SUPREME COURT OF QUEENSLAND

CITATION: *Mackellar Mining Equipment Pty Ltd & Ors v Thornton & Ors* [2019] QCA 77

PARTIES:
MACKELLAR MINING EQUIPMENT PTY LTD
ACN 010 398 428
DRAMATIC INVESTMENTS PTY LTD
ACN 059 863 204
trading as PARTNERSHIP 818
(first appellant/applicant)
JANET ELIZABETH WRIGHT
(second appellant/applicant)
v
TRAD THORNTON
(first respondent)
SHANE URQUHART
(second respondent)
ELIZABETH URQUHART
(third respondent)
FIONA NORRIS
(fourth respondent)
MIMIA WHAP
(fifth respondent)
GLENDON WOOSUP
(sixth respondent)
DEREECE WHAP
(seventh respondent)
TABUA WOOSUP
(eighth respondent)
RITA WHAP
(ninth respondent)
RAMSLEY WOOSUP
(tenth respondent)
OLIVE JOYCE BAGIE
(eleventh respondent)
DANIEL HUDSON
(twelfth respondent)
FLORENCE KEPA
(thirteenth respondent)
BETINA KEPA
(fourteenth respondent)
LEON BOWIE
(fifteenth respondent)
RENIA BOWIE
(sixteenth respondent)
SOLOMON BOWIE
(seventeenth respondent)
FRED BOWIE
(eighteenth respondent)

KALIS KEPA
(nineteenth respondent)
ERRIS ESELI
(twentieth respondent)
ANNIE BOWIE
(twenty-first respondent)
STEPHEN ROPEYARN
(twenty-second respondent)
LUCY ROPEYARN
(twenty-third respondent)
FRANCIS BOWIE
(twenty-fourth respondent)
JOHNNY TAMWOOY
(twenty-fifth respondent)
DALE BOWIE
(twenty-sixth respondent)
FLOSSIE BOWIE
(twenty-seventh respondent)
ELIZABETH STEPHEN
(twenty-eighth respondent)
MARYANNE MIRIAM STEPHEN
(twenty-ninth respondent)
CAROLINE THOMASINA STEPHEN
(thirtieth respondent)
RUBY GLORIA ROSEANNE STEPHEN
(thirty-first respondent)
FANNY MALETA FLORA NORA STEPHEN
(thirty-second respondent)
EMMIA FRANCES NOBBY HELENA STEPHEN
(thirty-third respondent)
FREDRICKA LOUISA KRIS
(thirty-fourth respondent)
RIM THOMAS JOE NATAPUI STEPHEN
(thirty-fifth respondent)
WANAKI MOOKA
(thirty-sixth respondent)
PADIALA KRIS
(thirty-seventh respondent)
EMAIMA KRIS
(thirty-eighth respondent)
EMILY KEPA
(thirty-ninth respondent)
SEBASTIAN BILLY
(fortieth respondent)
JOSEPH BILLY
(forty-first respondent)
KATRINA BILLY
(forty-second respondent)
GORDON SOLOMON
(forty-third respondent)
GLORIA SOLOMON

(forty-fourth respondent)
LIONEL SOLOMON
(forty-fifth respondent)
BESSIE BILLY
(forty-sixth respondent)
GILLIAN HURST
(forty-seventh respondent)
TAMLIN HARRIS
(forty-eighth respondent)
MARY GREEN
(forty-ninth respondent)
KERRI SONTER
(fiftieth respondent)
JANET MAREE LEWIS
(fifty-first respondent)
STEVEN LEWIS
(fifty-second respondent)
BEN LEWIS
(fifty-third respondent)
MELISSA BRADY
(fifty-fourth respondent)
JOHN HOTCHIN
(fifty-fifth respondent)
JANE HOTCHIN
(fifty-sixth respondent)
GREGORY ROBERT HOTCHIN
(fifty-seventh respondent)
DENISE J. KALIN
(fifty-eighth respondent)
ROGER DOWN
(fifty-ninth respondent)
MARY ESELI
(sixtieth respondent)
LEONARD ROBERT HOTCHIN
(sixty-first respondent)

FILE NO/S:	Appeal No 9627 of 2018 SC No 2252 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Miscellaneous Application – Civil
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 186 (A Lyons SJA)
DELIVERED ON:	7 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2018; 27 March 2019
JUDGES:	Sofronoff P and Morrison JA and Boddice J

ORDERS:

1. **Leave to reopen the hearing of the appeal refused.**
2. **Appeal dismissed.**
3. **Appellant to pay the respondents' costs of the application and the appeal.**

CATCHWORDS

PRIVATE INTERNATIONAL LAW – RESTRAINT OF PROCEEDINGS – OF FOREIGN PROCEEDINGS: ANTI SUIT INJUNCTIONS – GENERALLY – where a plane crash in North Queensland killed two pilots and 13 passengers – where the respondents, relatives of the deceased pilots and passengers, commenced proceedings against the appellants in Missouri in May 2008 – where the appellants brought an application in March 2017 in the Queensland Supreme Court for, *inter alia*, a permanent anti-suit injunction in respect of the Missouri proceedings – where the primary judge found that the appellants had delayed in seeking injunctive relief, and that the Missouri proceedings would probably apply Australian law, would be a jury trial and was ready for trial – where the application for a permanent anti-suit injunction was refused because the primary judge found that the Missouri proceedings were not vexatious or oppressive – whether the primary judge erred in her findings in respect of both the Queensland and Missouri proceedings – whether the findings formed part of the reasoning to refuse the application – whether the Missouri proceedings are vexatious or oppressive

EVIDENCE – ADDUCING EVIDENCE – COURSE OF EVIDENCE – RE-OPENING CASE – BY PARTY – where the appeal had been heard and judgment reserved – where the appellant made an application to reopen the appeal and adduce further evidence – where the primary judge found, in refusing an application for a permanent anti-suit injunction, that the Missouri proceeding was "ready for trial" and would be heard at a time earlier than the Queensland proceeding – where the appellant submits that there is new evidence that would show that neither the appellants nor respondents are really ready for a trial in Missouri in July 2019, and that the Queensland proceedings will be ready for trial before the Missouri proceedings – whether the circumstances are exceptional to allow the appeal to be reopened – whether the evidence, if led, would probably have an important influence on the result of the appeal

CSR Ltd v Cigna Insurance Australia Ltd (1997) 189 CLR 345; [1997] HCA 33, applied
Hawkins v Pender Bros Pty Ltd [1990] 1 Qd R 135; [1989] QSCFC 41, cited
Henry v Henry (1996) 185 CLR 571; [1996] HCA 51, cited
Hyman v Helm (1883) 24 Ch D 531, applied
Oceanic Sun Line Special Shipping Co Inc v Fay (1988)

165 CLR 197; [1988] HCA 32, cited
Société Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871, distinguished
Spotlight Pty Ltd v NCON Australia Ltd (2012) 46 VR 1; [2012] VSCA 232, applied

COUNSEL: J T Gleeson SC, with T Brennan, for the appellants/applicants
B Walker SC (in the appeal), R Douglas QC (in the application), with K Holyoak, for the respondents

SOLICITORS: Norton White for the appellants/applicants
Cleary & Lee for the respondents

[1] **SOFRONOFF P:** Mackellar Mining Equipment Pty Ltd and Dramatic Investments Pty Ltd were in partnership under the name "Partnership 818". Lambert Leasing Inc, a United States company, sold a Fairchild Metro 23 aircraft to Partnership 818 in early 2003.[1] Lesbrook Pty Ltd traded under the name "Transair" and operated in Queensland. The aircraft was brought from the United States to Australia and, in June 2003, Partnership 818 leased the plane to Transair and that company began to use it in its business. The chief pilot of Transair was Leslie Wright. The aircraft was registered by Transair under Australian law after its arrival in Australia. Transair operated it under various permits issued pursuant to the *Civil Aviation Regulations* 1988 (Cth) made under the *Civil Aviation Act* 1988 (Cth).

[2] On 7 May 2005, the plane was on a routine flight in North Queensland between Cairns and Bamaga carrying two pilots and 13 passengers. On its approach to Lockhart River aerodrome the plane crashed killing all aboard.

[3] Relatives of some, but not all, of the passengers issued proceedings against Transair in the Supreme Court of Queensland and in the District Court of New South Wales. The *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) imposes a limit of $500,000 on the amount of damages that can be awarded in such cases. All of these proceedings were resolved by judgment or settlement.

[4] The representatives of the passengers killed in the crash (with a single exception), as well as the representatives of the estates of the two deceased pilots, also issued proceedings on 4 May 2007 in the Circuit Court of Cook County in Illinois in the United States. The defendants in the Illinois proceeding included the US based manufacturer of the ground proximity warning system with which the aircraft had been equipped, as well as its designer and vendor. There were also numerous other defendants who had been associated with other equipment aboard the plane. With one exception, all of the defendants were US companies or citizens. That exception was Airservices Australia, an Australian company that had published the chart for Lockhart River aerodrome which the pilots were using at the time of the crash. The proceeding found its way to the United States Federal Court, where, upon application made by the defendants, the Court dismissed all of the claims. An appeal against that order was also dismissed.

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[1] There is a dispute about whether the contract of sale was finally performed in the Missouri in the United States or after its arrival in Australia. For the purposes of the appeal, nothing turns upon that particular factual dispute.

[5] On 6 May 2008 another proceeding was started in the Circuit Court of Greene County, Missouri. In this proceeding there are 61 plaintiffs who are relatives of the two pilots or relatives of 12 of the passengers killed in the crash. All of these plaintiffs are people who are ordinarily resident in Australia and, with one exception, they are all Australian citizens. When the action began the only defendants were Lambert Leasing, Partnership 818 and the widow of Leslie Wright (Transair's chief pilot) in her capacity as the representative of his estate. As I have said, Lambert Leasing was a US company, Transair is an Australian company and Mr Wright was an Australian citizen and resident, as is his widow.

[6] The plaintiffs in the Missouri action allege that when Partnership 818 took possession of the aircraft the ground proximity warning system fitted to the aircraft was defective in a number of respects, that several instruments were so placed on the instrument panel of the plane that their effectiveness was thereby reduced, and that other instruments, which were important to the safety of the aircraft, were defective. They allege that these defects were proximate causes of the crash. The plaintiffs alleged that Partnership 818, Lambert Leasing and Mr Wright's estate are liable to them for damages pursuant to the *Trade Practices Act* 1974 (Cth). They also bring a claim based on the common law. In that respect they allege that the crash was caused by the defendants' negligence in failing to detect the alleged defects or in failing to warn Transair about the existence of these defects before leasing the aircraft to Transair.

[7] In February 2009, Lambert Leasing made application to the Missouri Circuit Court seeking an order dismissing the plaintiffs' claim on a variety of grounds including *forum non conveniens.* On 7 December 2009, the Circuit Court dismissed the application. The Missouri Court of Appeals dismissed a petition for prohibition against that order and a further such petition to the Supreme Court of Missouri was also dismissed.

[8] Lambert Leasing, the only American defendant, joined four other companies as third parties. Three of these third parties were American companies and one of them was Airservices Australia. On 13 February 2015, Airservices Australia applied to the United States District Court, Western District of Missouri, for an order dismissing the claim on the ground of *forum non conveniens*. Partnership 818 and Lambert Leasing supported that application. While that application was pending, the plaintiffs settled their claims against Lambert Leasing. Accordingly, on 11 January 2016 Lambert Leasing took steps to discontinue the claims it had made against the third parties, including Airservices Australia. Lambert Leasing and the third parties it had joined were removed from the proceeding.

[9] The proceeding was remanded back to the Circuit Court of Greene County, Missouri on 21 January 2016. At this point all the remaining parties were Australian entities.

[10] Pleadings have closed. Depositions have been taken from numerous non-expert Australian witnesses and from some American ones. Disclosure has been ongoing.

[11] There was little activity between January 2016 and January 2017. Part of this inactivity was due to the parties' engaging in settlement discussions that failed. Noting this inactivity, on 3 January 2017 the Missouri Circuit Court scheduled a review of the case to be held within 45 days. On 13 February 2017, several of the plaintiffs filed petitions seeking the appointment of a Next Friend for some plaintiffs who

were minors. The Circuit Court made orders for such appointments on 2 March 2017.

[12] On 6 March 2017, the defendants in the Missouri proceedings, to whom I shall now refer as the appellants, issued proceedings in the Queensland Supreme Court against the Missouri plaintiffs. In summary, they sought:

1. Declarations that they are not liable to the Missouri plaintiffs (the respondents in this appeal) for any loss that they may have suffered as a result of the deaths of the passengers and pilots on the aircraft.

2. Permanent injunctions restraining the respondents from further continuing with the Missouri proceedings.

3. A mandatory injunction requiring the respondent to take steps to terminate the Missouri proceedings.

[13] Without notice to the respondents, or to the Missouri Circuit Court, on 7 March 2017, the appellants sought and obtained an *ex parte* interim injunction to restrain the respondents' further progressing the Missouri proceeding. On 21 March and 27 April 2017 that order was extended. On 13 June 2017, an injunction was granted until trial of the appellant's claim for a declaration and for permanent injunctions. On 12 October 2017 the respondents cross-applied for an order vacating the injunction and for an order that the appellants' claims for permanent injunctions should be heard separately from their claim for declarations. On 12 February 2018, Dalton J made an order for a separate trial of the issues concerning the injunction. The hearing of the other issues was adjourned *sine die*.

[14] In the meantime in Missouri, the Circuit Court was informed about the Queensland proceedings only on 12 July 2017. On 29 September 2017, the Court determined that the orders made in Queensland had not affected any orders made by the Circuit Court. That conclusion was, with respect, undoubtedly right.

[15] The matter came before the Missouri Circuit Court again on 14 December 2017 when the Court expressed its concern regarding the age of the case and remarked upon the Court's duty to advance the litigation and to manage its docket. The Court was concerned also with the need to ensure that a date for what was likely to be a lengthy trial was fixed with sufficient advance notice. Of its own motion, the Court set the matter down for hearing on 3 June 2019. On 21 December 2017 this trial date was vacated and a new date was set for 15 July 2019. Undoubtedly the Court was then considering its duties to the parties to determine the case promptly and its public duty to ensure the efficient administration of the system of justice in Missouri.

[16] It was in those circumstances that the trial of the appellants' application for a permanent anti-suit injunction came on for hearing before Lyons SJA on 14 and 15 June 2018. Her Honour gave judgment on 23 August 2018 and dismissed the application. The appellants have appealed her Honour's order.

[17] The appellants submitted to her Honour, and also submit in this appeal, that the continuation of the proceedings in Missouri is vexatious and oppressive. In support of that contention they point to seven matters:

1. All of the parties are Australian;

2. All issues will be governed by Australian law;

3. There will be factual questions that will need to be considered by reference to Australian civil aviation standards;

4. The claim is based upon a transaction that took place wholly in Australia, namely the lease of the aircraft to Transair and the delivery of the aircraft to Transair in Australia;

5. All of the damage alleged to have been suffered was suffered in Australia;

6. All the lay witnesses are in Australia and two of them are elderly and will be unable to travel to the United States;

7. The connection of the case to Missouri is, to put the matter at its highest, slight.

[18] The appellants submit that there is nothing that the respondents can gain by their action in Missouri that they cannot gain in the action in Australia.

[19] They then point to the cost and inconvenience that will be incurred by them in bringing witnesses to the United States. They point to the extra cost and the inconvenience of leading expert evidence in a Missouri court about the content of Australian law.

[20] They also submit that the "objective purpose and effect" of the continuation of the proceedings in Missouri is the respondents' desire to obtain more damages than can be awarded in Queensland. That purpose can be inferred, it is said, from the factors already mentioned about the equal utility of Queensland proceedings in a proper adjudication of the respondents' claim when those factors are considered in conjunction with the fact that the respondents' US attorney appears to have plenary power to conduct the litigation, that he is funding the proceeding and that, if the claims are successful, he will be paid a 30 per cent contingency fee.

[21] The applicable principles were not in dispute in this appeal. They have been established by several cases including *CSR Ltd v Cigna Insurance Australia Ltd*.[2] The appellants contend that Lyons SJA erred in some factual findings and in certain respects in her implication of the law.

[22] The power to order a stay of a court's own proceeding and the power to grant an injunction to restrain a person continuing to prosecute a proceeding in a foreign court are governed by different principles.[3] The test that governs a stay of proceedings in an Australian court in favour of proceedings in another country is that a stay will be only be granted if the Australian court is a clearly an inappropriate forum.[4] The power to stay on the ground of *forum non conveniens* is an aspect of a court's inherent power to prevent its own processes being used to bring about injustice.[5]

[23] The power to restrain foreign proceedings has different bases. One of these is the counterpart of a court's power to prevent its own processes being abused, namely,

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2 (1997) 189 CLR 345.

3 *ibid*. at 372-373 *per* Brennan CJ and at 390 *per* Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

4 *ibid*. at 391 *per* Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ following *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564 *per* Mason CJ, Deane, Dawson and Gaudron JJ.

5 *ibid*.

its power to protect the integrity of its own processes once they have been set in motion.[6] One category of case in which the exercise of this power may be invoked is in the exercise of equitable jurisdiction when a plaintiff in pending litigation before the court, in which complete relief may be obtained, commences a second proceeding abroad. However, the mere coexistence of parallel proceedings is insufficient to constitute a ground for an injunction because the foreign proceeding might offer further or alternative remedies.[7]

[24] A second basis is the equitable jurisdiction to restrain unconscionable conduct.[8]

[25] A third basis for the exercise of the power to restrain the continuation of foreign proceedings is the power, also deriving from the Court of Chancery, to make orders to prevent the unconscientious exercise of legal rights.[9] The exercise of a legal right to invoke the jurisdiction of a foreign court may be unconscientious when such proceedings are commenced in circumstances that render their prosecution vexatious or oppressive.[10] The usual case of that kind involves a plaintiff who sues both in the local court and in a foreign court in which the plaintiff can get no remedy that is unavailable in the local court. If the plaintiff can get legitimate advantages in the foreign court that are unavailable locally, the foreign suit is not oppressive.[11]

[26] Neither principle nor authority supports the view that foreign proceedings become vexatious or oppressive just because the party against whom they are brought later commences proceedings in Australia with respect to the same subject matter.[12] In *Hyman v Helm*[13] the appellants commenced an action against the respondents in England seeking an order for an account on the ground that the respondents were their agents. The respondents denied that they were the appellants' agents and alleged that they had acted as principals supplying goods to the appellants as customers. The respondents subsequently commenced a proceeding against the appellants in San Francisco, suing as principals and not as agents, seeking recovery of the balance of money the claimed was owed to them for goods sold and delivered. The appellants applied in England for an anti-suit injunction to stop the proceeding in San Francisco. A unanimous Court of Appeal dismissed an appeal from a refusal to grant the injunction. It was held that it was *prima facie* vexatious for a plaintiff to bring two proceedings in England for the same cause of action. However, the same *prima facie* case does not arise when a plaintiff sues both in England and abroad. That is because such a plaintiff may have a reasonable ground for bringing the foreign action because the foreign proceeding may be of some advantage to the plaintiff. In such a case, the defendant must show that the foreign proceeding is vexatious.[14] Cotton LJ doubted that a defendant in an English action would be acting vexatiously in suing as plaintiff abroad even in respect of the same subject matter.[15] Bowen LJ observed that:

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6 *ibid*.
7 *ibid*. at 393.
8 *ibid*. at 392.
9 *ibid*. at 392.
10 *ibid*. at 393.
11 *ibid*. at 383.
12 *ibid*. at 395.
13 (1883) 24 Ch D 531.
14 *ibid*. at 538 per Brett MR, at 539-40 per Cotton LJ.
15 *ibid*. at 540.

> "A man may wish to sue abroad as well as in England, both because he has superior facility of execution abroad, and also because of superior facility of procedure before judgment. And even if the money is brought into Court here it does not follow that the Defendants, by bringing their action in San Francisco may not have their claim determined more speedily, more cheaply, and more easily, and with more advantage to themselves. They know best."[16]

[27] Bowen LJ concluded that the position of a defendant in a local suit who prefers also to be a plaintiff in a foreign suit cannot be assimilated with the position of a plaintiff who commences proceedings in two jurisdictions.[17] The resolution of the case ultimately turned upon the difference in the causes of action in each of the two proceedings.

[28] The question whether a particular proceeding is vexatious or oppressive is one of substance and cannot turn entirely upon the identity of the plaintiff in each proceeding. The substantive question is whether the continuation of proceedings in a particular jurisdiction would work injustice. Considerations relevant to this question include that, when the impugned proceeding was started, a proceeding was already on foot in relation to the same subject matter.[18] The stage the first proceedings have reached and the costs already incurred in those proceedings are also relevant to the question.[19]

[29] The power to grant an anti-suit injunction is not one that involves a determination that the proceedings in the foreign court are vexatious and oppressive in the sense that they are an abuse of that court's processes. Nor is the power one that involves a determination that the foreign court ought to stay its own proceedings because it is a *forum non conveniens*.[20]

[30] There is no general principle that, before an injunction can be sought, an application must be made to the foreign court on *forum non conveniens* grounds. In some cases such a requirement would serve no purpose, for example, in cases where the injunction is sought to protect the integrity of the court's proceedings or its processes, and in cases in which bringing foreign proceedings clearly constitutes conduct that entitle relief, such as when commencing such proceedings is a breach of contract. However, there may be cases in which an injunction ought not be granted until that step is taken.[21]

[31] An anti-suit injunction operates *in personam* by restraining a person from doing acts but it also interferes with the processes of a foreign court and may well be perceived by the foreign court as a breach of comity. For this reason, the power should be exercised with caution.[22]

[32] In deciding whether to grant an injunction to restrain the continuation of a foreign proceeding, an Australian court must first consider whether the Australian court is a clearly inappropriate forum to determine the matters in dispute. If it is a clearly

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16 *ibid*. at 543-544.
17 *ibid*. at 544.
18 *Henry v Henry* (1996) 185 CLR 571 at 588, 592-593, 594 *per* Dawson, Gaudron, McHugh and Gummow JJ.
19 *ibid*. at 594.
20 *CSR v Cigna*, *supra* at 394.
21 *ibid*. at 396-397.
22 *ibid*. at 395-396.

inappropriate forum, then that will be the end of its involvement and the occasion for considering whether or not to grant an anti-suit injunction will not arise.[23] In a case in which the anti-suit injunction is sought to protect the court's own proceedings or its processes, no question arises about whether the court is an inappropriate forum because it is the only court that has an interest in that question.[24]

[33] If the court decides that it is not a clearly inappropriate forum, then it must go on to determine whether to require the applicant first to seek a stay from the foreign court or whether, without making such a requirement, the court ought to grant an anti-suit injunction.[25]

[34] It is important to distinguish between cases in which it is the plaintiff who has commenced more than one proceeding and cases in which the plaintiff has issued proceedings in one jurisdiction and the defendant has become the plaintiff in another jurisdiction. *Société Nationale Industrielle Aerospatiale v Lee Kui Jak*[26] was a case in the former class. The plaintiff was the widow of a man who had been killed in Brunei in a helicopter crash. The deceased man had lived with his wife and worked in Brunei. The defendant was a French company that had manufactured the helicopter in which the deceased man had died when it crashed. A Malaysian company had operated it in Brunei. The plaintiff also commenced proceedings against the French manufacturer in the United States. The proceedings each involved other defendants. The French company sought an anti-suit injunction in the High Court in Brunei to restrain the progress of the United States litigation. The application was refused and an appeal from that refusal was dismissed. The Privy Council allowed an appeal and restrained the widow from continuing the United States proceedings. The Privy Council found that courts of Brunei provided the natural forum for the action but held that that was not enough, on its own, to justify the grant of an anti-suit injunction. Such an injunction would only be granted to prevent an injustice. In the context of the case before their Lordships that meant that the applicant had to demonstrate that the proceedings sought to be enjoined were vexatious or oppressive. The critical point upon which the decision in the case turned was that the applicant, who was the defendant in all proceedings, was likely to seek contribution from a third party. Under applicable law it would be unable to do so in the United States proceedings but could do so in Brunei. If the action proceeded in the United States and the applicant was found to be liable, it would then have to sue the third party afresh in Brunei for contribution. That course carried the risk of inconsistent verdicts and multiple proceedings and it was that feature which, in conjunction with the fact that Brunei was the natural forum, rendered the continuation of the United States proceedings oppressive. The court granted a permanent injunction to restrain the respondent's prosecution of the foreign proceedings.

[35] *CSR v Cigna* was also a case in which there was more than a single proceeding. It was a case in which the appellants had commenced proceedings against the respondent in the United States seeking damages and after the commencement of that suit the defendants in the United States commenced a second proceeding in New South Wales seeking negative declarations of non-liability against the

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23 *ibid*. at 397.
24 *ibid*. at 398.
25 *ibid*. at 397-398.
26 [1987] AC 871.

appellants arising out of the same facts. In that proceeding, the respondents, as plaintiffs, applied for an anti-suit injunction to restrain the continuation of the American proceedings. The appellants applied in turn for a stay of the New South Wales proceedings. The Court found that the relief claimed by the appellants in the United States included relief that could not be granted in New South Wales. Accordingly, the anti-suit injunction was refused because New South Wales was a clearly inappropriate forum in which to litigate the appellants' claims. The Court stayed the New South Wales proceedings on the ground that, having regard to the whole controversy, they were oppressive. On the facts of that case, which it is unnecessary to detail, the negative declaration claimed by the insurers in New South Wales would also have resulted in the litigation of a non-issue or, at least, a merely collateral issue.[27] Because of that feature of the New South Wales litigation and because the proceedings had been commenced immediately after action was started in the United States, the Court concluded that the local proceedings had as their dominant purpose not the vindication of the insurers' rights but the purpose of preventing their insured seeking remedies in the United States that were unavailable in New South Wales.[28]

[36] The appellants' arguments have stressed the inconvenience of having the matter heard in Missouri. They emphasised that the parties, as well as most of the expected lay witnesses, are Australians who are resident in this country, that the crucial facts that have to be proved are facts connected to Australia and not the United States, and they have pointed to the resulting unnecessary trouble and expense if a trial were to be held in Missouri. They have emphasised also the applicability of Australian law rather than Missouri law in the determination of the issues raised in this case.

[37] If this had been an application for a stay of proceedings on the ground of *forum non conveniens*, then those factors would have been not merely important factors but, perhaps, decisive factors.

[38] In this respect, it is important to bear in mind that the Latin word *conveniens*, when used in this context, does not mean "convenient". As Deane J explained in *Oceanic Sun Line Special Shipping Co Inc v Fay*[29] the word literally means "coming together" in the sense of conformable, consistent and appropriate. His Honour said that, while the inconvenience, using the word in its ordinary meaning, involved in litigating in the respective jurisdictions is a relevant factor to be taken into account when the ground is relied upon, the authorities stress that it is the ends of justice that is always the fundamental consideration. It follows that it would be wrong to determine a case merely by balancing competing factors in order to determine which court is the more appropriate.

[39] The appellants failed to satisfy Lyons SJA that the continuation of the proceedings in Missouri would be vexatious or oppressive. The appellants have submitted, however, that, in reaching that conclusion, her Honour made several errors.

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27 *ibid*. at 402.
28 *ibid*. at 402.
29 (1988) 165 CLR 197 at 249.

[40] First, the appellants submit that although her Honour found that a Missouri court would probably apply Australian law, her Honour should positively have found that a Missouri court would apply Australian law.

[41] The appellants led expert evidence from Professor Waters whose expertise was not challenged. Lyons SJA found that, in the opinion of Professor Waters, whose evidence was not contradicted, Queensland law would be applied in Missouri. Her Honour then observed "it is obviously a matter for the trial judge in Missouri to actually determine what law applies." That statement that cannot be disputed. Having taken into account the evidence of Professor Waters, her Honour also had regard to the fact that the respondents asserted an intention to submit to the trial judge in Missouri that, at least in certain limited but significant respects, Missouri law was applicable. Her Honour was referred to the reasons for judgment of Judge St Eve of the Illinois Eastern Division Court to the effect that in air crash cases it was not uncommon for the law of different states to be applied.

[42] In any case, the point is immaterial because her Honour accepted, in favour of the appellants, "the fact that Queensland law is likely to be the law that applies in the Missouri proceeding" and that that was "a significant factor". This factor would not have been made any stronger if her Honour had said instead "that Queensland law will be applied in the Missouri proceedings". As her Honour correctly observed, it was just one of several factors that she had to take into account in deciding the case. Further, the possibility that Missouri law might be applied to resolve some disputed issues, if her Honour's reasons are to be understood as admitting such a possibility, did not constitute a reason for the refusal of the injunctions. As her Honour said, "…the potential outcome that Queensland law will apply to the proceedings does not inherently make Missouri an inappropriate forum."

[43] The appellants contend that her Honour's finding that a Missouri trial would be a jury trial was also wrong because the only evidence on the point, that of Professor Waters, did not support such a conclusion. Professor Waters did not express a strong opinion whether or not the tribunal of fact would be a jury. She said that there was no direct authority on the point and that the form of trial would depend largely upon the views of the presiding judge. The appellants correctly submit that at paragraph [78] Lyons SJA found that the trial would be a jury trial. However, at paragraph [120], after referring to two submissions made by the respondents, her Honour summarised the opinion of Professor Waters that "there would probably be such a preference but that it was ultimately a matter for the trial judge." My own reading of the evidence leads me to conclude that the only view that Professor Waters was prepared to offer on this question was that the there was no relevant case law on the subject and that, as a result, the decision about the mode of trial would depend entirely upon the view of the particular trial judge. It follows that her Honour erred in finding that the trial would be jury trial or, alternatively, that a Missouri judge would tend to prefer such a trial.

[44] However, there was no significance in this finding. A jury trial was asserted by the respondents to be a "benefit" to them but the nature of that benefit does not appear. As I read her Honour's reason, the controversy about the mode of trial did not form part of her Honour's reasoning to refuse relief.

[45] The appellants submit that Lyons SJA erred in drawing an inference that they had started their proceeding in Queensland for the dominant purpose of preventing the continuation of the Missouri proceeding. They submit that no such proposition was

put to any of the witnesses whose evidence was led by affidavit and submit that such finding "would not result in a conclusion that the Queensland proceeding was vexatious or oppressive".

[46] The point is a sterile one. On the face of the appellants' originating application itself it can be seen that the substantive relief claimed was a negative declaration and a permanent anti-suit injunction.

[47] In *CSR v Cigna*, in significantly different circumstances, the High Court held that the issue of proceedings by insurers in Australia, when they were already defendants in proceedings in the United States in a case arising out of the same facts, meant, in the circumstances of that case, that although the foreign suit was neither vexatious nor oppressive, the action begun by the insurers was.[30] That was a case in which appellants sought relief in foreign proceedings that could not be obtained in Australia. In the Court's view, the Australian proceeding failed to address any real dispute between the parties but was merely pretextual or, at least, it addressed a dispute about a matter, the resolution of which could not resolve the real issues in dispute.[31] The dominant purpose of the plaintiffs in the Australian proceedings was, therefore, not to obtain the relief sought on the face of their claim but to achieve a collateral purpose, namely to prevent the prosecution of the foreign proceedings. It was for that reason that the dominant purpose of the insurers in commencing Australian proceedings rendered those proceedings oppressive.

[48] There was nothing like that in this case. Lyons SJA made no adverse finding about the appellants' purpose in issuing proceedings. Her Honour did not base her order upon any finding of abuse of process by the appellants. She did not conclude that the Queensland proceedings were vexatious or oppressive. The appellants' submission leads nowhere because there was nothing improper in starting a proceeding here because the appellants believed, in good faith, that the dispute should be litigated here and not in the United States. Their purpose to stop the United States proceedings is not improper.

[49] The appellants had to establish that the prosecution of the Missouri proceedings was vexatious or oppressive. Whether the Missouri proceedings could be characterised in that way depended in part upon the circumstances surrounding the commencement of the Queensland proceedings, when they were started, why they were started and what those proceedings comprehended.[32] It was for this reason that her Honour was obliged to consider the question of the purpose of the proceedings. It was highly material that they were begun late in chronology and as a platform from which to seek injunctive relief.

[50] Her Honour rightly said that the proceedings here and in Missouri lack "parity" or are "not strictly parallel". One reason for this was that some of the parties in the Missouri proceedings cannot make valid claims in Queensland. Other differences were contentious, such as the availability of remedies in each jurisdiction and upon choice of law.

[51] Contrary to the appellants' submission, Lyons SJA did not find that there were no current proceedings in Queensland. Her Honour found, correctly, that when the

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30 *CSR v Cigna*, *supra*, at 401 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.
31 *ibid*. at 412.
32 *Henry v Henry*, *supra*.

appellants filed their Originating Application, there were no proceedings then on foot between the parties in Queensland. This was significant because the existence of these proceedings, only recently commenced, was pointed to as one reason why the other proceedings, long since commenced, were vexatious or oppressive.

[52] The appellants submit that Lyons SJA was wrong to find that the Missouri proceedings were ready for trial. Her Honour found that the Missouri matter "is now at the point where it is set for trial and therefore considered ready for trial." It was common ground that a date for trial has been fixed by the Circuit Court. I do not understand her Honour, an experienced trial judge, to be saying that, as result of a listing for trial, a matter is taken to be ready in all respects for a hearing. Rather, her Honour was stating that this case had reached the stage of readiness that permitted it to be listed for a fixed trial date.

[53] It was for the appellants to establish that the continuation of proceedings in Missouri was vexatious or oppressive and they point to the matters in paragraph [17] above. To those matters, the appellants add that the respondents could recover all their remedies in Queensland. They submit that holding a trial in Missouri in those circumstances will require the appellants, at great cost and inconvenience to themselves, to transfer witnesses and evidence to Missouri, to lead expert evidence on the content of Australian law and about Australian aviation standards. They submit that if the trial is by jury, then such a jury would apply its experience of American standards, rather than Australian standards, in deciding whether there has been a breach of the law and what damages should be paid. They submit that it is in the interest of the respondents' American lawyer, who is working on a contingency fee basis, to "drive" the Missouri action, rather than the interest of the respondents. In so doing, he is "forcing on the Appellants substantial additional cost and inconvenience". Finally, in this respect, the appellants contend that the "objective purpose and effect of the continuation of the Missouri action since January 2016" is to obtain "from a foreign judge (or a foreign jury on instruction from a foreign judge) a verdict and damages in excess of what is properly obtainable in a court of federal jurisdiction in Australia … pressuring the Appellants into an exorbitant settlement."

[54] The problem with these submissions is that the Missouri proceedings have always borne those characteristics, and always had those consequences, and the proceedings did not suddenly assume them at the moment that the appellants launched their Queensland action. Of course, it is apparent that the appellants were prompted to issue proceedings here by the removal of the single United States entity from the proceeding in January 2016. That is why the appellants submit that "the continuation of the Missouri proceedings from January 2016 onwards, or alternatively from service of the originating process in this proceeding in March 2017 was and is vexatious and oppressive". However, if the Missouri proceeding was neither vexatious nor oppressive between 5 May 2008, when it started, and January 2016, when Lambert Leasing was removed as a party, I do not see how the proceedings gained that character thereafter. All of the factors relied upon by the appellants to support the submission that the Missouri proceedings are vexatious and oppressive are factors that existed since those proceedings were commenced. The continuation of these proceedings is not rendered vexatious and oppressive against the remaining defendants just because the sole US party has been removed. Nobody has shown that Lambert Leasing could not have been made a party to proceedings here if the respondents had elected to sue in Queensland.

[55] Nor do the respondents become people who are pursuing vexatious and oppressive proceedings in Missouri just because the appellants have commenced mirror proceedings against the respondents in Queensland, and prefer to litigate their own proceedings rather than continue to litigate the Missouri proceedings.

[56] The hearing before Lyons SJA proceeded upon the premise that the Circuit Court had set a date for the trial of the proceedings in July 2019. Her Honour proceeded upon the basis, as she found, that the matter was "ready for trial" in July in the sense in which I have already considered.

[57] As I have already said and for the reasons I have given, her Honour's finding about readiness for trial was correct on the evidence before her. The appellants now seek to reopen the hearing of the appeal in order to lead further evidence that, they contend, would show that neither side is really "ready for trial" in Missouri and, in fact, there can be no trial in July 2019.

[58] The circumstances must be exceptional before a court may allow a case, having been closed and judgment reserved, to be reopened.[33] The overriding principle is that the court must consider whether, taken as a whole, the justice of the case favours the grant of leave to reopen.[34]

[59] One of the recognised classes of case in which leave may be granted is where fresh evidence has become available.[35] The decision whether to grant leave to reopen in this case is, therefore, bound up with the question whether, if leave were granted, the evidence now put forward would be admitted as fresh evidence. That is so because the appellants' purpose in obtaining leave to reopen is to enable the tender of further evidence. Such evidence would be led so as to permit this Court to make certain findings of fact which, the appellants submit, would affect the outcome of this appeal.

[60] The principles governing the reception of fresh evidence on appeal are not in doubt. They are the subject of r 766 of the *Uniform Civil Procedure Rules* 1999 (Qld) and have been settled by decisions of this Court. Rule 766(1)(c) provides that the Court of Appeal may, on *special grounds*, receive further evidence as to questions of fact. Rule 766(2) provides that further evidence may be received without *special leave* in any case as to matters that have happened after the date of the decision appealed against. It has been held that "special leave" in this context means that there are "special circumstances" that support granting leave.[36] No special leave is required in this case because the further evidence concerns events that happened after Lyons SJA gave judgment and, in fact, after oral argument in this Court. The predecessor to r 766, which was in similar but not identical terms, also used the expressions "special leave" and "special grounds".[37] That rule was held by this Court to mean that evidence about things that happened after the decision below did not require an applicant to show "special grounds" and did not require an

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33 *Spotlight Pty Ltd v NCON Australia Ltd* (2012) 46 VR 1 at [17] per Harper and Tate JJA and Beach AJA.

34 *ibid*. at [26].

35 *ibid*. at [25].

36 *Re Stockton Iron Furnace Co* (1879) 10 Ch D 335 at 348 per Jessel MR.

37 Order 70 r 10 of the *Rules of the Supreme Court* (Qld), which provided, relevantly, that "further evidence may be given without special leave except upon appeals from final judgments and in any case as to matters which have occurred after the date of the decision from which the appeal is brought… Upon an appeal after the trial or hearing of a cause or matter on the merits, such further evidence, save as to matters subsequent as aforesaid, shall not be admitted except on special grounds."

application for "special leave".[38] I would read the present rule in the same way so that the appellants here do not have to show the existence of "special grounds" or obtain "special leave".

[61] Nevertheless, there remains a discretion to be exercised[39] and this Court has also held that the discretion should be exercised rigidly to control the matters upon which further evidence may be received.[40] One important factor that must be taken into account is that it is in the interests of justice that there be an end to litigation so that:

> "Without finally closing the door to a litigant who, after the time for appeal has passed, wants to reopen the matter by giving evidence of matters since the relevant judgment, I would think he should only be allowed to reopen the matter in very special and exceptional cases indeed."[41]

[62] The appellants must show that the evidence is apparently credible, although it need not be incontrovertible. The appellants must show that the evidence, if led, would probably have an important influence on the result of the case, although it need not be decisive.[42]

[63] In summary, the evidence the appellants wish to tender is as follows.

[64] After the removal of Lambert Leasing as a party to the Missouri proceedings, the only remaining named defendant was "Partnership 818". Under Missouri procedural rules a partnership as such is not an entity capable of being sued. Realising their error, the Missouri plaintiffs have abandoned their claims against "Partnership 818" as defendant and have sought to commence afresh against the actual partners who constituted that partnership, namely the present appellants. The consequence is, say the appellants, that the plaintiffs have, in substance, commenced fresh proceedings in Missouri and the appellants, having been sued for the first time, are now entitled to take all the steps that anybody who is sued is entitled to take. Indeed, many of these steps are unavoidable because they are the means by which each party is apprised of the other party's case. The appellants rely upon the affidavit of the Honorable J Miles Sweeney, who is not only a licensed attorney in Missouri but is also a former judge of the Circuit Court of Missouri. Mr Sweeney was a judge for 23 years and, for nine of those years, he was the Court's Presiding Judge. In his opinion, the steps that are now open to the appellants include discovery, interrogatories, the taking of oral depositions, the identification of experts who are to be called, the administration of interrogatories to these experts and other matters of that kind. Mr Sweeney says that, the appellants are now "newly added Defendants" and the respondents were required to serve them with these new proceedings "to hail them into a Missouri court".[43] As newly added

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38 *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135 at 137 per Thomas J with whom Shepherdson and Williams JJ agreed.

39 *ibid*.

40 *ibid*.

41 *Murphy v Stone-Wallwork (Charlton)* [1969] 1 WLR 1023 at 1031 per Lord Upjohn, cited with approval by Connolly J, with whom Campbell CJ and Matthews J agreed, in *Avraam v Constello Constructions Pty Ltd* [1984] 1 Qd R 538 at 541 and by Thomas J in *Hawkins v Pender Bros Pty Ltd*, *supra*, at 137.

42 *Westpac Banking Corporation v Jamieson* [2016] 1 Qd R 495 at [216].

43 I pass over the curiosity that in Queensland, it was these new defendants who, before the change of plaintiff's name had been effect in Missouri, commenced mirror proceedings in Queensland

defendants, the appellants "were then entitled to all rights afforded to newly added defendants, including the right to challenge jurisdiction, the right to answer and assert by motion (as appropriate) all other available defences" and to take the other steps that I have already referred to. They also have the "right to assert all available defences, including … the untimeliness of the Plaintiffs' claims against these newly added Defendants". There is a substantial argument, it is said, that the fresh proceeding is out of time. The time limit for bringing proceedings has long since passed and the plaintiffs would need to persuade the Circuit Court that their newly constituted proceeding falls within one of the recognised exception to the general rules that apply to limitation of actions. This may require consideration of Queensland law, raising another burden that would have to be borne by the appellants if the Missouri proceeding continued.

[65] In addition, the appellants wish to lead evidence about the respondents' state of unreadiness as plaintiffs in Missouri. They seek to lead evidence that on 28 December 2018 the plaintiffs delivered substantial demands for discovery and extensive interrogatories. These demands and interrogatories were new and were extensive.

[66] The appellants also wish to lead evidence about what the respondents' US attorney has said about his state of preparation. He has said that he is in the habit of preparing evidence close to a trial date. He has said that he has "contacted" certain experts that he "intend[s] to call to give evidence". The appellants point out that no directions have been made to deal with the expert evidence or its disclosure although this is part of the usual procedure leading to trial. Mr Sweeney says that leaving preparation to such a late stage is, in his experience, contrary to usual practice and tends to prejudice defendants in their own preparation.

[67] Finally, the appellants wish to lead evidence of what the respondents' Australian lawyer, Mr Patrick Nunan, has said about his own preparation. He has deposed to the large amount of work he has yet to do to prepare his clients' case. This work will be hampered by the difficulties of reaching some of his clients in remote Bamaga in Far North Queensland. On his own evidence and in the events that have happened, the appellant submits, Mr Nunan has said that the prospect that he will be ready for trial is "remote".

[68] The appellants wish to prosecute their Queensland proceedings and they invite the respondents, the defendants in that action, to cooperate and litigate their claims here by counterclaim. The appellants have filed and delivered all of their affidavits of evidence. It now remains for the respondents to furnish their own evidence. In addition, of course, there must be disclosure and other interlocutory steps required by the rules to make the matter ready for trial.

[69] The appellants submit that, if the appeal is reopened and the evidence is led, this Court would make three findings. First, that there will be no trial of the Missouri proceedings in July 2019. Second, that it is not known when such a trial might take place. Third, that the proceedings in the Supreme Court of Queensland will be ready for trial before the proceedings in the Missouri Circuit Court.

[70] Ground 4A(c) of the Amended Notice of Appeal challenged the finding that the Missouri proceedings were "ready for trial and would be heard at a time earlier than [the Queensland proceeding] could be finally heard" because Lyons SJA found that

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describing themselves as "Mackellar Mining Equipment Pty Ltd (ACN 010 398 428) and Dramatic Investments Pty Limited (ACN 059 863 204) Trading as Partnership 818".

the Missouri proceedings were ready for trial. The appellants submit that this finding was material to the decision to refuse to grant an injunction. This submission means that, absent the likelihood of a trial in Missouri in July 2019, Lyons SJA should have granted the injunction. The submission cannot be accepted. While the imminence of the trial was a significant factor that bore upon the refusal of relief, it was neither the only factor nor a necessary factor in her Honour's reasoning.

[71] The appellants concede that the Missouri proceedings were regular when they were commenced and remained proper proceedings. Their case is that the proceedings became vexatious and oppressive as soon as Lambert Leasing ceased to be a party and because the respondents, instead of discontinuing proceedings in Missouri and commencing new proceedings in Queensland, decided to press on with their case. The factors to which the appellants point to make their case are those that I have stated in paragraph [19] above. In summary, the factors fall into three classes. First, the parties and witnesses are all here. Second, the underlying transaction that led to the alleged wrong occurred here, the crash of the aircraft was here and the damage allegedly suffered was suffered here. Third, the applicable law will be Australian and Australian civil aviation standards will have to be applied. These are the same matters that were put before Lyons SJA below as justifying the grant of relief.

[72] The first of these matters means that there will be trouble and expense involved in conducting a trial in Missouri. The second matter is of little moment because there is no suggestion that it will be necessary for anybody to go to the location in which the transaction happened, or to the place where the airplane crashed, or to have any knowledge about them to any extent greater than can be dealt with in the usual way by evidence. In any event, as will appear, the Circuit Court has held that part of the alleged wrong happened in Missouri. The third matter is common to all matters in which a court must apply foreign law. It would be invidious and objectionable to speculate about the respective ability of courts of different countries to come to grips with a body of law and to apply it. The law of nations and the common law concerning conflict of laws takes it for granted that whichever of two courts in two jurisdictions is to apply a body of law, that court is competent to apply the law.

[73] In truth, these are matters that weigh heavily when a court is asked to make orders on the ground of *forum non conveniens*. In such a case, inconvenience, expense and familiarity with applicable law, whether it is a question of foreign law or a question of a body of specialist law, are important matters to be considered. Indeed, they usually lie at the heart of the exercise of discretion in such cases. But on their own, they cannot, in general, give rise to a conclusion that the person who prefers to litigate in a foreign jurisdiction is acting in such a manner that equity will intervene by injunction to restrain the exercise of undoubted legal rights.

[74] The fundamental fallacy in the appellants' case can be seen when one considers what is really meant by the submission that it was not the commencement of proceedings but their continuation that is vexatious and oppressive. That submission means that these proceedings, which were regular when started, became vexatious and oppressive as soon as Lambert Leasing was removed as a party or within a very short time afterwards. It follows that, from that point, the respondents, if they were properly advised, should have discontinued the Missouri proceedings and commenced fresh proceedings in Queensland. Yet, their causes of

action had by then been statute barred in Queensland long before.[44] The aircraft crashed in May 2005; Lambert Leasing was removed as a party in January 2016. It would have been irrational for the respondents to have taken those steps in the circumstances. The appellants' response to this proposition, by their counsel during oral argument, was that the respondents could have asked the appellants whether, if they started again in Queensland, the appellants would agree not to plead the statute of limitations as a defence against them. There is no evidence that, if asked, the appellants would have agreed. The appellants did not go so far as to submit that they would have then given an affirmative response to such a proposal if it had been put and it is not possible to infer that they would have done so.

[75] It would have been quite another matter if, acting promptly after the removal of Lambert Leasing, the appellants themselves had suggested that the proceedings be abandoned and restarted in Queensland; and if the appellants had then offered not to prejudice the respondents by raising a time limitation defence; and if the appellants had then offered to ensure that, if the respondents met the appellants' convenience in that way, they would indemnify them against any resulting expense. But that is not what they did. Instead, they say now that it is the respondents who have acted unreasonably in failing to approach them to seek an indulgence. It must not be overlooked that, during all of the time until March 2017, the appellants, while seeking on numerous occasions to stop the Missouri proceedings, never volunteered to submit to an action in Queensland, much less offered to cooperate in prosecuting such an action. All of this, of course, is entirely hypothetical and is raised merely to demonstrate that the appellants' case is untenable because the whole foundation of their case, namely the respondents' unreasonableness in failing to discontinue the Missouri proceedings, is unsound.

[76] The unsoundness involved in characterising the respondents actions as amounting to vexation and oppression may also be illustrated by reference to another series of events. On 4 May 2009, the appellants applied to the Circuit Court to dismiss the proceeding upon the basis, among others, of *forum non conveniens*. The grounds for that application were the same as those that were raised before Lyons SJA and reargued on appeal. The application was based not only upon the basis that the Missouri Circuit Court was an inappropriate forum but also upon the ground that Australia is the more appropriate forum. The application was refused at first instance and, on 24 February 2010, the Missouri Court of Appeals dismissed an appeal. On 23 March 2010, the Supreme Court of Missouri declined to entertain a further appeal. When the matter went to the US District Court, another such application was made by the appellants on 10 March 2015, joining in applications with the other defendants, to dismiss the proceeding upon grounds including *forum non conveniens*. The parties then engaged in a mediation, which led to the plaintiffs' settlement with Lambert Leasing. The District Court did not determine the stay applications but, instead, remanded the whole case back to the Circuit Court in January 2016 leaving the pending motions to be determined there. The evidence is that the appellants did not then pursue their applications before the Circuit Court. Instead, they waited a year and then made an *ex parte* application for an interim injunction in the Supreme Court of Queensland as a step in the proceeding that they had just started by originating application.

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44 Some plaintiffs, who are minors, may not have had their actions barred but nothing turns on these exceptions.

[77] There has been no explanation offered as to why the applications were not pressed in the Circuit Court. The matters of controversy before Lyons SJA concerning choice of law, the content of Missouri procedural and substantive law, the scope of available remedies in Missouri and the mode of trial were all matters that could have been determined readily by a Missouri judge hearing such an application. Instead, the appellants litigated those issues in Queensland by applying here for an injunction.

[78] On 4 January 2019, after this appeal was heard, but before judgment, the appellants applied in Missouri for the proceeding to be dismissed "for lack of personal jurisdiction" and, in the alternative, on the ground of *forum non conveniens*. Mr Sweeney's gloomy prediction about delay, made on 20 January 2019, was based in part upon the delay that the filing of that motion would cause. Instead, there has been no delay. The motion was heard and, on 20 March 2019, it was dismissed. In his ruling, his Honour Judge Brown held that the respondents had "made a prima facie showing that Defendants committed tortious conduct in Missouri." The challenge to jurisdiction was rejected as was the alternative case about *forum non conveniens*.

[79] The result is that two courts in the United States, both of them in Missouri, one a federal court and the other a State court, have ruled that Missouri is not an inconvenient forum in which to litigate the dispute. The grounds raised in each of those two applications were the same and they are the same as the grounds that were raised before Lyons SJA and that have been repeated on appeal.

[80] To my mind, this constitutes, in the circumstances of this case, another, and distinct, insurmountable hurdle to making out a case that the Missouri proceedings are vexatious and oppressive such that this Court should, by injunction, prevent its further prosecution. The factors relied upon by the appellants to support their contention about the character of proceedings have failed even to support a plea of *forum non conveniens* in the very jurisdiction which, by its grasp of local law and practice, including the matters deposed to by Mr Sweeney, is best placed to make such a judgment. The Missouri Circuit Court, which itself must undertake the task of deciding this case if it is heard there, has held not only that it has jurisdiction but also that it can, without undue inconvenience, determine the dispute. No case was put forward in the Circuit Court that the continuation of the proceedings in Missouri constituted an abuse of the processes of the Circuit Court. Instead, that case was sought to be made in Queensland.

[81] Moreover, the Circuit Court has made orders for mediation and for trial. No party applied to vacate those directions or to adjourn the trial.

[82] For these reasons I would refuse leave to the applicants to reopen the hearing of the appeal. The facts that they would wish to prove if given an opportunity can make no difference to the case.

[83] There is another reason why the appeal should not be reopened. What the appellants want to do is to show that, since Lyons SJA decided the case, it has now become apparent that the case will not be ready for a trial in July 2019. The application for a permanent injunction was tried before her Honour on the evidence that was then obtainable. Her Honour was invited by the parties to make some predictive findings, including whether there would be a trial in July 2019 and she

did so. It would be abhorrent to the fundamental principle that litigation must be concluded and that, subject to appeal, the order of the Court is final, if a party were permitted, in a case like this one that involves the changing dynamics of litigation, to re-agitate its case as those dynamics change over time. Things do change in the course of litigation.[45] But it does not follow that past decisions must be reopened. In many cases judges are called upon to base a decision upon a judgment about what will or will not happen. The fact that future events do not vindicate the judgment does not mean that the Court's order does not stand. Particularly in a case like this one, concerning the fate of ongoing litigation in another court, it is inevitable that there will be unpredicted events and that the course of litigation will not run smoothly.

[84] I respectfully agree with Lyons SJA that the appellants have failed to show an arguable case that the respondents' continuation of the Missouri proceedings is vexatious or oppressive. Her Honour also considered, if she was wrong in that conclusion, whether she would have exercised her discretion to grant the injunction or to refuse to grant it. Her Honour decided that, if the occasion for the exercise of discretion had arisen then she would have refused an injunction. Her Honour considered that it would have been reasonable for the appellants to have sought the injunctive relief now claimed by, at the latest, 2016. This was when Lambert Leasing was removed as a party. I respectfully agree that, having regard to the appellants' case about when the proceedings became oppressive to them, they were in a position to apply for a remedy from then. Her Honour found that no explanation had been offered for the failure to seek relief until 6 March 2017. By their notice of appeal, the appellants placed the reasons for delay at the feet of the respondents. They point to the fact that the respondents took no steps in the litigation during 2016 after Lambert Leasing was removed as a party. They contend that as soon as the respondents did take a step, the present proceedings were commenced in Queensland. To my mind, this is not an answer. It is no more than an assertion that the appellants chose to delay seeking relief while they waited to see what the respondents would do after the proceeding was remanded back to the Circuit Court in Greene County, Missouri, by the US District Court, to which it had been removed at an earlier stage. There is no evidence that the decision to delay seeking relief in Queensland was a considered decision upon the respondents' acts. I have said that Lambert Leasing ceased to be a party in 2016; but the reason for their departure from the litigation was that the Missouri plaintiffs had settled their claims against it. According to the record of the US District Court that was in evidence, the settlement process openly began on 15 July 2015, when the plaintiffs filed a motion to dismiss Lambert Leasing from the proceeding on a voluntary basis. The parties, including the Partnership 818, participated in further steps concerning this motion until 9 December 2015 when the Court approved the settlement. Lambert Leasing was formally removed from the record on 21 January 2016 when the proceedings were remanded back to the Circuit Court in Greene County, Missouri. The removal of that party was not a sudden surprise. In any case, they only decided to act after the Circuit Court required the case to be reviewed, and after the Court made orders sought by the respondents for the appointment of Next Friends for some of the plaintiffs, and after the Circuit Court ruled, on 3 March 2017, that the

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45 See eg *Avraam v Constello Constructions Pty Ltd*, *supra*, a case in which an assessment of damages for future economic loss was fundamentally falsified by later events; *Hawkins v Pender Bros Pty Ltd*, *supra*, a case in which later events falsified the assumption at trial about how negotiations might progress.

respondents were proper parties to assert the claims they made. Their reasons for failing to seek equitable relief in Queensland sooner remain unknown.

[85] It was in those circumstances that Lyons SJA concluded that the appellants' delay in seeking injunctive relief, which was one of the respondents' answers to the claim for relief, was a reason to refuse to make the order. The appellants do not challenge any of the facts that I have set out. Rather, they say that her Honour failed to appreciate that she was hearing an application for "a permanent injunction in the exclusive equitable jurisdiction of the Court and that … delay was not a ground for refusal of an injunction unless the Respondents proved substantial prejudice which could not be appropriately accommodated or compensated". In their written outline of argument the appellants seemingly accept that that proposition is too narrowly stated. They actually submit that relevant delay must be delay of a kind that amounts to acquiescence and assent or, alternatively, it must be accompanied by prejudice to the respondent or third party. They submit that there was no occasion when the appellants' inactivity might have encouraged the respondents "reasonably to believe that the Appellants' inaction was accepted and not opposed". They point to the fact that the respondents' applications for the appointment of a Next Friend to some of the plaintiffs "was made over objections of the Appellants and without any waiver of previous objections and defences including jurisdictional defences".

[86] It has been accepted that a plaintiff's delay in seeking equitable relief, with no additional circumstances characterising or affording such delay, will not usually be a reason why relief should be refused.[46] For delay to be relevant, it must have some significance. That must be so because why should insignificant delay, whatever its length, matter when the plaintiff's rights have been affected? In some cases a plaintiff has stood by without seeking any remedy while seeing that a violation of rights is taking place. In such a case, delay may constitute an acceptance of the violation such that the plaintiff "cannot complain of that act as a wrong at all".[47] In another kind of case, after the plaintiff's rights have been violated, delay in seeking a remedy may be evidence of the plaintiff's assent to the continuance of the state of affairs created by the defendant.[48] A third category of case arises when, after there has been a violation of the plaintiff's rights, the plaintiff delays in seeking a remedy and, during that delay, there has been an alteration of position by the defendant or third party in reliance on such delay such that, if relief were then to be granted, the defendant or third party would suffer prejudice that is either irreparable or that would be difficult to undo.[49]

[87] The appellants have based their case upon the proceedings having been vexatious and oppressive only since Lambert Leasing was removed from the proceedings. That occurred, at the latest, in January 2016. At that time, the US District Court also remanded the proceedings back to the Circuit Court. The respondents argued below, and on this appeal, that the relevant time from which delay ought to be measured was much earlier. However, the appellants' contention that an anti-suit injunction was not warranted until the proceedings were finally constituted has not

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46 An early case was *Morse v Royal* (1806) 33 ER 134 at 141; a modern case is *Fitzgerald v Masters* (1956) 95 CLR 420 at 433 per Dixon CJ and Windeyer J.

47 *Cashman v 7 North Golden Gate Gold Mining Co* (1897) 7 QLJ 152 at 153-154.

48 see eg *Glasson v Fuller* [1922] SASR 148 at 161-163 per Poole J; and also *Cashman*, *supra*.

49 *Cashman*, *supra*.

been seriously controverted and I will proceed upon the basis that that contention is right.

[88] Views may differ about the inactivity of the parties for a year after that point, but one view that is open is that it must have been apparent to the appellants that, after January 2016, the proceedings ought not be permitted to continue. Yet, the appellants did not raise any objection with the respondents. They were content to leave the proceedings on foot. Even after the respondents made an application for the appointment of Next Friends the appellants did not ask for that application to be adjourned pending an application by them based upon the ground of *forum non conveniens* or pending an application in Queensland for an injunction. Instead, they appeared on that application and participated in argument by opposing it, albeit reserving their objections and defences, including those based upon jurisdiction. This stance is not the same as objecting to the very continuance of the proceeding in the jurisdiction on the ground that it constituted an abuse of process.

[89] The appellants have never asked for an adjournment of the trial. That failure is unexplained. After the appeal was heard the appellants made an application to the Circuit Court to dismiss the proceeding on the ground of *forum non conveniens*. That application was dismissed. Even then, and despite having Mr Sweeney's opinion about the steps that the appellants can now take and that, if taken, might delay the trial, no such steps have been taken nor is there any evidence that the appellants have even sought advice from their lawyers about whether they should take such steps.

[90] All of these matters, in the context of the applicant's failure to seek relief by way of anti-suit injunction, that is to say, in the context of their unexplained delay in seeking equitable relief between January 2016 and March 2017, are capable of proving the appellants' acquiescence in the continuation of the Missouri proceedings.

[91] The point is hypothetical because it is unnecessary to consider delay because the appellants have not shown any ground that would justify the relief that they seek. No occasion arises to consider the exercise of discretion.

[92] The appellants have a final weapon in their arsenal, one that they did not deploy against the respondents at the hearing below. They submit that the Queensland proceeding is in federal jurisdiction (as it is because of the relevance of certain Commonwealth laws). They submit that there is a constitutional guarantee of an appeal to the High Court in such a case (as there is). It follows, so the argument runs, that the election by the respondents to have a foreign court quell the controversy is incompatible with the "fundamental character of the federal jurisdiction enlivened by the application for negative injunctions" and "threatens the integrity of the local proceeding" and is, for that reason on its own, vexatious or oppressive.

[93] The two premises may be accepted. The conclusion does not follow. No authority has been cited for the novel principle that once a plaintiff has commenced a proceeding in federal jurisdiction in an Australian court, that plaintiff is entitled to an injunction to prevent a defendant litigating the dispute anywhere else and, it seems, whatever the circumstances. The existence of such a principle is

inconsistent with a case like *Henry v Henry*[50] in which a stay was sought of a proceeding under the *Family Law Act* 1975 (Cth) because there was already an existing proceeding between the parties in Monaco arising from their marital dispute. Although the case was concerned with a stay and not an injunction, none of the members of the High Court adverted to the existence of a principle that gives such primacy to proceedings in federal jurisdiction that a stay or an injunction, as the case may be, should be granted to vindicate a party's rights under the Constitution.

[94] The principle must also have escaped the attention of Gummow J when his Honour decided *National Mutual Holdings Pty Ltd v Sentry Corp*[51] as a member of the Federal Court.

[95] I would reject this submission.

[96] For these reasons I would refuse leave to reopen the hearing of the appeal and I would dismiss the appeal with costs.

[97] **MORRISON JA:** I have read the reasons of Sofronoff P and agree with those reasons and the orders his Honour proposes.

[98] **BODDICE J:** I agree with Sofronoff P.

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50 *supra.*

51 (1989) 22 FCR 209.