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"ANTI-SUIT INJUNCTIONS: DAMP SQUIB OR ANOTHER SHOT IN THE MARITIME LOCKER?"

REFLECTIONS ON *TURNER v GROVIT*

Justice Hugh Williams
High Court of New Zealand

Introduction

It is a privilege and a pleasure to have been invited by MLAANZ to present this year's Dethridge Memorial address and to acknowledge, as did Justice Brian Tamberlin at the commencement of his 2001 Dethridge Address,that :

> "The Dethridge Annual Address developed from a lifetime engagement and fascination with Maritime Law on the part of Frank Dethridge. He is remembered and admired with affection and respect for having the vision which led to the founding of this Association in May 1975 and for his outstanding service to the law and the maritime community." [1]

The title to this paper is "Anti-Suit Injunctions: Damp Squib or another Shot in the Maritime Locker?" but, as the sub-title shows, it was sparked by reflecting on the House of Lords' renewed enthusiastic imprimatur given to the anti-suit injunction in *Turner v Grovit*[2] and the resounding rebuff administered to their Lordships by the

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[1] Justice Brian Tamberlin: Frank Stuart Dethridge Memorial Address 2001 "*Globalization – Pressures and Changes*" (2002) 16 MLAANZ Journal 21.
[2] [2002] 1 WLR 107; [2001] UKHL 65.

European Court of Justice (ECJ) when the case was referred to it to consider whether anti-suit injunctions were consistent with the Brussels Convention.[3]

The theme of this address is that, although the anti-suit injunction must be confined within proper national limits informed by proper regard for international comity and notions of sovereignty, such injunctions may nonetheless have a valuable part to play and, perhaps, have an as yet unrealised potential in maritime law.[4]

In preparing this address, I was pleased to find that, entirely coincidentally, its theme echoes in broad measure some of those in Justice Brian Tamberlin's 2001 Dethridge Address and those discussed by Mr Justice David Steel in his 2002 Dethridge Address.[5]

The Nature of the Anti-Suit Injunction

The basic position is well recognised, at least in countries whose legal systems derive from the Common Law. *Dicey and Morris on the Conflict of Laws* states[6]:

> An English court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings, in a foreign court … where it is necessary in the interests of justice for it to do so.

However, even the authors of Dicey and Morris acknowledge that concerns arise on the part of other countries, Judges and litigants on receipt of anti-suit injunctions. They say [7] :

> English courts have long exercised a jurisdiction to restrain a party from instituting or prosecuting proceedings in a foreign court. As long ago as

[3] *Turner v Grovit* [2004] 1 Lloyd's Rep 216; [2004] 2 Lloyd's Rep 169
[4] It should be noted that no claim is made that this paper is definitive on the topic of anti-suit injunctions or comprehensively cites all the cases and literature on it.
[5] Steel: Frank Stuart Dethridge Memorial Address 2002 "*The Modern Maritime Judge – Policeman or Salesman?*" (2003) 17 MLAANZ Journal 6.
[6] Collins et al: *Dicey and Morris on the Conflict of Laws* 13th ed 2000 p 386 R 31(5)
[7] *Op.cit.* para 12-057 pp 414-415.

> 1834[8] it was said that this jurisdiction is grounded "not upon any pretension to the exercise of judicial … rights abroad" but upon the fact that the party to whom the order is directed is subject to the *in personam* jurisdiction of the English court. But although the injunction operates only *in personam* against the party to the foreign litigation, the remedy is an indirect interference with the process of the foreign court, and the jurisdiction must be exercised with caution, particularly if the foreign plaintiff is suing in his own court.

Others are blunter.

Prof Jackson[9] describes the granting of anti-suit injunctions as "controversial particularly in cases within the [Brussels] Convention". Some Contracting States under that Convention apparently refuse to serve them on the grounds they are unconstitutional and an affront to their sovereignty.[10] *Bills of Lading: Law and Contracts*[11] says the "courts of some Contracting States have taken a dim view of such an order..". A commentary on the House of Lords' decision in *Turner v Grovit*, described anti-suit injunctions as the "English artifice"[12]. And the Americans also loathe being on the receiving end of anti-suit injunctions.[13]

Umbrage taken at the granting of anti-suit injunctions has, predictably, given lawyers' ingenuity, led to cases where anti-anti-suit injunctions have been sought. Those are injunctions restraining a respondent from applying to a domestic court for an anti-suit injunction to prevent a foreign court exercising its own jurisdiction.[14]

And there are now cases, including at least one in Australia, dealing with applications for anti-anti-anti-suit injunctions. These arise when a party considers it has a good

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[8] The jurisdiction was raised but doubted as early as 1665: *Love v Baker* (1665) 1 Ch Cas 67; 22 ER 698; Dr Andrew Bell *"Forum Shopping and Venue in Transnational Limitation"* (2003) paras 4.85 p 172, 4.119-4.122 pp 187-189. Preparation of this paper was materially assisted by Dr Bell's scholarly and comprehensive treatment of anti-suit injunctions in that work Ch 4, Part IV paras 4.79-4.249 pp 170-246.

[9] "*Enforcement of Maritime Claims*" 3rd Ed (2000) para 4.40 p 110.

[10] Baatz "*Who Decides on Jurisdiction Clauses?*" (2004) LCLQ 25, 28.

[11] Gaskell, Asariotis and Baatz (2000) para 20.178 pp 645-646.

[12] Clare Ambrose: "*Can Anti-Suit Injunctions Survive European Community Law?*" (2003) 52 ICLQ 401, 407-408.

[13] But have no compunctions about issuing them: Bell *op.cit.* at para 4.137 p 196.

[14] *General Star International Indemnity Ltd v Stirling Cooke Browne Reinsurance Brokers Ltd* [2003] ILPr 314.

case to restrain foreign proceedings on the grounds of vexation or oppression but is conscious of the possibility that if the applicant to the foreign court has notice of the anti-suit injunction it may seek to protect its own vexatious strategy by seeking anti-anti-anti-suit relief so, in its own forum, it applies to preclude that occurring.[15]

Turner v Grovit

It is now convenient to turn to the case which sparked consideration of this topic: *Turner v Grovit.*

Mr Turner was a qualified English solicitor.[16]

The defendants were part of the Chequepoint Group which carried on business in a number of countries including various tax havens. One member was Changepoint SA which was incorporated in Spain and carried on business there. Mr Grovit controlled the Group.

In 1990 Mr Turner was working for Chequepoint as its Group solicitor in England doing all its UK conveyancing.

In late 1996 he wished to resign and shift to Spain to learn Spanish. The Group was keen to retain him and suggested he shift to its Madrid office but continue to do the work he did in London. His UK salary and his pension contributions and other perquisites would continue to be paid.

Mr Turner shifted to Madrid in late 1997. However, having worked in Spain only for 35 days he gave notice. He returned to London and in March 1998 commenced proceedings in the London Employment Tribunal against Chequepoint for unfair

[15] *Smith Kline & French Laboratories Ltd v Bloch* [1983] 1 WLR 730; *National Australia Bank Ltd v Idoport* [2002] NSWSC 623; *Dicey and Morris* op.cit. para 12-058 p 415; *Bell* op.cit para 4.142 p 198.

[16] The jurisprudence of the anti-suit injunction considered in *Turner v Grovit* may well have been affected by the fact that Mr Turner took no part in the House or Lords hearing and was not represented by counsel. An *amicus curiae* argued the case on his behalf.

dismissal. The Group's objections before the Tribunal included protesting jurisdiction on the ground Mr Turner was employed in Spain when the employment contract ended. It also relied on Article 5(1) of the Brussels Convention. Those objections were overruled by the Tribunal in its decision delivered in September 1998. It awarded Mr Turner substantial damages. The Group appealed unsuccessfully.

While those proceedings were in progress, Changepoint in October 1998 sued Mr Turner out of a Madrid court for a sum far in excess of his claim in the English Employment Tribunal, claiming a number of breaches of his employment contract, including that he "disappeared" from the Madrid office and raised "baseless" Court claims in Britain against the companies.

Mr Turner did not accept service of the Spanish proceedings, protested the jurisdiction of the Madrid Court and took no part in the Spanish claim. Instead, he sued Mr Grovit and his companies in December 1998 in London and sought an injunction restraining them from continuing the Spanish proceedings. A temporary injunction was made on 22 December 1998 but was not later renewed. That decision was reversed by the Court of Appeal.[17] It required the defendants to discontinue the Madrid proceeding and restrained them from taking any step to continue it.

Laws LJ (with whom the other members of the Court agreed) ended his judgment by describing the international background in the following way[18] :

> I wish to emphasise that the reinstatement of injunctive relief in favour of the plaintiff entails not the slightest disrespect to the Spanish court. It is of course elementary that there is no question of our requiring that court to do or refrain from anything. I consider that the grant of relief would underpin and support the proper application of the Brussels Convention, to which, it goes without saying, the Spanish courts are as loyal as are those of this jurisdiction.

He described the defendants' position as "spectacularly hopeless"[19] and concluded[20] :

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[17] *Turner v Grovit* [2000] 1 QB 345.
[18] At 364.
[19] At 360.
[20] At 362.

> On the question of abuse of process, it is to my mind plain beyond the possibility of argument that the Spanish proceedings were launched in bad faith in order to vex the plaintiff in his pursuit of the application before the employment tribunal here. ... The documents lead to the ineluctable conclusion that ... the Spanish proceedings were intended and intended only to oppress the plaintiff and as such fall to be condemned as abusive as a matter of elementary principle.

In the House of Lords the defendants submitted anti-suit injunctions could no longer be granted in Britain as the Brussels Convention was incorporated into domestic law and such injunctions were an abuse of process inconsistent with the Convention. Hence the need for reference to the ECJ.

Greatly abbreviated, the nub of Lord Hobhouse's judgment is in the following passages[21]:

> 23 The present type of restraining order is commonly referred to as an "anti-suit" injunction. This terminology is misleading since it fosters the impression that the order is addressed to and intended to bind another court. It suggests that the jurisdiction of the foreign court is in question and that the injunction is an order that the foreign court desist from exercising the jurisdiction given to it by its own domestic law. None of this is correct. When an English court makes a restraining order, it is making an order which is addressed only to a party which is before it. The order is not directed against the foreign court. The order binds only that party, in personam, and is effective only in so far as that party is amenable to the jurisdiction of the English courts so that the order can be enforced against him ...
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> 24 The power to make the order is dependent upon there being wrongful conduct of the party to be restrained .... It was necessary that the conduct of the party being restrained should fit "the generic

[21] [2002] 1 WLR 67, 117-120 paras 23-28.

description of conduct that is 'unconscionable' in the eye of English law". ... But the point being made by the use of the word is that the remedy is a personal remedy for the wrongful conduct of an individual. ... Other phrases have from time to time been used to describe the criticism of the relevant person's conduct, for example, "vexatious" and "oppressive" ... Sometimes, as in the present case, the phrase "abuse of process" ... is used to express the same general ideas but with particular reference to the effect of the unconscionable conduct upon pending English proceedings. ...

25 ... Under English law, a person has no right not to be sued in a particular forum, domestic or foreign, unless there is some specific factor which gives him that right. A contractual arbitration or exclusive jurisdiction clause will provide such a ground for seeking to invoke the right to enforce the clause. The applicant does not have to show that the contractual forum is more appropriate than any other; the parties' contractual agreement does that for him. Similarly, where as in the present case there has been clearly unconscionable conduct on the part of the party sought to be restrained, this conduct is a sufficiently strong element to support the affected party's application for an order to restrain such conduct. ... For reasons of comity an English court will be reluctant to take upon itself the decision whether the foreign forum is an inappropriate one ... and it will not do so where the foreign country is a Brussels Convention country.

26 ... Restraining orders ... involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction. English law makes these distinctions. ...

27 The applicant for a restraining order must have a legitimate interest in making his application and the protection of that interest must make it necessary to make the order. Where the applicant is relying upon a contractual right not to be sued in the foreign country (say because of an exclusive jurisdiction clause or an arbitration clause), then, absent some special circumstance, he has by reason of his contract a legitimate interest in enforcing that right against the other party to the

> contract. But where he is relying upon conduct of the other person which is unconscionable for some non-contractual reason, English law requires that the legitimate interest must be the existence of proceedings in this country which need to be protected by the grant of a restraining order. …
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> 28 Similarly, English law attaches a high importance to international comity … and the English court has in mind how the restraining order will be perceived by foreign courts. … It is recognised that to make an order against a person who is a party to proceedings before a foreign court may be treated as an interference (albeit indirect) in the foreign proceedings. Thus English law requires the applicant to show a clear need to protect existing English proceedings. The protection of English proceedings is, understandably, regarded as a legitimate subject matter for an English court. It is not the concern of any other court. The order made operates in personam and relies for its enforcement solely upon the English court. …

The ECJ dealt with the reference concerning compatibility of anti-suit injunctions with the Brussels Convention in short order.

Again much truncated, the opinion of Ruiz-Jaraba Colomer AG observed [22] :

> 32 It would be contrary to that spirit [European judicial co-operation and mutual trust] for a judicial authority in member states to be able, even if only indirectly, to have an impact on the jurisdiction of the court of another contracting state to hear a given case.
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> 33 … A comparative review shows that only legal systems within the common-law tradition allow such orders. … If all European courts arrogated such a power to themselves, chaos would ensue. …
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> 34 The United Kingdom Government, following the House of Lords, insists, of course, that the orders at issue are not concerned with the jurisdiction of the Spanish court; they are addressed only to the party

[22] [2004] 1 Lloyd's Rep. 216, 219-221 paras [32]-[36].

which commenced proceedings with the sole object of frustrating the conduct of another action pending in another court. That analysis is formally correct. Nevertheless, it is undeniable that, as a result of a litigant being prohibited, under threat of a penalty, from pursuing an action before a given judicial authority, the latter is being deprived of jurisdiction to deal with the case, and the result is direct interference with its unfettered jurisdictional authority. … For a court to hear a case, it is necessary for the claimant to exercise his right of action. If he is deprived of the opportunity to do so, the result is interference with the jurisdiction of the foreign judge by reason of the fact that he is not permitted to hear or decide the case. …

35 The effects of restraining orders are similar to those produced by application of the doctrine of forum non conveniens, whereby a decision may be made not to hear actions which have been brought in an inappropriate forum. Restraining injunctions, however much they are addressed to the parties and not to a judicial authority, presuppose some assessment of the appropriateness of bringing an action before a specific judicial authority. …

36 … the paradoxical situation could arise whereby a judge who had issued an anti-suit injunction might be obliged to grant an order for enforcement of a judgment delivered in spite of his having expressly imposed a prohibition. …

The judgment of the ECJ itself of April 2004 was equally blunt. In its principal passages it held[23] :

26. … the Convention does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State. …

27. … a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an

[23] [2004] 2 Lloyd's Rep. 169, 172-173 paras [26]-[31].

action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with … the Convention.

28. … such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceeding in the forum State. In so far as the conduct for which the defendant is criticized consists in recourse to the jurisdiction of the court of another Member State, the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State. …

29. Even if it were assumed … that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention. … However, that result would follow from the grant of an injunction of the kind at issue which … has the effect of limiting the application of the rules on jurisdiction laid down by the Convention.

30. … The possibility cannot be excluded that, even if an injunction had been issued in one Contracting State, a decision might nevertheless be given by a court of another Contracting State. Similarly, the possibility cannot be excluded that the courts of two Contracting States that allowed such measures might issue contradictory injunctions.

31. Consequently, the answer to be given to the national court must be that the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.

Judges, however they might feel personally about the way other courts handle their decisions, nonetheless strive to remain courteous and respectful in the public expression of their views. Comity, recognition of the difficulties of the judging role and the legitimacy of differing views compels nothing less. Seen in that light, the brusqueness with which the ECJ rejected the views of the House of Lords is remarkable.

For our purposes, three matters flow from that judicial contretemps.

First, what, if any, effect has the ECJ's views had on English decisions in the area?

Secondly, does *Turner v Grovit* say something generally about anti-suit injunctions outside the narrow arenas of the Brussels Convention, exclusive jurisdiction and choice of law or forum clauses and arbitrations?

Thirdly, given that both our common law jurisdictions still rely – though increasingly infrequently – on English decisions, what is the state of the anti-suit injunction in Australasia, and is *Turner v Grovit* likely to change it?

Consequences of *Turner v Grovit* in England

The answer to the first question would appear to be: English decisions do not seem to have been much influenced by *Turner v Grovit*.

Though the ECJ decision in *Turner v Grovit* should have come as little surprise to the English, [24] in May 2004 Sir Peter Gross, an English High Court Judge and one of those commonly involved in maritime cases began a speech about arbitrations[25] by saying:

> "No apology is needed for the development by the common law of the anti-suit injunction, properly deployed, as a weapon to restrain a party in breach or threatened breach of his contractual obligation to arbitrate."

[24] Dr Regina Asiarotis *"Anti-Suit Injunctions for Breach of a Choice of Forum Agreement: A critical review of the English approach"* (2000) YBEL 447, Ambrose *op.cit*, 423.
[25] "*Anti-Suit Injunctions and Arbitration*" (2005) LMCLQ 10.

In the balance of the article, he was unapologetic about the English practice of issuing anti-suit injunctions in support of English arbitration clauses. That, he said, did not engage the Brussels Convention or any EU regulation since arbitrations are unregulated. Of the ECJ's decision in *Turner v Grovit* he said "It is not every day that the reasoning of the House of Lords receives such comprehensive disapproval" [26] but almost immediately went on to say "Whether the end of practical justice is best served by decisions such as *Turner v Grovit* ... may be more difficult to decide."

In his conclusion, while Sir Peter Gross said[27] :

> "There is no reason to doubt the continuing effectiveness and good sense of using the anti-suit injunction to protect arbitration agreements in appropriate cases where the target is not domiciled in an EU country and the proceedings pursued are not before the courts on an EU state"

a sub-text is possibly suggested when he went on, almost immediately, to state[28] :

> "It is not inappropriate to dwell on London's position as the, or at least a, leading centre for dispute resolution internationally and the legitimate interests which the UK has in protecting the jurisdiction of arbitrations with a London seat."

And a random selection of the latest issues of Lloyd's Reports does nothing to dispel the implication that English Courts are likely to continue issuing anti-suit injunctions, at least in support of exclusive jurisdiction or arbitration agreements, much as they did before *Turner v Grovit*, distinguishing the ECJ's decision without much hesitation.

Through Transport Mutual Insurance Association (Eurasia) v New India Assurance Co Ltd[29] was the English Court of Appeal's first opportunity to consider the ECJ decision in *Turner v Grovit.* The case involved litigation in England and Finland. The

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[26] At 20 but the English Courts did no better in *Erich Gasser GmbH v Misat Srl* [2004] 1 Lloyd's Rep 222 where the ECJ effectively overruled *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 Lloyd's Rep 505 as to jurisdiction of the Court second seized of a dispute to adjudicate: Baatz *op.cit : ibid.*.

[27] At 26.

[28] At 26-27.

[29] [2005] 1 Lloyd's Rep 67.

English plaintiff, Through Transport, began an arbitration in England and obtained an injunction restraining New India from pursuing its Finnish or any other claim except through the arbitration. New India applied to stay the English proceeding and rescind the injunction. In reliance on authority, the Court of Appeal took the view that exclusive jurisdiction and arbitration clauses should be honoured without strong reasons shown to the contrary.[30] Then, after distinguishing *Turner v Grovit* on the ground that both jurisdictions in that case were within the Brussels Convention but only one was subject to the Convention in *Through Transport* the Court of Appeal concluded that there was nothing in *Turner v Grovit* to disturb the principles in "*The Angelic Grace*"[31] that there was "no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them."

O T Africa Line Ltd v Magic Sports Wear Corporation,[32] a dispute about alleged short delivery, involved proceedings in Canada, pursuant to statute, and London, the choice of forum and law under the bill of lading. The making of an anti-suit injunction in favour of England was upheld on appeal. Longmore LJ began his consideration of the question by saying [33]:

> "It is not now a controversial question whether, in the normal case, an anti-suit injunction should be granted if a party to an exclusive jurisdiction agreement, in breach of that agreement brings proceedings in a jurisdiction other than the one agreed."

and concluded his judgment in the following way :

> 43. It is to be hoped that the Canadian courts will not see this decision as an interference of any kind even if the cargo-insurers or their lawyers were to choose to categorise it that way. Freedom of contract is usually much valued in all common law systems ... The maintenance of the principle that parties should be free to choose the courts where

[30] At 84 para [68]-[69].
[31] *Aggeliki Charis Compania Maratima v Pagnan SpA ("The Angelic Grace")* [1995] 1 Lloyd's Rep 87, 96.
[32] [2005] 2 Lloyd's Rep 170.
[33] At 178 para [30].

> their disputes are to be resolved must be of paramount importance and cannot be reduced to a mere legal aspiration.

Then, in *West Tankers Inc v Ras Riunione Adriatica di Sicurta* (*"The Front Comor"*)[34] the charterparty required arbitration under English law. Proceedings were issued in London following a casualty but insurers of the damaged oil refinery sued the owners of the damaging ship in Italy. Owners were granted an anti-suit injunction against the insurers' Italian proceedings in England. An application to discharge the injunction was dismissed, Colman J concluding, after referring to *Through Transport* and *"The Angelic Grace"*[35] :

> 50. … It is an inescapable conclusion … [from *Through Transport*] that in the case of an anti-suit injunction in support of an arbitration agreement evidence that a foreign court will not recognise or enforce the order is not capable of sustaining a submission that the foreign court would be so offended or affronted that an order should not be made.

Anti-suit injunctions in Australia

Australian courts have been very active in the field of anti-suit injunctions. The number of cases is large. There is a deal of academic comment on the topic. Accordingly this part of the address could either be very short or very long.

Let us adopt the short route, if for no other reason than that the Australian law on anti-suit injunctions will be familiar to many members of MLAANZ.

For over a century, Australian courts have granted injunctions to restrain the institution or prosecution of foreign proceedings if they involve the unconscientious exercise of legal rights such as breach of an exclusive jurisdiction agreement. Such injunctions will not be issued if the foreign cause of action is unknown to the law of the forum in which the anti-suit injunction is sought or, conversely, if the party

[34] [2005] 2 Lloyd's Rep. 257.
[35] At 268 para [50].

seeking the restraint is unable to show the Australian courts can grant similar relief on similar principles as are available to the foreign plaintiff.[36]

There appears to be reluctance by courts in one Australian jurisdiction to interfere with or restrain proceeding in another.[37] It appears to a New Zealander that there may be delicate issues as between the various Courts in Australia concerning anti-suit injunctions though the Federal Court's power to grant such injunctions is apparently undoubted.[38]

As far as trans-Tasman anti-suit injunctions are concerned, in at least one case in the Supreme Court of Western Australia a plaintiff failed to obtain an anti-suit injunction to compel the defendant to seek stay of the latter's proceedings against the plaintiff in the New Zealand Employment Relations Authority.[39] Factors leading to the refusal of the anti-suit injunction were a choice of New Zealand law clause in the contract, differences in the relief able to be granted and the likely speed of resolution in the two jurisdictions.

The leading case in Australia still seems to be *CSR Ltd v Cigna Insurance Australia Ltd*[40] where CSR and its US subsidiary sued insurers in New Jersey for declarations that they were entitled to indemnity for certain American asbestos claims brought against them.

The insurers sued CSR and its subsidiary in New South Wales for a declaration of exemption from liability to indemnify in respect of all the asbestos claims and sought an anti-suit injunction restraining CSR from taking any further step in the US proceedings. CSR sought stay of the New South Wales proceedings. Anti-suit injunctions were made but stay was refused at first instance and on appeal. All those orders were reversed in the High Court of Australia. The judgment of the majority

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[36] Halsbury's *Laws of Australia* paras 85-500, 185-1415; *British Airways Board v Laker Airways Ltd* [1985] AC 58
[37] *Beecham (Australia) Pty Ltd v Rogue Pty Ltd* (1987) 11 NSWLR 1, 6
[38] *Cook Inc v World Medical Manufacturing Corp* [1999] FCA 1333, paras [27]-[31]; *Skinner v HAL Data Services Pty Ltd* [2000] NSWIR Comm 25.
[39] *Crestline Pty Ltd v Graham* [2004] WASC 183.
[40] (1997) 189 CLR 345.

noted the dissonance between applications for stay and those for anti-suit injunctions.[41]

The judgment went on[42] to note that the power to stay on grounds of *forum non conveniens* was an aspect of the Court's implied power to prevent its processes being used to cause injustice, the counterpart being to protect the integrity of its processes by the granting of anti-suit injunctions. Anti-suit injunctions, the majority noted[43] could issue to restrain persons from commencing or continuing foreign proceedings which tended to interfere with proceedings in the domestic court and could be "exercised if the administration of justice so demands or, in the context of anti-suit injunctions, when necessary for the protection of the Court's own proceedings and processes". The Court could also make orders restraining unconscionable conduct or unconscientious exercise of legal rights including granting an injunction[44] "in the exercise of its equitable jurisdiction in restraint of those proceedings no matter when they are brought". The power to restrain unconscionable conduct could be exercised in aid of rights such as breach of a contract not to sue in the domestic or the foreign court or an agreement to submit to the exclusive jurisdiction of a particular court. The essence of the judgment may be found in the following passages :[45]

> One well established category of case in which an injunction may be granted in the exercise of equitable jurisdiction is that involving proceedings in another court, including in a foreign court, which are, according to the principles of equity, vexatious or oppressive. ...
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> ... foreign proceedings are to be viewed as vexatious or oppressive only if there is nothing which can be gained by them over and above what may be gained in local proceedings. ... they are vexatious or oppressive if there is a complete correspondence between the proceedings ...
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> The cases concerned with injunctions in restraint of proceedings in foreign courts recognise that, although an injunction of that kind operates in

[41] At 390.
[42] At 391.
[43] At 392.
[44] Ibid.
[45] At 393-397.

> personam, it nevertheless interferes with the processes of the foreign court and may well be perceived as a breach of comity by that court. …
>
> For this reason, the cases also emphasise that the power to grant injunctions in restraint of foreign proceedings should be exercised with caution. …
>
> Where, the issue is whether a matter should be litigated in the courts of one country or of another and application is made for an interlocutory anti-suit injunction by reference to considerations which will or may fall for determination in proceedings in that other country, the injunction, if granted, operates with the consequence that the matter in question is heard and determined in the court granting the injunction. … Thus, an interlocutory anti-suit injunction is effectively a final determination as to where the matter or some particular aspect of it is to be litigated.
>
> In a case in which an anti-suit injunction is sought on equitable grounds, the central question is whether the court to which application is made or some other court should hear and determine the matter in issue or, at least, that aspect of it involved in the application for injunction. And where the courts concerned are, respectively, an Australian court and a court of another country, there is involved in that question the further question whether the Australian court is an appropriate forum, in the *Voth*[46] sense of it not being clearly inappropriate, for the determination of that matter.

Anti-suit injunctions in New Zealand

Anti-suit injunctions have scarcely figured in New Zealand, by contrast with the wealth of litigation on the subject in Australia. It is almost impossible to find a case in this country on the topic. Indeed, the New Zealand Law Commission, writing in 1998, said that New Zealand courts had not then utilized their undoubted jurisdiction to issue anti-suit injunctions.[47] While there are a number of examples[48] of applications to stay

[46] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538
[47] NZLS Rpt 50 "*Electronic Commerce : Part One*" para 279 p 98.
[48] e.g. *McConnell Dowell Constructors Ltd v Gardner-Roberts* (1987) 1 PRNZ 567; *Attorney-General v Mobil Oil NZ Ltd* [1989] 2 NZLR 649; *Cockburn v Kinzie Industries Ltd* (1988) 1 PRNZ 243; *Leucadia National Corporation v Wilson Neill Ltd* (1994) 7 PRNZ 693 (affirmed on appeal: *Leucadia National Corporation v Wilson Neill Ltd* (1994) 7 PRNZ 701) and *Sundance Spas NZ Ltd v Sundance Spas Inc* [2001] 1 NZLR 111.

New Zealand proceedings pending resolution of overseas litigation between the same parties, there appears to be only one New Zealand case dealing with the anti-suit injunction jurisdiction in this country.

That case is *Jonmer Inc v Maltexo Ltd*[49]. Maltexo, a New Zealand company, had an agreement with Jonmer, a Texas company, to distribute its traditional New Zealand product. Following breakdown of the agreement, Maltexo sued Jonmer in Texas to recover a debt owing while Jonmer sued in New Zealand for breach of contract. In the latter, Maltexo unsuccessfully protested the New Zealand jurisdiction on *forum conveniens* grounds. Jonmer applied for an order restraining Maltexo from pursuing the Texas claim. Robertson J held [50] that there was "no question that the Court has the jurisdiction to make such an order" relying on *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [51]. New Zealand was held to be the natural forum. Maltexo was restrained from continuing its Texas proceedings (but on condition of Jonmar consenting to judgment in Texas if the debt was found to be due).

Anti-suit injunctions in other Commonwealth jurisdictions

In Canada, in *Amchem Products Inc v British Columbia (Workers' Compensation Board)*[52], American – mainly Texan – asbestos manufacturers brought proceedings to stay British Columbian claims by asbestosis sufferers to prevent continuation of claims they made in Texas. The Texas Court issued an anti-anti-suit injunction prohibiting the seeking of similar injunctions in British Columbia.

The Supreme Court of Canada noted[53] increasing difficulties in deciding the most convenient or appropriate forum for modern litigation with the increase of free trade, the growth of multi-national corporations operating in many jurisdictions and the spread of plaintiffs in multi-party claims. Courts' responses were a stay of

[49] (1996) 10 PRNZ 119.
[50] At 120.
[51] [1987] 1 AC 871.
[52] (1993) 102 DLR (4th) 96.
[53] At 104.

proceedings in the domestic forum or an anti-suit injunction, a "more aggressive remedy"[54].

The appropriate test to be applied[55] included that anti-suit injunctions should not be countenanced if there were no proceedings in a foreign jurisdiction. The first step was to decide whether the domestic forum was the natural forum or whether another was clearly more appropriate. The next question was whether granting an injunction would deprive plaintiffs of advantages in the domestic forum of which it would be unjust to deprive them, balanced against loss of advantage to the parties in the foreign jurisdiction and whether further injustice would result if the foreign claim was allowed to proceed. When a foreign court assumed jurisdiction on a basis conforming with the Canadian law of *forum non conveniens*, a Canadian court would not act to deprive it. The injunction restraining the Texas proceedings was rescinded.

It appears anti-suit injunctions are available in Singapore on a somewhat similar basis.[56]

It also appears the anti-suit injunction jurisdiction is exercised along similar lines in the Pacific Islands.[57]

Damp Squid or Another Shot in the Maritime Locker?

So what do those cases – especially *Turner v Grovit* – tell us as maritime lawyers and Judges in Australia and New Zealand? Do they contain indications which should lead us to alter our existing practices? Do they suggest we should invigorate this area of maritime law in our respective jurisdictions?

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[54] At 105.
[55] At 118-121.
[56] Toh: *Admiralty Law and Practice* 1998 p 500-504.
[57] *Chan Wing (Vanuatu) Ltd v Motis Pacific Lawyers* [1988] VUCA 7; *Mount Kasi v Range Resources Ltd* [1999] FJHC 83 and see also Reid Mortensen *Duty Free Forum Shopping: Disputing Venue in the Pacific* (2001) 32 VUWLR 673 and *Comity and Jurisdictional Restraint in Vanuatu* (2002) 33 VUWLR 95 where these and other Pacific Island cases are discussed.

In the first place, it is notable that, even if *Turner v Grovit* is kept within what may be its legitimate domain of arbitrations, choice of law, exclusive jurisdiction and choice of venue clauses, it is a surprise that while a good proportion of the overseas anti-suit injunction cases are maritime cases there are only a few in our jurisdictions. Given the international flavour of the charterparties, bills of lading and the other documents on which international maritime commerce customarily depends, it is surprising there are comparatively few anti-suit injunction decisions in Australia in maritime cases and none in New Zealand.

That may in part result from the major questions in this area of sovereignty and comity.

Of course no civilized country regards itself as entitled to interfere in the affairs of another. Courts are at great pains to say they respect the sovereignty of other countries and their citizens and say they unquestionably accept, at least in relation to the countries whose systems come under scrutiny in the reported cases, the competence of their courts to adjudicate properly on disputes before them. But trade and international law – of which maritime law forms pretty much the most ancient segment – has never felt greatly inhibited by such considerations. While none would challenge the traditional view that courts of one country have jurisdiction to entertain claims *in personam* only if the defendant is served within its territory or abroad in circumstances authorised by its domestic statutes or regulations,[58] the near-ubiquity of "long arm" provisions in Common Law countries shows that absolute sovereignty has long been eroded to that degree in such countries. The antagonism of the Civil Law nations to the exercise of such jurisdiction is, however, a limiting factor.

It is pertinent to bear two precepts in mind. First, the exercise of jurisdiction extra-territorially is personal. For the purposes of the particular piece of litigation, citizens of other nations served abroad must have their right to object to jurisdiction preserved and to be subject to the issuing court's judgment only once their liability to the jurisdiction has been established.

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[58] *Dicey and Morris on the Conflict of Laws*, 13th ed, 2000, R 22 p 263.

Secondly, while all the cases stress that the exercise by the courts of one country of jurisdiction over the citizens of another, particularly one served abroad, is a personal jurisdiction to be exercised cautiously and said to constitute no more than indirect interference in the court of the foreign citizen's nationality, courts should be open about recognizing that interference. As the ECJ decision in *Turner v Grovit* re-emphasised, anti-suit injunctions against citizens of foreign countries, particularly those served abroad and more particularly served in the country of their origin, are a direct interference with the democratic, even constitutional, rights of those citizens to engage in litigation in their home country. But there is no rational basis for the courts of the home country to feel "insulted", "affronted" or any other of the pejorative epithets to be found in such cases at their citizens' involvement, if for no other reason than that their own country –if of the Common Law school of jurisprudence - almost certainly has a "long arm" statute to similar effect as that which involved their citizens in the issuing court's litigation. And most Civil Law countries with which our two nations trade are bound by international conventions, treaties and international documents prescribing how disputes concerning that trade are to be resolved.

And if courts conscientiously and even-handedly adjudicate on the question as to which, to put it neutrally, is the most sensible court to try the case, the "natural forum" as the cases put it, no umbrage should be taken by a court in which fresh litigation cannot be launched or existing litigation is stayed. It is not unreasonable to suggest the English authorities demonstrate a fairly marked jingoistic and, now, defensive streak but the pressure on court systems worldwide is such one would expect courts to be more resigned than they are in their reactions.

It would also be artificial nowadays to ignore the influence of the Internet and the World Wide Web in this area. Lack of universal international law and the exigencies of trade largely led to the creation of maritime law. Those involved in shipping had to find ways to facilitate commerce internationally. Their success in that regard is one of the reasons international associations such as CMI and MLAANZ exist.

But the Internet has brought about a manifold multiplication in the numbers of people who trade internationally. Millions of people around the world now habitually conduct business over the Internet in countries other than their own. A whole new

area of Internet law has been spawned, such that litigants and Judges are now accustomed to seeking and making injunctions and other orders against those over whom they have jurisdiction requiring those persons to take action with effect overseas.[59] By and large the gigantic increase in international commerce transacted through the Internet has been managed without difficulty.

Nonetheless, despite the web and the Internet, litigants, lawyers and courts have been cautious, perhaps too cautious, in modernizing the law in this respect. That may particularly apply in the maritime arena.

However, some forward-thinking signs are appearing. In relation to the Australian "long arm" provisions, the High Court of Australia observed in 2000[60] that long arm statutes bringing foreign citizens into domestic courts are now so common as to lessen the problems of comity and restraint.

In the maritime arena, in dealing with recourse to the ship as regards priorities between the interests of master and crew against that of the trustees in bankruptcy appointed by a shipper's financier, the New Zealand High Court observed in the "*Cornelis Verolme*" that[61] :

> ... whilst those priorities and that recourse being available to the complement of the ship were manifestly appropriate in days gone by when the vessel and her crew were wholly or largely out of contact with the owners and others with an interest in her for lengthy periods, it may be questionable whether that necessity remains so appropriate today when not merely the master and the owner but every member of the crew can be instantly in touch with whomsoever they wish at any time and in virtually every part of the globe.
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> ...
>
> ... When fortunes cross international boundaries at the click of a mouse, when the scale of international transactions ... is as vast and instantaneous as it is and when the Courts and litigants in one country can have confidence that

[59] *British Telecommunications plc v One In a Million Ltd* [1998] 4 All ER 476; *New Zealand Post Ltd v Leng* [1999] 3 NZLR 219.
[60] *Agar v Hyde* [2000] 173 ALR 665, at 676 per Gaudron McHugh Gummow and Hayne JJ.
[61] *Turners & Growers Exports Ltd v The ship "Cornelis Verolme"* [1997] 2 NZLR 110: noted by Justice Tamberlin in his 2001 Dethbridge address at 23-24.

> their rights and obligations will be properly acknowledged by Courts and litigants in other countries, ... it is appropriate that solutions to the legal problems created by international transactions ... should reflect modern international commercial practice and not be anachronistically encumbered by dictates from another age derived from different circumstances. [62]

Leading on from that does the anti-suit injunction - even as constricted by the ECJ in *Turner v Grovit* – indicate ways in which we as maritime lawyers should alter the way we conduct our business and our cases?

Part of the thesis of this paper[63] is to urge greater positivity and innovation on the part of Australasian maritime lawyers and Judges and increased assertiveness that we in this part of the world have the capacity to undertake our respective roles as well as anywhere else.

The ECJ's decision in *Turner v Grovit* may have reduced the scope of the anti-suit injunction in England but, provided the obligations of comity and respect to other countries' sovereignty are properly observed, there may well be at least two areas – there could be more – where the anti-suit injunction might provide "another shot in the locker" in the maritime arena.

The first of those is to encourage those involved in shipping to make greater use of exclusive jurisdiction and choice of venue or choice of law clauses in their shipping documents which focus on Australasia or at least on this part of the world. That is particularly the case if such clauses are coupled with arbitration clauses requiring dispute resolution in those venues.

Currently, it must be acknowledged that few such documents nominate Australian or New Zealand law as the proper law of the contract or include exclusive jurisdiction clauses or provide for arbitration in this part of the globe. However, when they do, our courts tend to uphold them. That occurred in *Alkimos Shipping Co Ltd v Hind Lever Chemicals Corporation Ltd*[64] where, on an application for leave to serve in

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[62] Supra 125-126.
[63] And others: "*Aspects of Admiralty Jurisdiction*" MLAANZ NZ Branch Conference Paper 31 March 2001.
[64] [2004] FCA 969.

Bangladesh Australian proceedings seeking an anti-suit injunction to prevent proceedings being taken or continued there, Allsop J indicated[65] that he would have been prepared to give effect to the voyage charterparty which provided for Brisbane arbitration. That is a useful example of the matter under discussion.

Surely more can be done in that regard. Even though there may now be only a few Australasian shipowners trading internationally, there are numerous Australian companies involved in the shipping trade who should be able to be persuaded to insert Australasian choice of law or forum or arbitration clauses in their shipping documents.

That is not to overlook that a large proportion of maritime clients and litigants in Australasia are from the northern hemisphere and well accustomed to documents and dispute resolution procedures with a sharply septentrional focus. London arbitration may be traditional and efficient but surely they could be persuaded if a service is available in this part of the world equally competent, equally efficient and, almost certainly, cheaper. What logic or efficiency is there in disputes about the Far East trade, the trans-Tasman trade or the Pacific trade being arbitrated in London?

In this regard MLAANZ is to be commended and encouraged in its efforts to revise and proselytize its maritime arbitrators' panel for this part of the world.

The second area may be in pre-emptive litigation to forestall arrests. The "*Cornelis Verolme*" arose after the collapse of a Belgium company. Vessels owned by the company were arrested in countries around the world. Litigation involved the company and its ships in a number of jurisdictions, notably Australia and New Zealand. However, what would have been the position if the shipowner had wished to continue to trade against the wishes of its banker? Could the owner have sought an anti-suit injunction to prevent its ships being arrested around the world? Could it have sought such an injunction in the courts of New Zealand or Australia? Conceptually at least, there is nothing about the jurisdiction which would have prevented an anti-suit injunction being sought in those situations. Indeed, the existence and potency of the anti-suit injunction is demonstrated by one case in the Federal Court of Australia:

[65] Para 25.

Marine Trade Consulting GmbH v The Owners of the Ship the "Kareliya".[66] That was an application heard in Sydney for an anti-suit injunction to be granted to prevent continuation of proceedings in Noumea. If successful, that would have obtained release of a cruise ship arrested there. The case failed on its facts but nonetheless demonstrated the availability of the jurisdiction in our part of the world.

Arrests may be an *in rem* proceeding but the jurisdiction is well-grounded and there seems no reason why anti-suit injunctions might not be considered to prevent arrest or to prevent or forestall litigation either in or from Australasia provided the other requirements as to jurisdiction can be met.

Conclusion

Therefore, whether the ambit of the anti-suit injunction is seen as practised by Commonwealth Courts and by the English Courts prior to *Turner v Grovit* or whether it is seen as restricted by the ECJ decision in that case, this is an area which – despite principled adherence to the doctrines of sovereignty and comity - should be regarded as ripe for re-consideration in light of the technological and other advances of our changing world and the altering notions of comity. This will particularly be the case if the members of MLAANZ respond to what this Paper proposes and there is a re-focusing of Australasian shipping documents.

At the conclusion of his 2001 Dethridge address on globalization, Justice Brian Tamberlin observed that globalization was unstoppable and that "the maritime community, in particular because of the acceleration of trade, will need to address the problems immediately" and "the courts of all nations which apply maritime law will be forced to adopt a more international perspective".

At the conclusion of his 2003 Dethridge address on the *Modern Maritime Judge*, Justice David Steel made similar observations.

[66] [1997] 253 FCA 1

Both addresses laid down challenges to Australasian maritime lawyers and Judges. Through the medium of anti-suit injunctions it is to be hoped that this address has laid down a further challenge to the MLAANZ members present.