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ANTI-SUIT INJUNCTIVE RELIEF: A COMMONWEALTH PERSPECTIVE

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1. This paper will examine the form of extraordinary injunctive relief that is the anti-suit injunction and its deployment in cross-border litigation in Australia, the United Kingdom and the Bailiwick of Guernsey.

2. It will consider the origins of and principles underlying anti-suit injunctions, and considerations relevant to the granting of anti-suit injunctions in the context of compulsory statutory regimes including competition and consumer law and insolvency law.

<u>Anti-suit injunctions in general: origins and underlying principles</u>

3. The principles underpinning the court's discretion to grant anti-suit injunctive relief were consolidated in the matter of *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871 ("***Lee Kui Jak***"), prior to which the jurisprudence concerning this type of extraordinary injunctive relief had been scattered across various decisions of the courts of England and Wales.[1]

[1] The practice of courts intervening to restrain litigation in another jurisdiction when proceedings are already on-foot can be traced back at least to *Wedderburn v Wedderburn* [1838] 41 ER 225, in which Lord Chancellor Cottenham observed (at 230) that "*There can be no doubt that the general rule precludes parties from proceeding in any other Court for the same purpose for which they are proceeding in this Court, whether the other proceedings are taken in this or in any other country; and if the party conceives there are any circumstances in his case which constitute an exception to the rule, I think that his proper*

4. Proceedings in *Lee Kui Jak* (on appeal from the Brunei Court of Appeal) were brought by the widow and estate administrators of a Brunei-based businessman following a fatal helicopter accident in which the deceased had been a passenger. The helicopter was manufactured by a French company, owned by an English company, and operated and serviced by a Malaysian company. After a formal investigation found that "*gear failure*" and "*mistaken health monitoring of the gearbox*" were likely causes of the accident, the plaintiffs brought proceedings in Brunei against both the Malaysian and French companies, and in France and the United States (Texas) against the French company.

5. The French proceedings were soon dismissed on the basis that the French company carried on business in Texas. After the service of a contribution notice on it by the French company, the Malaysian company advised that it would not submit to the jurisdiction of the Texas courts. Meanwhile, the progress of the matter in Texas led to a finding by the Brunei Court of Appeal that Texas had become the "*appropriate and natural*" forum for the matter.

6. The French company appealed against this finding to the Privy Council on the basis that it had access to a third-party indemnity against the Malaysian company in Brunei that was not otherwise legally available to it in Texas, seeking an anti-suit injunction to restrain the plaintiffs from continuing the Texas proceedings.

7. The Privy Council granted the anti-suit injunction and held that Brunei was the most appropriate forum. The reasons of Lord Goff of Chieveley, delivering the judgment of the Court, synthesise and distil the historical body of authority on anti-suit injunctions into the following key principles:

    7.1. That the jurisdiction to grant an anti-suit injunction is only to be exercised when the "*ends of justice*" require it (at 892A).[2]

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course is not to take proceedings in another Court, of his own authority, but to apply to this Court for permission to take such proceedings."

[2] Citing, *inter alia*, *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, per Lord Scarman at 573: "*Caution in the exercise of the jurisdiction [to grant an anti-suit injunction] is certainly needed: but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend that the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice.*"

7.2. That an anti-suit injunction is directed not at the foreign court, but at the party proceeding or threatening to proceed in the foreign jurisdiction (at 892C).[3]

7.3. That an anti-suit injunction will only be issued against a party who is amenable to the court's jurisdiction, making the injunction an effective remedy (at 892E).[4]

7.4. That the jurisdiction to award anti-suit injunctions should be exercised with caution, because of the indirect effect it has on foreign courts (at 892F).[5]

7.5. That an anti-suit injunction can be granted to restrain the pursuit of "*vexatious*" or "*oppressive*" proceedings, but the meaning and effect of those terms should be considered on a case-by-case basis (at 893E).[6]

8. Historical cases had largely considered such injunctions from the defendant's perspective as the respondent to multiple proceedings. *Lee Kui Jak* added a further

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[3] Citing *Bushby v Munday* [1821] 56 ER 908, per Vice-Chancellor Sir John Leach at 913: "*If a Defendant who is ordered by this Court to discontinue a proceeding which he has commenced against the Plaintiff, in some other Court of Justice, either in this country or abroad, thinks fit to disobey that order, and to prosecute such proceedings, this Court does not pretend to any interference with the other Court; it acts upon the Defendant by punishment for his contempt in his disobedience to the order of the Court; and if he continue contumacious, and ultimately obtain a judgment in the other Court, it will protect the Plaintiff here against the consequences of that judgment; and this authority is ordinarily found fully adequate to the purposes of justice.*"

[4] Citing *In re North Carolina Estate Co Ltd* (1889) 5 TLR 328. "*As Chitty J pointed out in In re North Carolina Estate Co Ltd (1889) 5 TLR 328, it necessarily follows from the fact that the court acts in personam against the foreign litigant, that the latter much be amenable to its personal jurisdiction. He must be present within the jurisdiction or amenable to being served with the proceedings out of the jurisdiction, or else he must have submitted voluntarily*": *Stichting Shell Pensioenfonds v Krys* [2015] AC 616, per Lords Sumption and Toulson at [27].

Stated differently, consideration of whether an anti-suit injunction is appropriate in the circumstances will turn on the principle of international comity: "*'Comity' in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws*" (*Hilton v Guyot* (1895) 159 US 113, cited with approval in *CSR Limited v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, at 396).

[5] Citing, *inter alia*, *Cohen v Rothfield* [1919] 1 KB 410, per Lord Justice Scrutton at 413: "*Where it is proposed to stay an action on the ground that another is pending, and the action to be stayed is not in the Court asked to make the order, the same result is obtained by restraining the person who is bringing the second action from proceeding with it. But, as the effect is to interfere with proceedings in another jurisdiction, this power should be exercised with great caution to avoid even the appearance of undue interference with another Court.*"

[6] Citing *McHenry v Lewis* (1882) 22 Ch D 397, per Lord Justice Bowen at 407-408: "*I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case.*"

principle, being that the court will consider not only injustice to the defendant if the plaintiff is permitted to continue proceedings, but also injustice to the plaintiff of being restrained from pursuing those proceedings. Accordingly (at 896G): "*the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him.*"

9. The seminal case in Australia relating to anti-suit injunctions is *CSR Limited v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, which expressly adopted (at 372) the approach taken in *Lee Kui Jak*. As in other Commonwealth jurisdictions, an Australian court's jurisdiction to grant an anti-suit injunction is grounded in equity and invoked for the purpose of avoiding an injustice.[7]

10. Australian courts apply the "*clearly inappropriate forum*" test when considering the threshold issue of *forum non conveniens*.[8] For an anti-suit injunction to be granted, the Australian court must firstly find itself to not be a clearly inappropriate forum for the proceedings, then it must be convinced that an equitable need for the relief exists.

Anti-suit injunctions in the context of compulsory statutory regimes

Competition and consumer law

11. The principle in *Lee Kui Jak* was recently applied by the Federal Court of Australia in the matter of *Home Ice Cream Pty Ltd v McNabb Technologies LLC (No. 2)* [2018] FCA 1093 ("***Home Ice Cream***"). In this case, the plaintiff company had engaged the defendant software developer to develop an electronic commerce platform.

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[7] *CSR Limited v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, per Chief Justice Brennan at 372: "*There must be an equity which entitles one party as against the other to an injunction to restrain the other from proceeding in the foreign court. It is not possible to define in advance the circumstances that give rise to such an equity, except to say that it arises when it would be unconscionable for the party enjoined to proceed in the foreign tribunal.*"

Alternatively, an anti-suit injunction may be granted when it is "*necessary for the protection of the court's own proceedings or processes*": per Justices Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby at 392.

[8] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538: "*Since the traditional test [for forum non conveniens, which was based on the court finding itself to be the 'most appropriate forum'] is apt to produce such an extreme result, the 'clearly inappropriate forum' test is to be preferred to the traditional test.*" The "*clearly inappropriate forum*" test is derived from the English case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460.

12. The agreement between the parties included choice of law and forum-selection clauses providing that all disputes were to be litigated in Illinois, applying Illinois law.

13. After "*significant failures*" in the provision of the contracted services by the defendant, the plaintiff instituted proceedings for misleading or deceptive conduct pursuant to section 18 of the *Australian Consumer Law*.[9] In response, the defendant instituted proceedings in Illinois and sent a cease-and-desist letter to the plaintiff in reliance on the choice of law and forum-selection clauses. The plaintiff then brought an application in the Federal Court for an anti-suit injunction to restraint the defendant from continuing with the Illinois proceedings.

14. Notably, the affidavit filed in the Illinois proceedings by the defendant's attorney stated that the plaintiff's claim under the *Australian Consumer Law* was unlikely to be determined in the Illinois courts. The practical effect of this was that the *Australian Consumer Law* would not be applied, and therefore that the plaintiff would not be capable of pursuing the relief it sought under that legislation.

15. Acting Chief Justice Greenwood of the Federal Court granted the anti-suit injunction to restrain the defendant from continuing the Illinois proceedings on the bases that:

    15.1. the relief sought by the plaintiff was not available to it in the Illinois proceedings, but the relief claimed by the defendant was available to it by way of cross-claim in the Federal Court proceedings (at [5] and [26]); and

    15.2. the choice of law and forum-selection clauses were not capable of operating in such a manner as to deny the plaintiff its legal right to seek relief under the *Australian Consumer Law*, and the plaintiff's statutory right to that protective relief could not be contracted out of (at [17] to [19]).

16. From the *Home Ice Cream* decision it follows that:

    16.1. American entities engaged in trading or other business relationships with Australian entities may find themselves caught by the *Australian Consumer Law* regardless of whether the relevant underlying contract or agreement

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[9] Section 18 of the *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act 2010* (Cth)) is unique and often perceived as somewhat draconian by foreign entities. It provides that: "*A person must not, in trade and commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*" The provision is very wide-ranging and frequently employed in commercial proceedings in Australia, and a corporation (domestic or foreign) found to have contravened section 18 may be held liable to pay damages to the claimant for any loss or damage the claimant establishes that they suffered as a consequence of the contravention.

contains express choice of law and forum-selection clauses in favour of the courts of the United States; and

16.2. where a statutory cause of action under the *Australian Consumer Law* is pleaded, it is possible that an Australian court exercising federal jurisdiction will grant an anti-suit injunction in favour of the complainant due to the absence of corresponding relief in the United States.

Insolvency law

17. Statutory causes of action in insolvency proceedings provide another basis upon which anti-suit injunctions are commonly sought, and the principle in *Lee Kui Jak* (as to which see paragraph [8] above) is particularly pertinent when seeking an anti-suit injunction in the cross-border insolvency context.

18. The remedies available to liquidators and administrators are typically grounded in a statutory regime. As such, it is straightforward for an insolvency practitioner to argue that if they are not permitted to pursue proceedings in their home jurisdiction, they will be denied their ability to seek certain remedies which will, in turn, be unjust for creditors.

19. This was the argument deployed by liquidators in the matter of *Carlyle Capital Corporation (in liquidation) v Conway* [2013] 2 Lloyd's Rep 179 ("***Carlyle***"). This matter involved English liquidators, a company incorporated in Guernsey and its parent/holding entity, an American private equity firm.

20. Prior to its collapse, the plaintiff company's primary mode of investment was in AAA Residential Mortgage-Backed Securities ("**RMBS**"). It was intended that the company would deliver strong returns to its core cadre of investors by selling and repurchasing its RMBS on a monthly cycle with various counterparties.

21. After the sub-prime housing crisis took root, a "*contagion*" spread across all forms of RMBS and many of the company's counterparties became reluctant to continue participating in these repurchase arrangements. This, of course, meant that the company could not generate revenue and within the space of approximately 18 months, the company had lost the majority of the funds invested in it.

22. The liquidators' case against the directors of the company was largely based on the premise that the directors had effectively "*sat on their hands*" and done nothing, or very little, in response to the unfolding crisis, rather than taking proactive steps to sell down the company's RMBS portfolio in order to preserve investors' money.

23. Amongst the defendants was an entity with whom the company had an investment management agreement. In that agreement was an exclusive jurisdiction clause bestowing the jurisdiction to hear and determine disputes arising out of the agreement exclusively upon the courts of Delaware.

24. The liquidators initially brought proceedings in Delaware, New York, Washington, and Guernsey, but subsequently withdrew the Delaware proceedings.[10] The defendants acted swiftly to seek an anti-suit injunction in Delaware so as to restrain the liquidators from bringing their case, to the extent that it was based on the agreement (with its exclusive jurisdiction clause) with the investment management entity, anywhere other than in Delaware.

25. In response, the liquidators applied for and were granted an anti-anti-suit injunction in the Royal Court of Guernsey to prevent the defendants from taking any steps in furtherance of their anti-suit injunction application in Delaware. The anti-anti-suit injunction was upheld on appeal, the defendants having argued (at [76]) that they had a contractual right to have all matters heard and decided in Delaware, with the Guernsey Court of Appeal holding that the courts of Guernsey provided the *forum conveniens* for reasons including that:

    25.1. Guernsey was the only jurisdiction in which all of the plaintiff company's causes of action, both statutory and equitable, could be pursued (at [78]);

    25.2. the Delaware proceedings were clearly an attempt to stymie the liquidators' efforts to pursue statutory insolvency remedies against the defendants (at [112]).

26. It follows that, not only in the insolvency context but in any cross-border litigation scenario, pleading a cause of action that is grounded in a compulsory statutory regime (where, of course, such a cause of action is available) will establish a basis upon which

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[10] In comparison to Australia and other Commonwealth jurisdictions, Delaware is perceived to have a very permissive attitude towards company directors and to take an approach that can be viewed as tolerant of conduct that might constitute a breach of fiduciary duty elsewhere.

to challenge an exclusive jurisdiction clause and any consequential anti-suit injunctive relief sought.

27. In the insolvency context, anti-suit injunctions also serve a useful purpose in dealing with creditors who institute proceedings in an offshore jurisdiction for the purpose of trying to secure a higher priority for themselves in a liquidation.[11]

28. In the recent matter of *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41 ("***Stichting***"), a Dutch creditor in the liquidation of an entity incorporated in the British Virgin Islands instituted proceedings and obtained pre-judgment in a Dutch court. The practical effect of this was to give the creditor priority in the liquidation over other creditors. The liquidators obtained an anti-suit injunction, against which the creditor appealed.

29. On appeal from the Eastern Caribbean Court of Appeal, the Privy Council held that an anti-suit injunction was appropriate so as to prevent the Dutch creditor from pursuing the proceedings in its home jurisdiction and artificially obtaining an elevation in priority over other unsecured creditors. The Court's reasons included that:

    29.1. in a winding-up scenario, a statutory trust is created whereby all assets, both local and international, are pooled to be shared amongst unsecured creditors pursuant to the statutory rules of distribution (at [14]);

    29.2. courts have an equitable jurisdiction to uphold the *pari passu* principle and grant an anti-suit injunction to prevent one creditor from instituting proceedings elsewhere in order to secure priority for themselves (at [22]); and

    29.3. by submitting a proof of debt in the liquidation, the Dutch creditor had tacitly submitted itself to the jurisdiction of the BVI courts, which precluded it from

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[11] *In re North Carolina Estate Co Ltd* (1889) 5 TLR 328, per Justice Chitty: "*Under the Companies Act of 1862 is was clear that after a winding up order the assets of the company were to be collected and applied in discharge of its liabilities, and that the assets were fixed by the Act of Parliament with a trust for equal distribution among creditors. No creditor, therefore, could be allowed, by taking proceedings at his own will and pleasure, to destroy, waste, or impair assets which were subjected to a trust for the general benefit of all creditors alike.*"

See also *CSR Limited v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, per curiam at 391: "*The counterpart of a court's. power to prevent its processes being abused is its power to protect the integrity of those processes once set in motion. And in some cases, it is that counterpart power of protection that authorises the grant of anti-suit injunctions. Thus, for example, if 'an estate is being administered … or a petition in bankruptcy has been presented … or winding up proceedings have been commenced … an injunction [may be] granted to restrain a person from seeking, by foreign proceedings, to obtain the sole benefit of certain foreign assets'.*"

acting in a manner that would prevent the assets of the liquidated entity from being distributed in accordance with the statutory trust (at [32]).

30. Accordingly, and while the UNCITRAL Model Law on Cross-Border Insolvency is intended to reduce the requirement for anti-suit injunctions by encouraging the recognition of foreign main proceedings, anti-suit injunctions remain an important weapon in the liquidator's arsenal and will often, and necessarily, be interdictory in nature.

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