missouri judge and jury would be required to identify and apply Queensland law. The applicants argue that in an anti-suit injunction there are a number of different

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9 T 1-40: 23 – 24.

circumstances in which such an injunction can be granted but it is sufficient if an applicant can show that the proceedings which are sought to be restrained are being brought in an inappropriate forum. This can justify the exercise of the equitable jurisdiction to restrain unconscionable conduct, or the unconscientious exercise of legal rights.

[62] In this regard, I accept that the following facts and circumstances are uncontentious:

(i) The aircraft was operated by a Queensland company on an intrastate flight in Queensland;

(ii) Passengers and crew were Australian residents and the overwhelming majority were Queenslanders;

(iii) The aircraft was Australian registered and an Air Operation Certificate issued by CASA pursuant to the *Civil Aviation Act* 1988 (Cth) and the aircraft's operations were subject to the regime created by that legislation;

(iv) All of the witnesses who can give evidence and the remaining evidence such as the cockpit voice recorder and the flight data recorder are all in Australia where the investigations took place.

[63] I accept that there is a very significant connection with Australia and that if the current parties were the only parties to the original proceedings in Missouri then Queensland would be the natural forum. However, the proceedings remain listed in Missouri. Indeed, after the last of the US corporations was removed from the proceedings, the judge who has been allocated the case listed the matter for a three week trial which commences in less than a year. The Court docket indicates that at the time of the listing the judge was well aware of the history of this current application and listed the trial nonetheless. I accept however that the case law, particularly the approach of Brereton J in the 2009 decision of *Ace Insurance Ltd v Moose Enterprise Pty Ltd,*[10] indicates that the judge hearing the application needs to make an assessment as to what law they consider would apply. I can therefore take into account the expert opinions as to Missouri law and the submissions and expert predictions as to what law would apply if the proceedings continue in Missouri.

**The expert opinion as to whether Queensland law or Missouri law should apply**

[64] The applicants argue, on the basis of existing case law and the expert evidence adduced during the hearing, that the Missouri proceedings will be determined for both liability and quantum by the application of the law of Queensland. In this regard I note that the Missouri *Restatement (Second) of Conflict of Laws* ("*Restatement (Second)")* provides:

"§175. Right of Action for Death

In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the

[10] [2009] NSWSC 724.

> occurrence and the parties, in which event the local law of the other state will be applied."

[65] In relation to the issue of the measure of damages, § 178 of the *Restatement* provides:

> "§178. Damages
>
> The law selected by application of the rule of § 175 determines the measure of damages in an action for wrongful death."

[66] The *Restatement Commentary* also provides in relation to § 178 the proposition that "In a situation where one state is the state of domicil of the defendant, the decedent and the beneficiaries, it would seem that, ordinarily at least, the wrongful death statute of this state should be applied to determine the measure of damages."[11]

***The evidence of Professor Waters***

[67] Professor Melissa Waters has sworn two affidavits in these proceedings, each attaching an expert report.[12] Professor Waters is a Professor of Law at Washington University located in St Louis, Missouri in the US and specialises in international law, conflicts of law, foreign relations law and international human rights law.

[68] Professor Waters' detailed report of 20 July 2016 considers at length the laws of Missouri and how they would apply on the basis of a number of factual assumptions. These include: the fact that the aircraft was on a domestic, intrastate flight in Australia; was operated by an Australian operator; that all the deceased were Australian citizens and residents; and all the plaintiffs in the Missouri proceedings were Australian residents. She also noted that Lambert Leasing was a Delaware Corporation with its principal place of business in Virginia and that the aircraft was ferried to Australia where Partnership 818 leased it to Transair. For the purposes of the opinion report, Professor Waters assumed that the only relevant contacts with Missouri were Lambert Leasing's storage of the aircraft in Springfield, Missouri, from March to June 2003 and Wright's inspection of it there. It was also assumed that Lambert Leasing retained control and ownership of the aircraft until delivery to Partnership 818 in Australia.

[69] The report states that in 1969, Missouri adopted the "most significant relationship" test set forth in the *Restatement (Second)* which essentially provides that that the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence.[13] Her conclusion was that the Missouri Court would apply Queensland law when the relevant principles were taken into account which included the place of injury, the place where the conduct causing the injury occurred, the domicil, residence, nationality, place of incorporation and place of business as well as the place where the relationship between the parties was centred.

[70] Professor Waters noted that in Australia there was a comprehensive regulatory regime under the CACL Act and that certain limitations on liability would apply to Mr Wright

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[11] Exhibit 24(1).

[12] Exhibit 1: Affidavit of Professor Melissa Waters sworn 24 February 2017 and Exhibit 15: Affidavit of Professor Melissa Waters sworn 29 November 2017.

[13] *Restatement (Second) of Conflict of Laws* §145.

but that Missouri law does not provide for similar limitations on liability for suit for carriers or their agents. She considered therefore that a conflict existed between Queensland law and Missouri law but that the choice of law rules required application of Queensland law in this respect as well. In this regard she noted the wrongful death proceedings had been instituted in Australia under the Act and had all been concluded. In her evidence at the hearing, Professor Waters discussed the Missouri choice of law principle of 'depecage' which is a process where the Court considers the issues individually and decides what the most appropriate law is for the particular issue. This is evaluated on an issue by issue basis and the courts consider different state laws as well as different international laws, if required. Courts that follow such a practice are considered 'modern courts' who follow the *Restatement (Second)*.

[71] Professor Waters explained that legislative law is quite different to the *Restatement (Second)* as the Restatement is not statute and not binding on the courts of Missouri. There are Restatements on a number of areas of law, such as contracts or torts. Restatements are effectively a body of law that experts in that particular area have collated and state courts have the option to follow them. Missouri has adopted the *Restatement (Second)* however that does not mean that Missouri will adopt every single provision within that Restatement. Traditionally a court would adopt every provision, but there are exceptions to this.

[72] Professor Waters gave evidence that courts who adopt such a practice could in theory apply two different laws to the same issue where there are different defendants from different jurisdictions. The court may decide to apply the laws of each of their domicils. Ultimately, it is a decision for the judge.

[73] Professor Waters explained that despite the number and proximity of states in the US, it is quite rare for a court to be faced with a choice of law issue and the case law reflects this. The Missouri courts endeavour to have the same law applying to all parties and issues in the case. This is primarily because judges do not want juries to have to deal with different laws of different jurisdictions for different defendants. Importantly, Professor Waters noted that choice of law will only be considered by the judge if the parties raise it as an issue but that there must be a real conflict. Professor Waters' view is that Australian law will apply here, even if every issue is determined separately by the court.

[74] Professor Waters gave evidence that the Missouri choice of law rules are still considered for different states as well as different international laws. In either context, the *Restatement (Second)* would still apply. One of the differences in the transnational context concerns §6. This section sets out general rules and policy considerations that courts take into account when choosing the applicable law. Professor Waters noted that §6A will be considered when there are concerns about international choice of law issues. Professor Waters was of the view that, in the transnational context, the courts analyse the case quite differently. She noted that there is some Missouri case law where the courts have deferred to the foreign jurisdiction and its interests.

[75] In cross-examination, Professor Waters was asked a series of questions regarding the classification of matters as procedural or substantive. Professor Waters explained that courts that follow the *Restatement (Second)* have abandoned that traditional distinction between substantive and procedural. There are still courts in the US who follow the traditional approach and still consider such distinctions. However, even the more

modern courts still consider there to be a distinction with regards to statutes of limitations. This is one of the areas in the *Restatement (Second)* where the courts disagree. Professor Waters advised that some courts consider it so integral to the cause of action, therefore substantive, so if it has been already decided that the liability law of, for example, Kansas, should apply, then so do the statutes of limitations. Others consider it procedural in nature and therefore the rules of the forum should apply. The drafters of the *Restatement (Second)* originally considered statutes of limitation to be procedural, however, many courts disagreed with this classification and so this part of the *Restatement (Second)* was revised.

[76] Professor Waters gave evidence that liability issues are substantive issues. However, she noted that the *Restatement (Second)* does not refer to it in such terms. It was her view that a Restatement Court would, with regards to liability, presume that the law of the place of the injury is the applicable law. That is unless, another jurisdiction can show a more significant relationship.

[77] Professor Waters stated that in Missouri, procedural law is governed by the laws of Missouri. Professor Waters gave examples of issues that would be considered procedural which included service of process and the requirements for a valid complaint. According to the *Restatement (Second)*, jury trials are considered procedural. As a result, the law of the forum should apply. However, Professor Waters noted that not enough courts have actually signed on to that particular provision for it to be clear whether jury trials are considered procedural or not. She noted that this provision is quite obscure, and it has only been cited around 25 times by courts in the US. The reality is that the question of jury trials, particularly in the choice of law context, does not arise often in the US. This is primarily because all 50 states in the US recognise a right to trial by jury. To the best of her knowledge, Professor Waters was also not aware of any transnational cases where such an issue has been considered. However, she noted that such an issue could arise in an obscure context; for example, if one jurisdiction says that a contributory negligence issue is clear on the facts and so the judge will rule on it, but another says that even if it is clear, it will still go to a jury.

[78] This trial would very likely be a jury trial in Missouri, according to Professor Waters. The jury would be given directions about all the different laws which applied although, by the time the matter reaches a jury, they would usually only be applying one law.

[79] It was put to Professor Waters that this matter would not be a jury trial in Australia and she was asked whether that prohibition could be imported in a choice of law context. Professor Waters stated that to her knowledge, "certainly no Missouri court and no court in the United States has actually addressed this issue in the transnational context."[14] However, it was her view that there could be a strong argument that the laws of a foreign country should be imported for a case as well as their prohibitions as this would be consistent with practice for related contexts (such as forum non conveniens cases) in the US.[15] Professor Waters was unable to give a view on the likely outcome of such an application and said that it would all depend on the judge. She noted that some judges would be sensitive to the transnational nature of the case and mindful of the reasons for why Australia has adopted a mandatory judge trial in such circumstances (namely, to ensure plaintiffs are adequately compensated but not at the expense of the

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[14] T 1-65: 2 – 3.
[15] T 1-65: 8 – 10.

defendant paying too much); however, others would never consider waiving the right to a jury trial. That being said, she noted that the right to trial by jury has been taken away in forum non conveniens and Missouri courts have had no issues in the past dismissing a matter to a different jurisdiction where there is no right to trial by jury, nor recognising and enforcing the judgment of a jurisdiction without trial by jury.

[80] Professor Waters' report considered the three types of allegations (negligence, failure to warn and defective products) separately. When asked by Mr Mullins if that was the way a Missouri court would consider the issues, Professor Waters agreed that that was a reasonable assumption but that she considered them in that manner because that is how the issues were presented to her.

[81] Mr Mullins asked Professor Waters about a series of documents[16] including section 537.080 of the *Revised Statutes of the State of Missouri* which defined a person's entitlement to bring a wrongful death claim. Professor Waters stated that the *Restatement (Second)* is not statute and is not binding on the courts of Missouri as choice of law is judge-made law. Provision 537.080 also refers to provision 537.090, which relates to the damages a person could receive in a wrongful death claim. In Missouri, damages are determined by the jury. Mr Mullins put to Professor Waters that this provision contains two broad components: first, a traditional dependency claim; and second, entitlement to damages for pain and suffering that the deceased may have suffered immediately prior to their death which is not available in Queensland.[17]

[82] Professor Waters was asked how this statute would apply in the context of choice of law for the entitlement to bring the claim and whether the court would apply the Missouri statute or the Australian equivalent when determining if the plaintiffs have a right to make a claim. Professor Waters stated that they are separate issues and the court will first need to decide whether it has personal jurisdiction over the parties. To assess this, the court will ask if the defendant has the minimum contacts with Missouri to make personal jurisdiction appropriate. If yes, then they can hear the cause of action. The question would then be what substantive law would apply and that raises the question of choice of law between Australia and Missouri.

[83] Professor Waters gave evidence that this statute can be considered procedural as it entitles a plaintiff to get before a Missouri court but it does not alone resolve the issue of what law would apply. As a result, there are substantive elements to this statute which mean the courts would then ask whether it is more appropriate to apply, for example, Missouri law or Australian law. Effectively, the court will apply Missouri law to allow someone "in the door of the court"[18] but then the issues will be considered separately.

[84] Mr Mullins referred Professor Waters to the case of *Thompson v. Crawford,*[19] where one of the respondents was a resident of Missouri. This case concerned a car accident where the car was also registered in Missouri. The Missouri Supreme Court held *en banc* that the substantive law of Tennessee should apply as the car accident occurred in Tennessee, the plaintiff lived in Tennessee and the injury occurred in Tennessee.

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16 Exhibit 25.
17 Professor Waters gave neither an affirmative or negative response to this point: see T 1-53: 26 – 27.
18 T 1-53: 2.
19 *Thompson v. Crawford,* 833 S.W.2d. 868 (Mo. 1992) (*en banc).*

[85] Mr Mullins also referred Professor Waters to the decision of *Livingston v Baxter Health Care Corp.,*[20] another authority from the Missouri Court of Appeals, which involved a fatal car accident in Kansas. An application was made that the law that controlled the dispute was Missouri law. This was rejected with the court holding that Kansas law controlled the substantive law. Professor Waters noted that this was a case with some substantial connection to Missouri but she relies on this case to demonstrate that two factors that are decisive in determining the choice of law are the place of injury and the conduct that occurred. Professor Waters noted that the case shows that Missouri courts have a tendency to favour the law of the place in which the injury occurred:

> "Absent exceptional circumstance, the law of the state where the conduct and injury occurred will apply to determine whether a cause of action for wrongful death accrued at all from the conduct and whether the actor met the state's applicable standard of care."[21]

[86] Professor Waters was referred to her report which stated that in the present case Missouri's connections to the parties and occurrences are far more attenuated than in *Livingston* as Queensland is not only the place of injury, place of domicil of the plaintiffs, the deceased and the defendants but also the place where the deceased and the plaintiffs' damages were suffered and the place where the relationship between the parties was centred.[22] Professor Waters was asked if her opinion would remain the same if this action involved a defendant who was Missouri based. Professor Waters said that her opinion would remain the same, as in her view, the Missouri court does not consider people being residents in Missouri particularly important when considering those issues.

[87] Professor Waters agreed with Mr Mullins' summary of her analysis as "the law where the injury occurred will be applicable regarding rights and liabilities, unless another state has a more significant relationship. That's the restatement 175 starting point."[23]

*Alternative Assumptions*

[88] During cross-examination, Mr Mullins put a series of alternative assumptions to Professor Waters.

[89] The alternative assumptions were:

(i) The aircraft was inspected by Mr Wright in Missouri on behalf of Partnership 818 acting as Partnership 818's agent;

(ii) Mr Wright ordered work to be done to the aircraft by WAS (based in Springfield, Missouri) and that the work was done, but was paid for by the vendor, Lambert;

(iii) Partnership 818 signed a certificate of technical acceptance in Missouri which acknowledged that the aircraft was in the condition and status required under the purchase agreement and the seller had performed all actions required of it pursuant to the purchase agreement, except the release to the buyer of the

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[20] 313 S.W.3d 717 (2010).
[21] T 1-56: 17 – 40 and *Livingston v Baxter Health Care Corp.* 313 S.W.3d 717 (Mo. App. 2010), 721.
[22] Exhibit 1: Affidavit of Professor Melissa Waters sworn 24 February 2017, "MW-1", p 20.
[23] T 1-56: 42 – 45.

warranty bill of sale and the removal of the aircraft from the FAA civil aircraft registry;

(iv) All of the records for the aircraft were handed over to Duncan Mackellar, an agent of Partnership 818, who then flew the plane to Australia;

(v) The aircraft was then insured by Partnership 818 when it was in Missouri in the name of Lessbrook Pty Ltd, t/a Transair, Partnership 818 and a third party;

(vi) Full payment was made by the seller prior to the aircraft leaving Missouri, but was held in escrow until the closing of the sale after the aircraft returned to Australia;

(vii) The buyer (Partnership 818) always intended, at the time of purchase, to lease the aircraft to Transair.

[90] Professor Waters confirmed that she had been asked to assume, for the purposes of her report, that there was an inspection by Mr Wright in Springfield, Missouri, and that she was aware work had been done on the aircraft. Professor Waters acknowledged that one could consider there was a more extensive connection with Missouri, depending on the meaning of the term 'inspecting the aircraft'[24]. She stated that she was aware work had been ordered on the aircraft but was of the view that not much turned on that and had not included it in her report.

[91] Professor Waters was taken to a particular passage of her report where she stated:

> "The Queensland statute at issue here is part of comprehensive Australian legislation…which provides a detailed set of provisions governing the liability of Australian air carriers and ensuring adequate compensation of Australian air crash victims."[25]

Professor Waters noted that the court would take into account, when determining issues on liability, the fact that the CACL Act is a comprehensive scheme and a Missouri court would give much more deference to Australia's legislation as a result. They would not want to depecage parts of it.

[92] With respect to defective products and the alternative assumptions, Professor Waters was asked how the alternative assumptions would impact on the choice of law decision for the defective products action, in particular, the entering stream of commerce aspect. Her view was that it would not make a difference and noted that Missouri considers product liability laws to be focused on compensation, rather than deterrence. The question Missouri courts will ask under the *Restatement (Second)* is therefore more "which of these two jurisdictions, Australia or Missouri, has the greatest interest in ensuring the compensation of victims?"[26] As a result of this being the question, and not one of focus on deterrence of negligent conduct (or focus on deterring products liability that deters negligent conduct), a Missouri court would say that Australia has the strongest interest in ensuring the compensation of victims. This is regardless of whether or not it is more favourable to the plaintiffs.

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[24] T 1-60: 18 – 20.
[25] Exhibit 1: Affidavit of Professor Melissa Waters sworn 24 February 2017, "MW-1", p 12.
[26] T 1 -63: 36 – 38.

[93] Professor Waters did not consider that the plaintiffs' arguments in the Missouri matter are made stronger based on the alternative assumptions, compared to her assumptions in her report because, despite the negligent conduct being in Missouri, all of the other factors weigh so heavily in favour of Australia. Those factors include; the plaintiffs' domicil, the defendants' residence and the parties' relationships (namely, between plaintiffs and defendants). It was Professor Waters' view that a Missouri court is unlikely to hear much about conduct given that these factors point to Australia and "that the presumption in the Restatement (Second) begins with injury and in the damages context….adds in domicil as another important factor."[27] Professor Waters also considered that *Johnson v Avco Corp.*[28] supports this view.

[94] With regards to product liability, Professor Waters held a similar view: all of the factors strongly point to the application of Australian law. She opined that a Missouri court would likely say that their products liability law is not relevant where they are dealing with "an Australian defendant that took a product to Australia and put it in the stream of commerce in Australia where it injured Australian plaintiffs."[29] Professor Waters was of the view that Missouri's interest in ensuring that corporations comply with their design standards is less substantial than the interest a foreign nation would have in protecting their citizens from injury and ensuring manufacturing and distribution standards are set within its borders. In her opinion, all other factors point to Australian law being applied in this dispute so it would not matter if Partnership 818 was put into the stream of commerce in Missouri.

[95] Professor Waters also considered that for damages, there is one of the strongest cases she has seen in the choice of law context for the application of Australian law. Professor Waters also stated that "adequate compensation"[30] is not necessarily a component of the assessment for choice of law, but if, for example, the Australian statute said "every plaintiff receives $5"[31] then a Missouri judge might consider that to be inadequate compensation and say "Maybe I'm going to take that into account sub silentio."[32] However, generally speaking, a court will not consider in depth whether a plaintiff would receive the same compensation they would in Missouri. Professor Waters explained that this would not be a factor, because if it was, courts in the US would never defer to other jurisdictions as their laws are generally quite generous regarding damages. Professor Waters said that the consideration is effectively whether there is adequate compensation in the context of forum non conveniens and/or choice of law.

[96] Mr Mullins then put to Professor Waters the damages awarded in six of these cases that went to trial under the CACL Act and noted that in five of those six cases, damages were assessed at 20% greater than the cap and had therefore to be reduced. Mr Mullins then asked Professor Waters if the US courts would consider that adequate compensation. Professor Waters said that she did not think the court would consider this question as a formal matter and that noted that there was a similar cap on damages in *Livingston*, as Kansas has a cap on non-economic damages, but this was not an issue for the Missouri court. In that case, the court found that the factors set out in the *Restatement (Second)* pointed in the direction of Kansas law.

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27 T 1-64: 14 – 16.
28 *Johnson v Avco Corp.,* No. 4:07-cv-1695, 2009 WL 4042747 (E.D. Mo 2009).
29 T 1-64: 26 – 27.
30 T 1-61: 45.
31 T 1-61: 47.
32 T 1-62: 1 – 2.

[97] Professor Waters emphasised that the argument regarding choice of law is strongly points to Australia with respect to all of these issues. She noted that Missouri does not just take into account where the injury occurred as all *Restatement (Second)* courts take that into account when considering damages. The domicil of the parties is also considered and as a result, a Missouri court, in her opinion, would say that Australia clearly has the stronger interest in applying their laws of damages to this dispute, despite the cap on damages. Professor Waters gave evidence that different types of damages could be determined on different choices of law.

[98] Finally, concerning costs, Professor Waters' evidence was that in Missouri, there are no orders for costs like in Queensland. If the plaintiff was unsuccessful in Missouri, they would not have to pay the other side's attorney's fees.

[99] Having established the relevant factual background, most of which is uncontentious, it is necessary now to turn to a consideration of the principles that apply in relation to an application for an anti-suit injunction.

**The essential requirements for an anti-suit injunction**

[100] The relevant principles in relation to an anti-suit injunction have been set out by the High Court in the leading decision of *CSR Ltd v Cigna Insurance Australia Ltd.*[33] In that case, the Court indicated that an anti-suit injunction may be granted in the exercise of a court's equitable jurisdiction if there are proceedings in another court including a foreign court which are, according to the principles of equity, vexatious or oppressive. In relation to this aspect, however, the Court held:

> "In *Société Aerospatiale*, the Privy Council emphasised that the various cases decided in the nineteenth century with respect to vexation and oppression, including *Peruvian Guano Co v Bockwoldt,* have continuing significance for the grant of anti-suit injunctions. Those cases establish that the mere co-existence of proceedings in different countries does not constitute vexation or oppression. In particular, *Peruvian Guano* establishes that "double litigation [which] has no other element of oppression than this, that an action is going on simultaneously abroad, which will give other or additional remedies beyond those attainable in [the domestic forum]" does not amount to vexation or oppression.
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> More recently, in *Bank of Tokyo Ltd v Karoon,* Robert Goff LJ pointed out, correctly, in our view, although without specific reference to underlying equitable principle, 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. On the other hand, they are vexatious or oppressive if there is a complete correspondence between the proceedings or, in terms used in *Carron Iron Co*, if "complete relief" is available in the local proceedings.
>
> Given that, in England, the power to grant injunctions has for many years been conferred by statute, it is not surprising that the cases decided

[33] (1997) 189 CLR 345.

> in that country in recent years do not make a clear distinction between injunctions granted in exercise of the inherent power and those granted in the exercise of equitable jurisdiction. However, the older cases referred to in *Société Aerospatiale* make it abundantly clear that the power to stay foreign proceedings which are vexatious or oppressive, in the sense already described, is a power which derives from equity.
>
> Because the power to grant injunctions in respect of foreign proceedings which are vexatious or oppressive, in the sense described, derives from equity, it is not to be confined to the examples found in the decided cases. Rather, it is a power the limits of which are determined by the dictates of equity and good conscience. Thus, for example, it may be that the bringing of proceedings with respect to one claim is properly to be seen, in the circumstances of the case, as an election either not to proceed on another claim or not to proceed in another jurisdiction, thus giving rise to an estoppel by conduct such that it would be unconscionable for that other claim to be pursued or for proceedings to be commenced in another jurisdiction. In cases of that kind an injunction may issue in restraint of the subsequent proceedings."[34] (citations omitted)

[101] The Court also noted that whilst anti-suit injunctions operate in personam, such a suit also necessarily operates to interfere with the process of a foreign court and therefore "may well be perceived as a breach of comity by that court."[35] The Court explained this is the recognition which one nation allows within its own territory to the executive, legislative or judicial acts of another country whilst also having regard to its international duty and convenience and to the rights of its citizens and others who are under the protection of its laws. It is for this reason the Court stated that the cases emphasise "that the power to grant injunctions in restraint of foreign proceedings should be exercised with caution."[36] The High Court also stated that the different circumstances in which interlocutory injunctions may be granted in restraint of proceedings in a foreign court are such that they do not permit of a "general rule."[37]

[102] A more recent decision which considered the relevant principles is the decision by Brereton J in *Ace Insurance Ltd v Moose Enterprises Pty Ltd.*[38] This case concerned a contract dispute where the contract itself contained an express choice of law clause which stipulated that all disputes were to be determined in accordance with Australian law and that the parties would submit (not expressed to be exclusive) to the jurisdiction of any competent court in Australia. Ultimately it was held that the choice of law jurisdiction clause was an exclusive one which meant that the issue as to whether proceedings instituted in California were vexatious and oppressive did not necessarily have to be considered. However, his Honour summarised that issue as follows:

> "Moose invoked the observations of the High Court in *Cigna* to the effect that foreign proceedings would not be vexatious oppressive or unconscionable if there was available in them relief or a benefit not

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34 (1997) 189 CLR 345 at 393 – 394.
35 (1997) 189 CLR 345 at 395.
36 (1997) 189 CLR 345 at 396.
37 Ibid.
38 [2009] NSWSC 724.

> available in local proceedings – in particular (at 393), that foreign proceedings were to be viewed as vexatious or oppressive only if there was nothing that could be gained by them over and above what could be gained in the local proceedings. In *Bank of Tokyo Ltd v Karoon* [1987] AC 45, Goff LJ suggested that this criteria "was very rarely fulfilled."[39]

[103] His Honour's conclusion was in the following terms:

> "As to ACE's contention that institution of the Californian Insurance Proceedings in an attempt to invoke Californian municipal law is vexatious and oppressive: given the choice of law, the jurisdiction clause (even if it be non-exclusive), the location of the parties, where they made their contract, and the very faint connection with California, California is a clearly inappropriate forum for the resolution of the dispute, and the invocation of Californian jurisdiction for the purpose of securing a supposed legal advantage which on the evidence before me does not exist is unconscionable, vexatious and oppressive in the relevant sense. On this ground also, ACE is entitled to the injunction claimed."[40]

[104] I accept the fact that Queensland law is likely to be the law that applies in the Missouri proceeding is a significant factor, however, it is just one factor that I must take into account in determining this application. As the authorities make clear, the applicants in particular need to establish that the action in Missouri is vexatious and oppressive, particularly when one considers that the basis of the equitable relief is to prevent the processes of a court being used to bring about an injustice. The basis of the relief is the power of the court to protect the integrity of the courts processes. As Bromwich J stated in *Herold v Seally (No 2),*[41] examples can be derived from previous cases but the categories of cases are not closed and the court may make orders in the exercise of its equitable jurisdiction to restrain unconscionable conduct or the unconscientious exercise of a legal right. In relation to the well-established category of cases where it is argued that the foreign proceedings are vexatious or oppressive his Honour stated:

> "A well-established category of case in which an injunction may be granted is when foreign proceedings are, according to principles of equity, "*vexatious or oppressive*". The High Court quoted with approval the test in *Carron Iron Co v Maclaren* (1855) 5 HLC 416 at 437 to the effect that where there are pending local proceedings in which "*complete relief may be had"*, commencing subsequent proceeding abroad may generally be considered as "*a vexatious harassing of the opposite party*" and will restrain the continuation of the foreign proceedings [via an order addressed to a litigant in those proceedings].
>
> A long history of cases arising from competing foreign proceedings establish that the "*mere co-existence of proceedings in different countries does not constitute vexation or oppression*", especially if the other proceedings give "*other or additional remedies beyond those attainable*" in Australia. Foreign proceedings are to be viewed as

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39 [2009] NSWSC 724 at [74].
40 [2009] NSWSC 724 at [84].
41 [2017] FCA 543.

> vexatious or oppressive "*only if there is nothing to be gained by them over and above what may be gained in local proceedings*". However, they 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."[42]

[105] In this regard I also note Bromwich J's reference to the decision of Gordon J in *TS Production LLC v Drew Pictures Pty Ltd*[43] and the analysis of the meaning of vexatious or oppressive as follows:

> "Gordon J in *TS Production*, on the issue of the anti-suit injunction, considered the question of whether the United States proceedings were vexatious or oppressive, noting that *CSR v Cigma* [sic] required more than mere co-existence of the two proceedings. Her Honour at 448 [56] referred to the test from *Oceanic Sun* at 247. The full version of that test was that "*oppressive*" meant "*seriously and unfairly burdensome, prejudicial or damaging*" and "*vexatious*" meant "*productive of serious and unjustified trouble and harassment*" (the test for "*oppressive*" being picked up and applied in *CSR v Cigma* [sic] at 401). By contrast, the only additional thing that the appellant could point to beyond coexistence of proceedings was inefficiency and additional cost if both went ahead. In substance that was no more than burdensome, which was not enough. Once it was appreciated that the rights and relief sought were different, and something more could be gained in the United States proceedings, then it was not arguable that it was either unjustified or unfair to maintain those proceedings simultaneously with the Australian proceedings.
>
> The vexatious or oppressive basis for seeking an anti-suit injunction does not appear to arise very often. When it does, the facts and their characterisation, rather than any legal controversy, are generally determinative of the outcome. In those circumstances, academic writing, especially by experienced practitioners or judges, is of assistance in identifying and addressing points of difficulty emerging from *CSR v Cigma* [sic]. In *Nygh's Conflict of Laws in Australia* (Ninth Edition, LexisNexis Butterworths, 2014) at 230-2 [9.27], the following six points are made:
>
> (1) the requirement of "*complete correspondence*" between the two set of proceedings, or "*complete relief*" being available locally is "*surprisingly absolute*";
>
> (2) a tension may be discerned between that absolute requirement, and the notion that the categories are not closed in applying the equitable concept of vexatious or oppressive;
>
> (3) that tension may be resolved to an extent by requiring the absolute test to be met in a substantive rather than merely procedural way –

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42 [2017] FCA 543 at [34].
43 (2008) 172 FCR 433.

in other words substantive correspondence rather than correspondence in procedure, even extending to procedural advantages (or disadvantages) such as civil trial by jury, for otherwise the relief could only rarely be obtained;

(4) there is no reason in principle why a foreign statutory claim may not be entertained in Australia; the availability of a remedy overseas not available in Australia will [or at least may] be largely a function of choice of law rules and how "*internationalist*" the local forum is in its approach to foreign causes of action [such as by way of cross-claim]. By way of example, the conclusion in *CSR v Cigma* [sic] that relief available in the United States was not available in Australia depended upon the application by Australian courts at the time of the "*double actionability"* rule for tort. However, that rule has since been abolished in *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10; (2002) 210 CLR 491, to the effect that the tort law of an overseas jurisdiction may be applied and litigated in Australia;

(5) it is unclear whether, even if foreign proceedings are not characterised as vexatious or oppressive by reason of offering a remedy not available in Australia, they may nonetheless be unconscionable and warrant equity's intervention – for example if proven to be actuated by malice or an improper collateral purpose; and

(6) the requirement that no advantage exist in the foreign proceedings does not seem to apply where the anti-suit injunction application was based on a breach of a contractual right or an order to protect the integrity of the Australian court's processes – a residual basis is implicit in the High Court's reasoning in *CSR v Cigma* [sic] on whether there was a contractual bar to the United States proceedings, albeit not applicable in this case."[44]

**Should an injunction be granted?**

[106] The applicants relied on two sets of written submissions at the hearing and provided a further set of written submissions subsequent to the hearing, which set out in particular detail a history of the proceedings in the US since 2007. The essence of the applicants' submission is that an injunction should be granted to restrain the Missouri proceedings because all factors of relevance point to Queensland as the clearly appropriate forum for a resolution of the claims and Missouri is now clearly an inappropriate forum for the litigation. On that basis the applicants argue that it is vexatious or oppressive for the respondents to continue in that forum. In particular, it is argued that it is untenable for the respondents to argue in that forum that choice of law principles require the application of the law of Missouri as the place of Partnership 818's tortious conduct given the provisions at 175 and 178 of the *Restatement (Second)*.

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[44] [2017] FCA 543 at [42] – [43].

[107] The applicants also argue that all the witnesses are in Australia except for Professor Waters and that, of the 49 witnesses who have given depositions, only 16 are US based and that those residents were primarily deposed in relation to their employment with the US based companies. Those companies are no longer defendants or third party defendants in the proceedings in either Illinois or Missouri. As such, it is argued that their evidence has no relevance in the ongoing proceedings. Furthermore, the applicants have indicated that they will consent to an order to the effect that the depositions and any material produced during the depositions could be used in the Australian proceedings and they will not take any limitation defence which could not have been taken in Missouri. It is therefore argued that the respondents will suffer no disadvantage if required to litigate the proceeding in Australia.

[108] The applicants argue that the only connection with Missouri is that the aircraft was stored and inspected in that State when it arrived and some additional equipment was installed there. Furthermore, it is argued that the aircraft was never operated in Missouri but was rather located there at the time the contract for sale was entered into. It is also argued that the contract of sale was not made in Missouri and was not completed until the aircraft arrived in Australia and that after the aircraft arrived in Australia, it was leased by Partnership 818 to Lesbrook trading as Transair, which was operating the aircraft at the time. Transair is not a defendant in the Missouri proceedings. The chief pilot and chief executive of Lesbrook/Transair was Mr Wright.

[109] I accept the force of the applicants' argument that the facts in this case are strikingly analogous to those in *Bell Helicopter Textron, Inc. v. Arteaga.*[45] The court in that case held that the prima facie rule was that the law of the state in which the injury occurred should apply, especially in a case where the accident happened, and the parties including the deceased and their dependants, were resident of that state. That was held to be the case despite the fact that the allegedly defective design, testing and manufacture of the helicopter component occurred in Texas. Those factors were insufficient to displace the prima facie rule that the law of the state would apply. I also note the applicants' submission that in the present case the alleged negligent inspection of the aircraft in Missouri would be no more significant than the alleged defective design testing and manufacture in the *Bell Helicopter* case.

[110] There is also no doubt that there were multiple actions in Australia for compensation and all of those proceedings have concluded. The respondents have not instituted proceedings in Australia in the same terms as those instituted in Missouri despite the orders of Douglas J on 12 June 2017 that the respondents were to file a counterclaim by 23 August 2017.

[111] I note the applicants' submission based on Professor Waters' expert evidence and Missouri law that there is a strong basis to conclude that in Missouri, the Restatement Rules would apply and that the Missouri Court would apply Queensland law. Professor Waters' detailed report and her oral evidence directly addresses the choice of law to be made pursuant to §175 and §178 of the *Restatement (Second)* and she has carefully concluded that in her view, Queensland law would be applied. However it is obviously a matter for the trial judge in Missouri to actually determine what law applies. In particular, if it is determined that Queensland law will apply, it could be applied on

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[45] 113 A.3d 1045 (Del. 2015).

every issue or the court might still consider adopting an issue by issue approach, as outlined by Professor Waters in her evidence.

[112] In closing, counsel for the respondents submitted that this application centred around two major issues. First, 'the entitlement issue' and second, 'the delay issue' and concluded that the delay issue would be decisive in this case.

[113] Counsel submitted 'the entitlement issue' is whether the proceedings in Missouri are vexatious or oppressive, within the meaning of the authorities. This is the primary test that the applicants must satisfy to be entitled to this anti-suit injunction. In support of his submission that the test is not satisfied, five key points were emphasised. First, that there is no claim for damages in the local proceedings and second, that the plaintiffs in the Missouri proceedings seek a form of damages unavailable in Australia, which is 'fear, terror and physical suffering of the deceased'. A number of the respondents do not have a claim for dependency damages under Australian law but would have access to such damages in Missouri. Third, the authorities focus on the relief sought in the foreign jurisdiction, to some extent, rather than the likely outcome. In the respondents' submission, the issue for this court is not whether Missouri law or Queensland law will apply, but whether the choice of law issue is arguable. Fourth, the Missouri proceedings provide the advantage of a jury trial and the absence of exposure to adverse costs orders. Finally, even if Australian law is found to be the applicable law in each issue, the applicant still has to show that the further prosecution of the Missouri proceedings would be "productive of serious and unjustified trouble and harassment or severely and unfairly burdensome, prejudicial or damaging."[46] The respondents submit that the applicants have failed to satisfy this test.

[114] The Missouri proceedings seek damages for loss of support, loss of net accumulations, loss of household and other services including loss of care and comfort, loss of companionship, and guidance. Damages for mental anguish, sorrow and grief are also claimed as well as the emotional distress and trauma, severe physical injuries, conscious pain and suffering of the deceased persons. I note that no such damages are recoverable under Queensland law for those heads of damage. The plaintiffs in the Missouri proceedings are not exactly the same as the plaintiffs in the Australian claims for dependency under the CACL legislation because there are 61 plaintiffs in Missouri include the surviving parents and spouses, not all of whom had claims for dependency under the Queensland law.

[115] Some of the plaintiffs in the Missouri proceedings would have no claim for dependency under Australian law, including Shane Urquhart, the father of passenger Constable Sally Urquhart. Professor Waters' evidence in this regard was that the entitlement to make a claim in the first place would be determined under Missouri law as she confirmed that the correct position was that "the court will apply Missouri law to allow the person in the door of the court but will then look at the other issues separately."[47]

[116] The claim in the Missouri proceedings against the defendants is based on products liability in Count 1, and negligence in Count 3. The negligence claim is based on a breach of duty by the defendants in failing to discover on inspection and purchase of the aircraft in Missouri the defective nature of the equipment on board, in particular the

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[46] T 2-6: 40 – 42.
[47] T 1-53: 1 – 3.

GPWS system. As Counsel for the applicants noted in his closing submission, such a negligence claim would be a novel claim under Australian law.

[117] The litigation has proceeded through its ordinary course in Missouri including the filing of pleadings, disclosure and depositions. In particular in relation to the depositions, the respondents argue that Partnership 818 has participated in every deposition of a witness in Missouri and in total 34 witnesses have been deposed.

[118] Counsel also argued that the court should exercise caution in restraint of foreign proceedings and noted that the court in *Cigna* recognised that an injunction of this nature interferes with the process of a foreign court which then could be perceived as a breach of comity. The respondents' submission was that this application does not need to determine the choice of law issue, as that is for the Missouri court to decide. All that needs to be determined is whether the choice of law issue can be argued.[48]

[119] Counsel for the respondents also referred in his closing address to aspects of the Coroner's Report regarding maintenance to the aircraft and policies as well as the CASA procedures. Particular reference was made to the discussion in the report about the GPWS on board the aircraft and it was submitted that the inquest showed that there was evidence that there could have been issues with the GPWS, contributing to the crash. He emphasised that the importance of going through the report in this manner was to illustrate that there is indeed a genuine issue to be considered in relation to the equipment on this aircraft and it is being pursued in Missouri.

[120] As the respondent submits, there is a better damages and stronger liability scheme operating in Missouri. Furthermore, if a trial were to be held in Missouri where Queensland law would apply, there would still be a strong preference for a jury trial, particularly as the entitlement to a jury is considered to be a procedural matter and as such the law of the forum would be applied in this regard. As I understood her evidence, Professor Waters confirmed that there would probably be such a preference but that it was ultimately a matter for the trial judge. Under Missouri law 537.080 any damages which are payable are determined by a jury. In this regard it would seem to me that there could well be an issue as to what heads of damage the jury would take into account in assessing damages.

[121] Whilst I note Professor Waters' evidence that the calculation of damages would be in accordance with Queensland law, it is certainly arguable, and it would seem that it would indeed be argued, that such an assessment would include a component for the emotional distress the passengers suffered in the moments before death which is not a compensable head of damage in Queensland. It may well be the case that the trial judge determines that the calculation of damages by the jury is to be on the basis of Queensland law but it would seem to me certainly arguable that the trial judge may take a different approach if they adopt an issue by issue determination of the relevant law to be applied. I note in particular that in the Illinois proceedings in this matter, Judge St Eve of the Illinois Eastern Division Court in her Opinion and Order delivered on 6 August 2013, stated that all issues in tort need not be governed by a single law and that it was not uncommon for courts to apply the law of different states in resolving air crashes as follows:

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[48] *Central Petroleum Limited v Geoscience Resource Recovery LLC* [2017] QSC 223.

> "In opposing the application of Australian law, Airservices relies largely on the logic that because Plaintiffs have brought claims under the Illinois Wrongful Death Act, Illinois law should also govern any issues involving the third-party contribution claims. That position is not consistent with the Restatement principle of depecage, by which '[a]ll issues in tort need not be governed by a single law.' *See Schoeberle,* 2000 WL 1868130, at *3 ('[U]nder the doctrine of depecage, it is not uncommon for courts to apply the substantive law of several different states in resolving air crash cases.') (quoting *In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 926 F.Supp. 736, 740 (N.D.Ill.1996)). Nor do the handful of cases Airservices cite, in which the courts happen to apply the same law to the contribution issue as the underlying claim, stand for the broader proposition that the Restatement favours this approach. Rather, the thrust of these cases is that the respective interests of states vary with the application of the Restatement factors to a particular case. *See Palmer v. Freightliner, LLC,* 889 N.E.2d 1204, 1212, 383 Ill.App.3d 57, 66 (Ill.App.Ct.2008)."[49]

[122] In my view, there are not strictly parallel proceedings on foot in Australia and it cannot be ignored that there were no proceedings on foot when the current application was filed in March 2017. That inevitably leads to an inference that this application was instituted for the dominant purpose of preventing the decade long Missouri proceedings from proceeding to a conclusion, just at the point it had entered its final phase.

[123] Neither is there an exact parity between the parties to the proceedings in the two jurisdictions, given that not all the current parties in Missouri were entitled to make a claim in Queensland. There are 61 plaintiffs and two defendants in this matter in Missouri. If the injunction is granted the trial cannot proceed in Missouri in 2019 and all the parties will have to litigate this case in Queensland where there are no current proceedings. The *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR") rules in Queensland would require certain steps to be taken before the matter could go to trial; statements of loss and damage would have to be filed for at least each group of plaintiffs; disclosure would take place; expert evidence would need to be obtained; and, the rules would demand that some form of alternative dispute resolution be undertaken. The matter could then proceed to trial. However, if this was to be a 5 days or more trial in Australia, the likelihood is that the trial would not be ready to proceed to trial until 2020 at the earliest, given all the pre-trial steps which need to be undertaken. Those steps would necessarily involve additional costs to the parties.

[124] In my view, the applicants have failed to establish that the current Missouri proceedings are vexatious or oppressive. It is significant in particular that the applicants have been litigating in that forum in relation to this matter for over a decade and the matter is now at a point where it is set for trial and therefore considered ready for trial. Not only has the Missouri court been involved for a decade but the US lawyers and attorneys have been similarly engaged and invested time and resources in this litigation. It is significant, in my view, that the proceedings have been case managed for over a decade and are now listed for trial which is to commence in less than a year by a listing judge who was well aware of the current application before me.

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[49] Exhibit 26.7 – *Thornton v. Hamilton Sundstrand Corp.,* No. 12 C 329, 2013 WLR 4011008 at *7 (N.D. Ill. Aug. 6, 2013).

[125] Even if the applicants had established that the proceedings were vexatious and oppressive, I would, in the exercise of my discretion, refuse the application on the basis of the applicants' delay in bringing this proceeding. As the authors of the text *Conflict of Laws*[50] indicate, the sooner the application for the injunction is made the better:

> "The timing of the application.
>
> In principle, the sooner the application for an injunction is made the better its chances of success, for the amount of wasted time and money will increase the longer the application is delayed, and a combination of delay and participation before the foreign court might well lead to the conclusion that it is too late for the applicant to ask for relief from the English court. Moreover, the application may well be defeated if the applicant has already submitted to the jurisdiction of the foreign court."[51] (citations omitted).

[126] In the US proceedings, neither side would be exposed to an adverse costs order which is a substantial difference to the way in which cases would conclude in Australia. I accept that this is a matter which the cases indicate is normally of only marginal relevance but in this case I consider it assumes some significance because of the delay by the applicants in bringing the current application before me which has necessarily resulted in additional costs being expended in a number of further appearances before the Missouri Courts in 2017.

[127] Whilst Counsel for the applicants accepted in his oral submissions that there had been delay by both sides after the proceedings against last of the US corporations resolved in January 2016, he submitted that in Australia mere delay is not a factor which can sufficiently outweigh their entitlement to an equitable remedy of a permanent injunction. In this regard, it was submitted that such an injunction can only be granted in Equity's exclusive jurisdiction and there has to be something more than delay, such as substantial prejudice caused by that delay or acquiescence. Furthermore, it was argued that such delay must be such that it cannot be appropriately accommodated or compensated. Reliance was placed on the principles expressed in the text *The Principles of Equitable Remedies* by I.C.F. Spry[52]as follows:

> "But it is not sufficient that the defendant should be able to show merely that the plaintiff has been guilty of unreasonable delay. It must be shown further that the delay in question has rendered unjust the grant of the particular relief that is sought. So ordinarily it must be established that, by reason of the material delay, either the plaintiff has gained an unjust advantage or the position of the defendant has been altered so that an injunction now granted would operate more harshly upon him than an injunction granted without delay or that some other such consideration has arisen so that in all the circumstances it is just that the plaintiff should be confined to such other remedies as he is entitled to."[53]

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50 Dicey, Morris and Collins, *The Conflict of Laws,* 15th ed (2012).
51 Ibid, 593.
52 I. C. F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages,* 9th ed (2014).
53 Ibid, 449 – 450.

[128] In this regard it is necessary to consider not only the length of the delay but the nature of the acts done in the interval. I note that an examination of the Missouri Court docket reveals that after the proceedings were returned to Missouri there was a period of 12 months when there was no activity and the matter was listed for a review by the Missouri Court on its own motion. However, before the current application in this Court in May 2017, there was an application in Missouri by some of the current respondents for the appointment of a Next Friend for each of the 11 infant plaintiffs. Having considered the material in support of that Petition, it was necessary for all those persons who were proposed as the next friend for an infant plaintiff to swear an affidavit in support of the petition. Those affidavits were sworn in various locations in far north Queensland including Bamaga and Weipa throughout December 2016 and January and February 2017. It was also necessary for the Petition to be supported by an Application in writing which set out the background of the Petition and the legal basis for the additional parties to be added as Next Friend, which included a summary of the relevant law in Queensland and Missouri.

[129] There were clearly then subsequent appearances in hearings in Missouri including the need to comply with a direction by 23 August 2017 to advise the judge in relation to the relevant case law and an appearance before the judge at a subsequent review when the matter was set down for a 3 week trial. If the current application had been brought expeditiously in 2016 those steps may not have been necessary and the associated inconvenience and costs may not have been incurred.

[130] The issue of delay was a focus of the respondents' closing submissions. The respondents' position is that, when taking into account the delay in the applicants bringing this application and the subsequent prejudice to the respondents, the court should refuse the relief sought. In particular I accept that a great deal of progress has been made in the matter, through disclosure, interrogatories and depositions. Counsel for the respondents emphasised how much work has been involved in these proceedings and noted that the applicants have participated in these proceedings the whole time. The applicants could also have brought an application for a stay of the US proceedings before the Missouri Court and indeed the judge who conducted the Review on 11 August 2017 essentially foreshadowed such an application by a direction that any application for a stay was to be filed by the date of the next review on 23 August 2017.

[131] A number of English authorities were relied on by counsel in support of this submission including *Aggeliki Charis Compania Maritima S.A. v Pagnan S.p.A (The Angelic Grace),*[54] *Toepfer International GmbH v Molino Boschi SRL*[55] and *Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd.*[56] In the *Angelic Grace* decision, which involved a party proceeding in a foreign court in breach of an arbitration agreement, the court held that an English Court should not feel any difficulty in granting such an injunction "provided that it is sought promptly and before the foreign proceedings are too advanced."[57]

[132] The *Toepfer*[58] case involved proceedings in Italy and England and a consideration of the application of the Brussels Convention. Mance J considered at length the nature of the

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54 [1995] 1 Lloyd's Rep 87.
55 [1996] 1 Lloyd's Rep 510.
56 [2009] EWHC 3642.
57 [1995] 1 Lloyd's Rep 87 at 96.
58 [1996] 1 Lloyd's Rep 510.

proceedings already on foot in Italy and the circumstances surrounding the proceedings brought in England. The effect of delay on such applications for injunctions was discussed given that the defendants had been pursuing proceedings in Italy since October 1988. Toepfer sought a declaration that Molino were obliged and entitled to pursue the arbitration agreement contained in the contract of sale and an injunction to restrain Molino from taking any further steps in the matter in Italy. Mance J had no hesitation in concluding that it was not a case where the Court should issue an injunction at such a late stage. He dismissed the application for the relief sought and stated:

> "The claims are either indisputable or extremely strong. If they were being litigated in England, the English Court would in the case of the smaller claim and might well in the case of the larger claim give summary judgment straightway and refuse any stay pending arbitration. Italian law does not appear to recognize such a possibility, but, if so, that is a possible advantage to Toepfer in Italy. Whatever the position if a prompt application had been made in this country, it is not appropriate to contemplate issuing a declaration in an English action brought at the last minute with the simple aim of pre-empting Italian proceedings which have been on foot for years. In so far as the object or effect of the declaration is simply to establish what English law is, that seems of no direct relevance and has not been canvassed in the Italian proceedings."[59]

[133] That case records that there was a six to seven year delay and the parties, in that time, had incurred significant cost and engaged in exhaustive memorandum and procedure in Italy.[60] Mance J found that Toepfer had a considerable amount of time prior to this hearing to have investigated and pursued any possible applications in England and that these were not circumstances in which they would contemplate issuing an injunction as this late stage. Whilst I note that there was an exclusive jurisdiction clause in that case, Mance J did not consider it appropriate to contemplate issuing an injunction which had the aim of pre-empting proceedings that had been on foot in Italy for a number of years.[61] Similarly in the more recent *Transfield*[62] decision, it was held that if a party did not seek relief promptly it ran the risk that discretionary relief would be refused.

[134] I accept the force of the submission that the appropriate time for the applicants to pursue this application was in 2010 after the appeal on the refused forum non conveniens application was denied by the Missouri Supreme Court. A 'second chance' arose in August 2013 and then another in 2016 when the matter was sent back to the Greene County Court in Missouri. However, the applicants did not take any of these opportunities. I consider that the application has not been made promptly and that the Missouri proceedings are too far advanced, especially in light of the trial listing for July 2019.

[135] As Counsel for the respondents submitted, there is no evidence before me of any reason why an anti-suit injunction was not pursued prior to this application. His submission

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59 [1996] 1 Lloyd's Rep 510 at 518.
60 *Toepfer International GmbH v Molino Boschi SRL* [1996] 1 Lloyd's Rep 510 at 515.
61 Ibid 518.
62 *Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3642.

was that the only reference to why proceedings were not commenced was in the affidavit of Mr O'Donoghue. This reference appears to be quite broad and there is no indication that Mr O'Donoghue took any advice from a lawyer in the US or counsel in Australia, nor that he undertook any investigations. It appears that it is the inclusion of an American defendant that led Mr O'Donoghue and Mr Wright to believe that they would fail in an application for an anti-suit injunction. However, the American defendants left the matter in 2015. Furthermore as counsel for the respondents noted, the addition of further defendants in the case, as it progressed, would not have supported a view that the application would be unsuccessful as Professor Water's evidence was that the addition of further defendants would not have altered the choice of law outcome. As the respondents submit, the more the applicant argues that the choice of law outcome is clear, the harder it becomes for the applicant to submit that there was no delay in bringing this anti-suit injunction application.

[136] I find that the proceedings in Missouri are not vexatious or oppressive and the potential outcome that Queensland law will apply to the proceedings does not inherently make Missouri an inappropriate forum. The delay in this case has also been a significant factor.

[137] For the reasons outlined above the application is dismissed.

[138] I will hear from the parties as to costs.