DUTY FREE FORUM SHOPPING: DISPUTING VENUE IN THE PACIFIC

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This article considers how the basic principles of forum non conveniens *and the granting of anti-suit injunctions*[1] *have been adopted and applied in some Pacific island courts. As developed in common law countries these procedural tools have incorporated principles restricting both plaintiffs' and defendants' choice of forum, and have imposed obligations on both parties that aim to ensure, as far as possible, a procedurally neutral setting for determining the litigation. It is argued that Fiji and Vanuatu decisions either ignore some of these obligations or misapply them so that the procedures do not serve as adequate restraints on local litigants' forum shopping strategies.*

I FORUM SHOPPING: CONDITIONS AND INCENTIVES

Forum shopping is an increasingly popular pastime. It has grown in modern times with the intensification of international trade, communications and movement and the rise of multinational business activity.[2] However, the degree to which forum shopping has become possible is not only a consequence of globalisation, for opportunities to select a favourable court were more limited when, in general, the plaintiff had to go to the defendant's place of

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1 The principles of *forum non conveniens* and anti-suit injunctions will be examined only where that is needed to illuminate Fiji and Vanuatu decisions. For detailed discussion, see JG Castel *Canadian Conflict of Laws* (3 ed, Butterworths, Toronto, 1994) 227-247; JJ Fawcett *Declining Jurisdiction in Private International Law* (Clarendon Press, Oxford); PM North & JJ Fawcett *Cheshire & North's Private International Law* (12 ed, Butterworths, London, 1992) 220-49; PE Nygh *Conflict of Laws in Australia* (6 ed, Butterworths, Sydney, 1995) 100-19; EF Scoles, P Hay, PJ Borchers & SC Symeonides *Conflict of Laws* (3 ed, West Publishing Co, St Paul, 2000) 479-95.

2 AS Bell "The Why and Wherefore of Transnational Forum Shopping" (1995) 69 ALJ 124.

domicile for a court to adjudge a multistate case.[3] It has been the willingness of courts to set increasingly liberal rules of jurisdiction embracing people and events beyond their territorial jurisdiction that has enhanced opportunities for the practice.[4]

The pros and cons of forum shopping have been argued at length in the scholarly literature.[5] But, by and large, Common Law courts have over the last 30 years tried to place restrictions on it.[6] In the common law countries of the Commonwealth two, possibly three, important procedural tools have been developed to limit the plaintiff's choice of court. These are the doctrine of *forum non conveniens*, the doctrine of *lis pendens* (which is usually treated as an example of *forum non conveniens*), and the anti-suit injunction.[7] All of these have some potential to be used by a proactive defendant to help negative or reverse forum shopping.[8] As formally presented, however, all proceed on the assumption that there is "a natural forum" or court for the determination of the dispute between the parties, that the procedures for determining it should provide a "level playing field" for the parties,[9] and that outcomes to disputes should depend as little as possible on the choice of court.[10] While these procedural tools are all dealt with in interlocutory proceedings, success in an early dispute about where the litigation should be conducted should not be underestimated. The litigants may only be

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3 See EG Lorenzen *Selected Articles on the Conflict of Laws* (Yale University Press, New Haven, 1947) 151-2; AF Lowenfeld *International Litigation and the Quest for Reasonableness* (Clarendon Press, Oxford, 1996) 46.

4 L Collins "International Jurisdiction and Forum-Shopping: An Overview" in CW Cheong, HH Lai, LE Beng & NW Loon (eds) *Current Legal Issues in International Commercial Litigation* (National University of Singapore, Singapore, 1997) 3-4.

5 See "Forum Shopping Reconsidered" (1990) 103 Harv L Rev 1677; GD Brown "The Ideologies of Forum Shopping – Why Doesn't a Conservative Court Protect Defendants" (1993) 71 North Carolina Law Review 665; FK Juenger "What's Wrong with Forum Shopping" (1994) 16 Sydney LR 5; BR Opeskin "The Price of Forum Shopping: A Reply to Professor Juenger" (1994) 16 Sydney LR 14; FK Juenger "Forum Shopping: A Rejoinder" (1994) 16 Sydney LR 28.

6 Fawcett, above n 1, 2-3.

7 Fawcett, above n 1; compare Bell above n 2, 135.

8 Bell above n 2, 125; "What's Wrong with Forum Shopping" above n 5, 13; Note (1992) 105 Harv L Rev 1813, 1817.

9 *Edmonson v Leesville Concrete Co* (1990) 895 F 2d 218, 222; "Forum Shopping Reconsidered" above n 5, 1685.

10 Brown, above n 5, 668.

arguing over venue, to determine whether settlement negotiations will be conducted in light of litigation pending in one country or in another.[11] Or, an adverse decision about forum may effectively make it worthless for a plaintiff to sue at all.[12] These interlocutory decisions frequently determine the ultimate outcome of the dispute.

The purpose of this article is, first, to sketch the basic principles of *forum non conveniens* and the granting of anti-suit injunctions and, second, to consider closely how they have been adopted and applied in some Pacific island courts. Forum shoppers are rarely attracted to courts in the Pacific islands. This is partly because the islands do not offer many of the incentives that lead plaintiffs, especially, to prefer one court over another and, despite having standard rules of extraterritorial jurisdiction, these do not set such generous jurisdictions as are claimed by some near neighbours.[13] The Pacific islands have few of the attractions that carry litigants to, say, the United States: the availability of high damages awards, long limitation periods, generous pre-trial discovery, civil jury trials, low court costs, speedy trials, and contingency fees.[14] However, outside America, the usual motivation for forum shopping is home ground advantage: parties' understandable desire to litigate in the country where they live or do business.[15] This has clearly motivated forum selection in Fiji and Vanuatu cases, and these have necessarily raised the doctrine of *forum non conveniens* (including *lis pendens*) and the availability of the anti-suit injunction.

II FORUM NON CONVENIENS

A Outline

The doctrine of *forum non conveniens* enables a court to close its own doors to a plaintiff who chooses it for litigation. The court concludes that it is not an appropriate court (*forum conveniens*) for determining the proceedings, and so either dismisses them or grants a stay of proceedings that were, otherwise, properly commenced in the court. The doctrine thus gives a discretion to a court not to exercise a jurisdiction that it has a right to exercise.

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11 *Spiliada Maritime Corporation v Canulex Limited* [1987] 1 AC 460 at 469 [*Spiliada*].

12 *Dow Chemical Co v Alfaro* (1990) 786 SW 2d 674, 682 [*Dow*].

13 Especially the Supreme Court of New South Wales, the busiest superior court in the South Pacific, with a large extraterritorial jurisdiction: s 10.1A Supreme Court Rules 1970 (NSW).

14 Bell, above n 2, 126-33.

15 Collins, above n 4, 4.

Forum non conveniens came late to common law courts in the Commonwealth. The Scottish courts had long entertained the plea, and were prepared to compare themselves with relevant foreign courts to determine where litigation was best conducted. They would dismiss proceedings where 'the court [was] satisfied that there [was] some other tribunal, having competent jurisdiction, in which the case [might] be tried more suitably for the interests of all the parties and the ends of justice'.[16] In contrast, under the old English principle for a stay of proceedings, there was a requirement that the defendant show that proceedings were vexatious or oppressive or an abuse of the process of the court.[17] In effect, the plaintiff had to be guilty of some moral wrongdoing before a stay was possible. However, as litigation internationalised in the latter 20th century, the question in England only became the extent to which the law would change. Would the Scottish doctrine be embraced completely, or would it be met halfway by a more relaxed interpretation of the common law requirement to show vexation and oppression? While, characteristically, the English courts experimented with the latter approach from the 1970s,[18] they continued to feel the pressure of the Scottish doctrine up until 1986. Then, in *Spiliada Maritime Corporation v Cansulex Ltd*[19] the House of Lords fully adopted the Scottish doctrine of *forum non conveniens* for the purposes of English law.

In applications for a stay, the defendant has to show that the court in England is not the appropriate forum for the trial and, further, that there is a foreign court that is "clearly or distinctly more appropriate than the English forum".[20] This largely means identifying the "natural forum", the court with which the proceedings have "the most real and substantial connection".[21] Factors to consider when making this assessment include matters of convenience and expense like the availability of witnesses, the places where the parties reside and carry on business, and the governing law. If it appears that the foreign court is clearly more appropriate for determining the case, then a stay should be granted unless the plaintiff

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16 *Sim v Robinow* (1892) 19 R 665, 668.

17 *Bank of New Zealand v Proudfoot* (1885) 3 NZLR 372, 375-6; *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] KB 382, 398; *Maritime Insurance Co Ltd v Geelong Harbour Trust Commissioners* (1908) 6 CLR 194.

18 *The Atlantic Star* [1974] AC 436; *Rockware Glass Ltd v MacShannon* [1978] AC 795; *The Abidin Daver* [1984] 1 AC 399; *Amin Rasheed Corporation v Kuwait Insurance Co* [1984] AC 50.

19 *Spiliada,* above n 11.

20 *Spiliada,* above n 11, 477.

21 *Spiliada,* above n 11, 478.

can show that justice requires that it be refused. Analogous principles apply when an English court is asked to grant leave to serve a writ outside England.[22]

Spiliada settled the broad principles of *forum non conveniens*. Adjudication since then has confirmed the decision and largely amounts to internal exegesis of its principles. It has also been adopted in other Commonwealth countries, including New Zealand.[23] The glaring anomaly is Australia, a significant point as the pattern of development in the Australian approach to *forum non conveniens* has influenced its development in the Pacific islands. In *Oceanic Sun Line Special Shipping Co Inc v Fay*[24] in 1988 the High Court of Australia split three ways on the question. Brennan J maintained the old principle that the plaintiff's choice of court could only be displaced if vexation and oppression (in the sense of moral turpitude) were proved.[25] Wilson and Toohey JJ approved *Spiliada*.[26] Deane and Gaudron JJ took the *via media*, endorsing the need to show that the proceedings were vexatious and oppressive but accepting that they would be if the Australian court were a clearly inappropriate forum for the determination of the dispute.[27] *Oceanic Sun* was roundly criticised, not only because a majority had openly rejected principles accepted in other Commonwealth countries that were more consonant with the internationalisation of litigation, but also for the court's self-conscious failure to provide authoritative guidance on stays of proceedings.[28] The judges eventually compromised, agreeing to adopt Deane J's middle-ground principles in *Voth v Manildra Flour Mills Pty Ltd*.[29] The court in *Voth* considered that "[t]he clearly inappropriate forum" test is similar to and, for that reason, is likely to yield the same result as the "more appropriate forum"

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22 *Spiliada,* above n 11, 478, 480.

23 *Club Mediterranée NZ v Wendell* [1989] 1 NZLR 216; RJ Paterson 'Forum Non Conveniens in New Zealand' (1989) 13 NZULR 337; S Gallacher "After The *Spiliada – Forum Non Conveniens* in New Zealand and Australia" (1996) 8 Otago L R 603, 606-7; *Brinkerhoff Maritime Drilling Corporation v PT Airfast Services Indonesia* [1992] 2 SLR 776; *Amchem Products Inc v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897, 931 [*Amchem*]; *Eng Liat Kiang v Eng Bak Hern* [1995] 3 SLR 97.

24 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 [*Oceanic Sun*].

25 *Oceanic Sun,* above n 24, 212.

26 *Oceanic Sun,* above n 24, 239-40.

27 *Oceanic Sun,* above n 24, 251-2, 265-6.

28 *Oceanic Sun,* above n 24, 220; *Primesite Outdoor Advertising Ltd v City Clock (Australia) Ltd* (1991) 4 PRNZ 472, 478; MC Pryles "Judicial Darkness on the Oceanic Sun" (1988) 62 ALJ 774, 784-9.

29 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 [*Voth*].

test in the majority of cases".[30] A different result would only arise where the foreign court was clearly more appropriate than the Australian court for deciding the merits but the Australian court was not clearly inappropriate for that purpose. In that case proceedings would continue in Australia even though, under *Spiliada*, they would be stayed.[31] The majority in *Voth* emphasised that the clearly inappropriate forum test relieved the local court of any obligation to compare itself with the foreign court.[32] It was not thought appropriate for an Australian judge to assess the ability or willingness of the courts of another country to accord justice between the parties.[33] In practice, the *Voth* test is probably not shaped adequately to cope with common demands of international litigation. In the mid-1990s the High Court of Australia revised it in some important respects, bringing the test closer to the principles of *Spiliada*.[34] This has been especially so in cases of *lis pendens*.

The problem of *lis pendens* arises when the same parties are litigating the same question at the same time, but in more than one country. Naturally this duplicates efforts at having the matter determined, and adds expense. Furthermore, it also risks the rendering of incompatible judgments, with attendant problems of res judicata and the international recognition and enforcement of the separate judgments.[35] English law had traditionally regarded *lis pendens* as an independent ground for the granting of a stay of proceedings. It has, nevertheless, been absorbed by larger developments in the doctrine of *forum non conveniens* and is now regarded as an important factor that the court must take into account when deciding whether it is a less appropriate forum for determining the dispute.[36] *Lis pendens* will almost inevitably lead to a stay in cases where the foreign proceedings are more significantly advanced than the local or where the local proceedings are for a declaration of no liability.[37] It has taken on greater

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30 *Voth,* above n 29, 558.

31 *Voth,* above n 29, 558; see especially R Garnett "Stay of Proceedings in Australia: A "Clearly Inappropriate' Test" (1999) 23 Melb U LR 30.

32 *Voth,* above n 29, 558-9.

33 *Voth,* above n 29, 559. In this respect, the High Court of Australia overstated the nature of the enquiry into the appropriateness of the foreign court under the English principles: See *The Abidin Daver* [1984] AC 398, 424; *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50, 72.

34 Garnett, above n 31, 63.

35 Fawcett, above n 1, 27-8.

36 *De Dampierre v De Dampierre* [1988] AC 92, 108.

37 Fawcett, above n 1, 29-30, 214-17.

prominence in Australia where, bending the *Voth* principles, the High Court concluded that "[i]t is prima facie vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts of this country if an action is already pending with respect to the matter in issue."[38] Consequently, it has recommended that "courts should strive, to the extent that *Voth* permits, to avoid that situation."[39]

With a few significant differences, the *Spiliada* principles parallel those used by most courts in the United States.[40] Stated broadly the American doctrine also centres on the identification of the more appropriate forum, with the result that the case can be dismissed by a court that concludes that it is *forum non conveniens*.[41] However, it is also notable for overtly discriminating against foreign plaintiffs. This also has a long pedigree, but was endorsed by the US Supreme Court in *Piper Aircraft Co v Reyno*:[42]

> … a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum … When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

In the wake of *Piper Aircraft* American federal courts have dismissed a substantial number of cases brought by foreign plaintiffs, making the doctrine of *forum non conveniens* a more significant disincentive to forum shopping in the USA. That standpoint may usefully make American courts less attractive places for litigation, because little else does.[43] On the other hand there is some evidence that the doctrine can be used to protect American defendants from

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38 *In the Marriage of Henry* (1995) 185 CLR 571, 591 [*Henry*].

39 *Henry,* above n 38, 591.

40 *Canada Malting Co Ltd v Paterson Steamships Ltd* (1932) 285 US 413, 422-3; *Gulf Oil Corporation v Gilbert* (1946) 330 US 485, 504-5 [*Gulf*]; LE Miller "Forum Non Conveniens and State Control of Foreign Plaintiff Access to US Courts in International Tort Actions" (1991) 58 U Chi L Rev 1369, 1371, 1373-6.

41 Scoles, Hay, Borchers & Symeonides, above n 1, 377-8.

42 *Piper Aircraft Co v Reyno* (1981) 454 US 235, 255-6 [*Piper*]; see also *Koster v (American) Lumbermens Mutual Casualty Co* (1947) 330 US 518 [*Koster*].

43 Scoles, Hay, Borchers and Symeonides, above n 1, 377.

valid claims, even where the American court would be the most suitable place to sue.[44] The same pattern has generally not held under the *Spiliada* or *Voth* approaches, where the tie of the defendant to the forum is a much more important consideration than the nationality or residence of the plaintiff.[45]

B Forum non conveniens in the Pacific

The question of *forum non conveniens* first arose in Fiji in 1991 in *Translink Shipping Limited v Compagnie Wallisienne de Navigation SARL.*[46] The proceedings followed a squabble over the berthing of the ship *Coral Link* at the wharf at Mata Utu, Wallis Island, in May 1990. Translink Shipping Limited, a company incorporated in Vanuatu, had chartered the *Coral Link*, a ship registered in Denmark, and was using it to establish services in Wallis Island. The *Coral Link* was berthed at Mata Utu on 26 May to offload cargo, while the company's operations manager dealt with shipping agents and stevedores on the island. Early that day another ship, the *Moana III*, arrived at the wharf. This ship was registered in Wallis Island and was owned by a Wallis Island company, Compagnie Wallisienne de Navigation SARL ("CWN"). There was already "certain bad blood" between the crews of the two ships, and the *Moana*'s chief mate boarded the *Coral Link* and demanded it be removed to allow the *Moana* to berth. The *Coral Link* was removed, but only after threats by the *Moana*'s master that more of his crew would board it, the *Coral Link*'s moorings were forcefully cast off, and its gangway was thrown on the wharf. It anchored outside the wharf area until 28 May, but was unable to offload the cargo it brought to Wallis Island or to load the cargo it was to carry away. Translink claimed the loss from this incident amounted to F$253,460.

Moana III visited Fiji approximately every two months. It arrived in Suva on 30 May 1991, and on that day a writ claiming damages was issued out of the High Court and served on CWN. The next day, the High Court granted Translink a Mareva injunction, effectively requiring CWN to preserve assets in Fiji worth F$253,460 and preventing *Moana III* from leaving Suva until security in that sum was lodged in court or the injunction was dissolved. However, by the time the parties came before Byrne J in the High Court again on 3 June the

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44 J Duval-Major "One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff" (1992) 77 Cornell L Rev 650, 685; Paterson above n 23, 342-3.

45 Garnett above n 31, 39-40.

46 *Translink Shipping Limited v Compagnie Wallisienne de Navigation SARL* (1991) 37 Fiji LR 46 [*Translink Shipping*].

primary issue was whether the court should continue to exercise jurisdiction in the proceedings. This was dealt with as a plea of *forum non conveniens*, although the question did not come before the court in the usual way. It was instead argued as a reason for dissolving the Mareva injunction, with the practical objective of allowing *Moana* to sail out of Fiji.[47]

In *Translink Shipping* Byrne J readily accepted the principles of *forum non conveniens* spelt out in *Spiliada* as law in Fiji, and was helped in reaching that conclusion by the adoption of *Spiliada* in New Zealand. The confusion left in Australia by *Oceanic Sun* also encouraged this, it being thought that, at that point, the law in Australia had produced no coherent approach to compete with *Spiliada*.[48] Undertaking a straightforward analysis of the connections the dispute had with different countries, the judge held that the natural forum for the dispute between Translink and CWN was Wallis Island. That was where most witnesses could be found, where CWN was incorporated, and where the *Moana III* was registered. It would also provide the governing (French) law. The expense and inconvenience of proceeding in Fiji favoured Wallis Island as "the proper forum".[49] He also thought it irrelevant that there was no evidence as to whether there were any courts in Wallis Island capable of dealing with the dispute:[50]

> As I see it my function in this matter is not to decide whether there are any Courts in Wallis Island capable of hearing an action between the Plaintiff and the Defendants but rather whether this Court is the proper forum for such action.

The Mareva injunction was therefore dissolved.

While the central doctrine espoused in *Translink Shipping* conforms to the orthodox approach to stays of proceedings in Commonwealth countries, this last comment reveals potential for more deference to the plaintiff's choice of court than the actual outcome in *Translink Shipping* would suggest.

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47 *Translink Shipping,* above n 46, 46, 50, 54.

48 *Translink Shipping,* above n 46, 50-53. Though *Voth,* above n 29, was decided 5 months previously, it does not appear to have been cited to the court.

49 *Translink Shipping,* above n 46, 53-4.

50 *Translink Shipping,* above n 46, 54.

Any plaintiff-orientation in *Translink Shipping* is minimal compared to the result and doctrine adopted in Vanuatu in *Naylor v Kilham*.[51] This involved precisely parallel proceedings in the USA and Vanuatu. Roxanne Naylor lived in Port Vila, Vanuatu, and conducted a business called "The Kava Kampani". She brought proceedings in the US District Court in Massachusetts in March 1998 claiming damages from Chris Kilham, a resident of Massachusetts, who was also involved in the Vanuatu kava industry. Kilham was alleged by Naylor to be liable for damages on account of three separate libels. One was an allegation that libellous material was published in a letter that Kilham sent to Ministers of the Vanuatu Government. Naylor also brought proceedings in respect of this letter in the Supreme Court of Vanuatu in June 1998. It is unclear how Kilham was served with the writ in the Vanuatu proceedings, but in July 1998 he applied to have them stayed on the ground that they duplicated the US proceedings or were vexatious and oppressive. The former was an independent plea of *lis pendens*. The latter was a plea of *forum non conveniens*, the reference to vexation and oppression contemplating the possibility that the court would adopt the *Voth* approach to the plea.

However, in the Supreme Court of Vanuatu, Lunabek ACJ responded to Kilham's plea by claiming a strong duty on the part of the court to determine proceedings brought by a resident plaintiff. Kilham argued that it was prima facie vexatious and oppressive for the one plaintiff to bring proceedings in respect of the one complaint in two different countries.[52] It had been suggested that, in choosing between continuing the US and the Vanuatu proceedings, the US proceedings must be preferred. In part this was because a judgment of the US District Court was more easily enforced against the defendant as all of his assets were located in the USA.[53] The judge discounted the relevance of enforcement: Vanuatu had no arrangements for the reciprocal enforcement of judgments with any other country, including the USA. Lunabek ACJ also rejected the significance of comity; presumably to the extent that it might suggest deferring to US jurisdiction. He said:[54]

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51 *Naylor v Kilhan* (12 March 1999), unreported, Supreme Court of Vanuatu, Civil Case No 54 1998 [*Naylor*].

52 *Naylor,* above n 51, 2.

53 *Naylor,* above n 51, 4.

54 *Naylor,* above n 51, 2.

> A nation has an interest in ensuring that its citizens and residents have access to the nation's Courts in order to obtain relief. A foreign Plaintiff is not necessarily entitled to the same access as a resident or citizen.

A stay was still possible in these circumstances, but the defendant had to show that the Vanuatu court was a clearly inappropriate forum for the determination of the dispute. Faced with the alternative principles of *Spiliada* and *Voth*, the judge opted for *Voth.* The reasons seem to include the interlocutory character of the application for a stay, and the less onerous duty under the *Voth* principles to examine the procedures of the foreign court.[55] So, borrowing from the majority in *Voth*, he emphasised that the "Vanuatu judiciary … is not going to sit in "judgment upon the willingness or ability of the Courts of another country to allow justice to the Plaintiff in the particular case"."[56]

In *Naylor*, the defendant Kilham summoned a large number of reasons why the Supreme Court of Vanuatu was a *forum non conveniens.* These related to the procedural advantages for Naylor in continuing to litigate in the USA, and the inconvenience and expense to Kilham of continuing in Vanuatu. All were discounted, the court adding that Vanuatu was the place where the plaintiff was resident and conducted business and where her witnesses were. Furthermore, the Vanuatu proceedings were based on the letter to the Government Ministers and, therefore, "the relevant acts complained of took place in Vanuatu".[57] The Supreme Court concluded that it was not a clearly inappropriate forum and the application for a stay was dismissed.[58]

C Evaluation of the cases

1 Procedure

The plea of *forum non conveniens* is normally raised in an application for a stay of proceedings, or objecting to the giving of leave to serve a writ outside the country.[59] An

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55 *Naylor,* above n 51, 3-4.

56 *Naylor,* above n 51, 3.

57 *Naylor,* above n 51, 4-5.

58 *Naylor,* above n 51, 5.

59 *Spiliada,* above n 11, 475, 478-82; *Voth* above n 29, 561-4. In some jurisdictions it is possible to serve internationally without leave, but in Fiji and Vanuatu the prior leave of the court is required for the issue of a writ that will be served *ex iuris*: O 6 r 6 High Court Rules 1988 (Fiji); O 2 r 3 High Court (Civil Procedure) Rules 1964 (Van).

unusual feature of *Translink Shipping* was that none of these applications were made when *forum non conveniens* was pleaded. The jurisdiction of the High Court of Fiji was established over two transient defendants. CWN (or rather its servant) and the *Moana*'s master were served with the writ while the ship was passing through Fiji, the planned stay in Suva being no more than 3 days.[60] In this case, the plea of *forum non conveniens* would normally be raised by CWN in an application for a stay of the proceedings.[61] However, in *Translink Shipping* the application was for the dissolution of the Mareva injunction that froze CWN's assets in Fiji. Usually, the means of securing the dissolution of a Mareva injunction is to establish that, on a fuller consideration of the evidence, at least one of the conditions for the granting of the Mareva is not satisfied. So, two years later in *Merchant Bank of Fiji Limited v Raniga*,[62] Fatiaki J accepted that a Mareva injunction would have to be dissolved if the plaintiff did not have a good arguable case, there was no real risk of dissipation or removal of assets, or the plaintiff had not made full and frank disclosure of material facts.[63] None of these arguments was put in *Translink Shipping*; it was argued only that the High Court was *forum non conveniens*. Novel as this approach was, it reveals a legitimate strategy for disposing of the Mareva injunction without having to address the conditions challenged in *Merchant Bank of Fiji*.

The Mareva injunction is an interlocutory order, securing the purpose of litigation by preventing the defendant from siphoning assets out of the country or squandering them so as to make any judgment obtained incapable of being satisfied.[64] Although, in general, the Mareva injunction is necessarily sought before the primary claim against the defendant is brought, it is only ordered to assist the primary claim and is therefore ancillary to it. For this reason, if the court has no jurisdiction to deal with the primary claim made by the plaintiff it has no jurisdiction to grant the Mareva injunction.[65] It must follow that, where the court decides not to exercise jurisdiction, it also cannot grant the Mareva. The plea of *forum non conveniens*, once established, disables the court from making orders ancillary to the primary

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60 *Translink Shipping,* above n 46, 48-9; although the court also claimed that service was justified under O 11 r 1(1)(c) High Court Rules 1988 (Fiji).

61 *Spiliada,* above n 11, 475; *Voth,* above n 29, 552, 561-2.

62 *Merchant Bank of Fiji Limited v Raniga*, (1993) 39 Fiji LR 181.

63 *Merchant Bank of Fiji Limited v Raniga*, (1993) 39 Fiji LR 181, 182.

64 *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769, 785.

65 *Siskina (Cargo Owners) v Distos Cia Naviera SA, The Siskina* [1979] AC 210; *Mercedes-Benz AG v Leiduck* [1995] 3 All ER 929.

claim. So, the High Court's conclusion that it was a *forum non conveniens* did require, as it decided, that the Mareva injunction against CWN be dissolved. What happened to the primary claim commenced by writ on 30 May was not reported, but a permanent stay should have been granted. However, given that it was not known whether there were even any courts in Wallis Island, the practical result of the dissolution of the Mareva in *Translink Shipping* was that Translink's claim on the merits could not be pursued.

2 The forum delicti

In one respect, the decisions in *Translink Shipping* and *Naylor* exemplify the trend that the *forum conveniens* in international tort cases be a court in the place where the events occurred. Under the *Spiliada* principles it is now accepted that the place where a wrong took place is prima facie the natural forum for the determination of the dispute.[66] This was the court's conclusion in *Translink Shipping*, holding that Wallis Island was the "proper forum" for the dispute. And, the fact that *Naylor* was decided under the *Voth* principles might make it an even stronger case. If the place of the tort is prima facie the natural forum, there is a more powerful argument that it is not a clearly inappropriate venue. However, there are aspects of both decisions that might require some departure from this presumption.

3 Relevance of the foreign court

A feature of both *Translink Shipping* and *Naylor* was the reluctance of the judges to investigate the availability of the foreign court. As has been seen, in *Translink Shipping* the judge refused to decide whether there was even a court in Wallis Island "capable of hearing an action between the Plaintiff and the Defendants".[67] He thought he should only decide if the High Court of Fiji were the natural forum. However, this myopia is not allowed under the *Spiliada* principles that the court adopted. The basic principle of *Spiliada* is that the stay is not granted unless "there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and the ends of justice".[68] There must be a foreign court, and it must have jurisdiction in the matter.[69] Then, and only then, is

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66 *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey; The Albaforth* [1984] 2 Lloyd's Rep 91; *Schapira v Ahronson* [1999] EMLR 735; *Berezovsky v Michaels* [2000] 1 WLR 1004, 1013-14, 1017.

67 *Translink Shipping,* above n 46, 54.

68 *Spiliada,* above n 11, 474, 476; compare *Voth,* above n 29, 558.

the local court in a position to conclude that it is not the appropriate forum and that there is a foreign court that is more appropriate.[70]

In *Translink Shipping*, the court seemed to be distracted from this principle by conflating the idea of the forum (in the sense of a tribunal or court) and the territory of the forum. The connections recounted were all with the territory of Wallis Island. But ultimately, it is not with territories that the local court must make the comparison. Territorial connections are only relevant in enabling some comparison to be made between alternative courts. For instance, there is some possibility that, even though Wallis Island was the place where the events occurred, French courts in New Caledonia may have had some role to play in the matter.[71] If so, this may have strengthened the appropriateness of the geographically closer courts of Fiji. Unlike the outcome in *Translink Shipping*, the *Spiliada* principles have generally led to the refusal of a stay where the defendant cannot show that there is a foreign court with jurisdiction in the matter.[72] The result in *Translink Shipping* could not be more satisfactory to a reverse forum shopper, as declining jurisdiction meant that the merits of the plaintiff's claim might never be adjudged anywhere.

The curial myopia of *Translink Shipping* has more in common with the earliest form of the *Voth* approach to *forum non conveniens* than with *Spiliada*. This also aligns the approach actually taken in *Translink Shipping* with *Naylor*, and the proposition in that case that a Vanuatu court is not to adjudge the willingness or ability of a foreign court to do justice between the parties.[73] The refusal in *Naylor* to consider the advantages of preferring the US proceedings rested on the plaintiff's contention that these affected her alone, and could not be raised by the defendant.[74] Still the judge's method is consistent with the *Voth* focus on the local court -

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69 Even if the foreign court's jurisdiction is only foreshadowed by the defendant's undertaking to the local court to submit to the foreign court's jurisdiction: *Tulloch v Williams* (1846) 8 D 657; *Lubbe v Cape Plc* [2000] 1 WLR 1545, 1562-6.

70 *Spiliada,* above n 11, 477.

71 G Powles & M Pulea (eds) *Pacific Courts and Legal Systems* (University of the South Pacific, Suva, 1988) 360-1.

72 *European Asian Bank AG v Punjab and Sind Bank* [1982] 2 Lloyds' Rep 356; *Spiliada,* above n 10, 478; *Metal Scrap Trade Corporation v Kate Shipping Co Ltd* [1990] 1 WLR 115, 133; *The Maciej Rataj* [1991] 2 Lloyd's Rep 454, 463.

73 *Naylor,* above n 51, 3.

74 *Naylor,* above n 51, 4.

ignoring any other. But, as has been considered in Australia, one wonders whether this deals properly with the more basic question of vexation and oppression in cases, like *Naylor*, of *lis pendens*.

4 Lis pendens

The likelihood of a stay being granted increases significantly when the plaintiff in the local proceedings is the plaintiff in the foreign proceedings. This is so under both *Spiliada* and *Voth*.[75] It is well-settled that a defendant is "doubly vexed" when a plaintiff brings the same claim in two different countries and, normally, a stay will be granted or the plaintiff will be required to elect between the local and foreign proceedings.[76] The term "double-vexed" itself also raises the prospect of a stay in accordance with the *Voth* principles. In any case, these have been revised in Australia so that later, local proceedings are regarded as prima facie vexatious and oppressive, with the expectation that this will normally lead to them being stayed.[77] Inevitably Australian courts have declined jurisdiction in these cases,[78] and the circumstances of the later Vanuatu proceedings in *Naylor* would strongly suggest the same. The court considered that, there being no reciprocal arrangements for the enforcement of judgments between Vanuatu and any other country, submissions that Kilham was vexed by the Vanuatu proceedings were irrelevant.[79] Presumably, it therefore assumed that the Vanuatu proceedings were needed to ensure the enforceability of any judgment against Kilham in Vanuatu. However, the uncontested evidence was that Kilham had no assets in Vanuatu.[80] The plaintiff's hope of vindicating reputation by defamation proceedings, especially in a small community like Port Vila, should not be underestimated, but this was not urged on the court in *Naylor*. In material terms therefore, the Vanuatu judgment would only be worth obtaining if it

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75 *De Dampierre v De Dampierre* [1988] AC 92, 103, 108; *Manufacturers Life Insurance Co v Guarantee Co of North America* (1988) 62 OR (2d) 147; *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65 at 70; *Henry* above n 38, 591.

76 *McHenry v Lewis* (1883) 22 ChD 397, 399; *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65, 70.

77 *Henry,* above n 38, 591.

78 Garnett, above n 31, 61; *The Sentry Corporation v Peat Marwick Mitchell & Co* (1990) 24 FCR 463; *Discovision Associates v Distronics Limited* (1998) 39 IPR 140.

79 No cases on *lis pendens* in international cases (including the Australian revisions of *Voth*) were cited in *Naylor*.

80 *Naylor,* above n 51, 4.

were enforceable in the USA. Although a Vanuatu judgment can, under certain conditions, be enforced in the USA, in *Naylor* that was unlikely.[81] It is then possible to question whether the Vanuatu proceedings had any material purpose and, in the absence of any evidence that they did or, alternatively, the plaintiff placing significance on the mere protection of reputation, there must be weight in the argument of vexation and oppression.

5 *The foreign plaintiff rule*

The most dramatic feature of *Naylor*, nevertheless, is the decision that Vanuatu nationals and residents be given greater access to Vanuatu courts than foreign nationals and residents. As a consequence, a stay is less likely when a Vanuatu plaintiff is suing at home. This has no precedent under the *Spiliada* or *Voth* approaches, but does imitate the position under the foreign plaintiff rule in the USA. Of course, the Vanuatu rules of court do not embody as exorbitant a jurisdiction as American rules often do and, accordingly, may not require as intrusive a doctrine of *forum non conveniens* as American courts do to discourage forum shopping.[82] However, there is a more fundamental, principled objection to the foreign plaintiff rule that applies equally to Vanuatu and American courts.

The objective of procedural neutrality remains unrealised, as the local court effectively prefers to hear and is more likely to vindicate the claims of a national or resident than those of outsiders in like cases. American judges have conceded this. However, they have countered that they must manage congested court lists and, so, can adopt a rule that does not "forc[e] our residents to wait in the corridors of our courthouses while foreign causes of action are tried".[83] This argument remains a mere argument, even though it is capable of empirical verification. It is open to serious question whether the foreign plaintiff rule does have any measurable effect

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81 See *Naylor,* above n 51, 4. The US District Court was likely to render judgment first, and a foreign judgment need not be recognised in Massachusetts if it conflicts with an earlier judgment: Massachusetts General Laws Annotations c 235 § 23A; Scoles, Hay, Borchers & Symeonides, above n 1, 1192-3.

82 See O 11 High Court (Civil Procedure) Rules 1964 (Van). It is unclear how jurisdiction was established in *Naylor*, but it is possibly a case of a transient defendant: J Corrin Care *Civil Procedures of the South Pacific* (Institute for Justice and Applied Legal Studies, Suva, 1998) 5-7.

83 *Dow* above n 11, 690; *Gulf* above n 40, 508; *Piper,* above n 42, 252; *Rubenstein v Piper Aircraft Corporation* (1984) 587 F Supp 460, 461; *Sibaja v Dow Chemical Co* (1985) 757 F 2d 1215 at 1218.

on reducing the congestion of American courts.[84] And, however busy the courts in the USA might be, congestion could not be considered a serious problem in the Pacific.

Still, none of this addresses the principle of procedural neutrality and the obligation of courts to deal with litigants without regard to national origin or residence. As has been seen, for the parties the decision about where to litigate will often, in effect, decide the merits of the case for them.[85] A procedural preference for local litigants can effectively become a substantive preference for them.

Given that *Naylor* recognised that preferential access to the court would be given to Vanuatu citizens and residents, it remains significant that it was still thought necessary that the court "attend[] to the particular considerations of the case and subject to the discretion of the court".[86] In adopting the *Voth* principles, the court therefore subordinated the foreign plaintiff rule to the general question of vexation and oppression. This was originally the position under the foreign plaintiff rule in the USA, where a local plaintiff would only be denied access to the court if the defendant could establish that the vexation and oppression caused by the proceedings was disproportionate to the convenience enjoyed by the plaintiff in suing at home.[87] However, given the question of *lis pendens* and the apparent material futility of the Vanuatu proceedings, it is submitted that vexation and oppression was established in *Naylor*.

III THE ANTI-SUIT INJUNCTION

A Outline

The companion to the procedures (like *forum non conveniens*) that a local court can use to refuse to deal with proceedings before it are those that are directed at proceedings before another court. Although more rarely used, the court has some means of discouraging litigation elsewhere.[88] Foremost amongst these is the anti-suit injunction.

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84 Duval-Major, above n 44, 676.

85 See above nn 11-12.

86 *Naylor,* above n 51, 3.

87 *Koster,* above n 42, 524.

88 For example, a local declaration of no liability prior to the foreign court's decision: see Collins, above n 4, 11-12.

The anti-suit injunction is an interlocutory order prohibiting the local defendant from pursuing the matter in another court. In international litigation, this means the local court restrains proceedings that the local defendant is conducting as plaintiff in a foreign court. Formally, the injunction is not an order addressed to the foreign court that it not entertain litigation pending before it. The injunction itself has no direct extra-territorial operation. It is a command to the local defendant (who is within the territorial jurisdiction of the local court) to discontinue the litigation in the foreign court, unless they are willing to risk being in contempt.[89] Consequently the anti-suit injunction operates within the territorial jurisdiction of the local court, but with extra-territorial effects.[90]

The powers for granting anti-suit injunctions are twofold. There is an equitable jurisdiction to restrain proceedings in a foreign court, and an inherent jurisdiction in a superior court to do so in order to protect its own proceedings and processes. The former arises in both the exclusive and auxiliary jurisdictions of courts of equity. The exclusive jurisdiction is most regularly invoked, and there the conditions required for the injunction are that the proceedings in the foreign court are vexatious and oppressive.[91]

Like the plea of *forum non conveniens*, it is only over the last few decades that the anti-suit injunction has received close attention as a means of dealing with international forum shopping. For the Commonwealth the leading decision is *Société Nationale Industrielle Aerospatiale v Lee Kui Jak*,[92] an appeal to the Privy Council from Brunei that proved influential in the Canadian decision in *Amchem Products Inc v Workers' Compensation Board*,[93] the Australian decision in *CSR Limited v Cigna Insurance Australia Limited*,[94] and the English decision in *Airbus Industrie GIE v Patel*.[95] In *SNI Aersospatiale*, Lord Goff stated four principles

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89 *Bushby v Munday* (1821) 5 Madd 297, 307; 56 ER 908, 913; *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, 892 [*SNI Aerospatiale*].

90 In the same way as an order under the principle of *Penn v Lord Baltimore* (1750) 1 Ves Sen 444; (27 ER 1132), or a worldwide Mareva injunction: *Derby & Co Ltd v Weldon* [1990] 1 Ch 48.

91 *SNI Aerospatiale* above n 89, 892; *CSR Limited v Cigna Insurance Australia Limited* (1997) 189 CLR 345, 391 [*CSR*].

92 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak,* above n 89.

93 *Amchem Products Inc v Workers' Compensation Board*, above n 23.

94 *CSR Limited v Cigna Insurance Australia Limited,* above n 91.

95 *Airbus Industrie GIE v Patel* [1999] 1 AC 119 [*Airbus*].

for the granting of an anti-suit injunction that he thought were indisputable. First, the injunction is granted when the "ends of justice" require it. Second, it is granted against the plaintiff in the foreign proceedings, and not against the foreign court itself. Third, it is only granted against a person "who is amenable to the jurisdiction of the [local] court, against whom an injunction will be an effective remedy". Fourth, the jurisdiction is one that should be exercised with caution.[96] This last principle has preoccupied the courts, and nuanced differences have emerged.

The cautionary principle arises because, even though the anti-suit injunction is issued directly against the local defendant, it indirectly attacks the jurisdiction of the foreign court and, consequently, could compromise the international comity of courts. In this sense "comity" simply means that the local court recognises the legitimate authority of a foreign court within its own territory, and the rights of its citizens and of those protected by the laws it administers.[97] It has been emphasised that considerations of comity in this sense require courts to be cautious about granting the injunction.[98] This has further procedural consequences. The first is that, except perhaps where *lis pendens* is involved, the principles for the granting of the injunction do not merely mirror those for granting stays in response to a plea of *forum non conveniens*.

This asymmetry has not always been recognised. Until the English courts seriously considered the implications of the doctrine of *forum non conveniens*, it was assumed that stays of proceedings and grants of anti-suit injunctions were made by reference to the same principles. In 1980 the House of Lords endorsed this approach without qualification in *Castahno v Brown & Root (UK) Ltd*:[99] "[t]he principle is the same whether the remedy sought is a stay of proceedings or a restraint upon foreign proceedings."[100] Although the House of Lords had not finalised the adoption of the doctrine of *forum non conveniens* at the time of *Castahno*, once the doctrine was incorporated into English law the demand for symmetry would allow an anti-suit injunction to

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96 *SNI Aerospatiale,* above n 89, 892.

97 Cf *Hilton v Guyot* (1895) 159 US 113, 163-4; *CSR,* above n 91, 395-6.

98 *Cohen v Rothfield* [1919] 1 KB 410, 413; *Castahno v Brown & Root (UK) Limited* [1981] AC 557, 583 [*Castahno*]; *Laker Airways v Sabena, Belgian World Airlines* (1984) 731 F 2d 909, 926-7; *SNI Aerospatiale,* above n 89, 892; *Amchem* above n 23, 928; *CSR,* above n 91, 396; *Airbus,* above n 95, 133.

99 *Castahno v Brown & Root (UK) Ltd,* above n 98.

100 *Castahno,* above n 98, 574.

issue when the English court concluded that it was the *forum conveniens*. It was not to be. The Privy Council ruled it out explicitly in *SNI Aerospatiale*, holding, in the case of a Brunei court asked to restrain proceedings in Texas, that "[t]he mere fact that the courts of Brunei provide the natural forum for the action is … not enough of itself to justify the grant of an injunction."[101] Something more is required, and in general this is that the proceedings in the foreign court be shown, in the circumstances, to be "vexatious and oppressive".[102]

The requirement of vexation and oppression again preserves the language used in the pre-1970s cases, but in the case of anti-suit injunctions the strength of those terms has not been diminished to the extent that it has in the *Voth* principles of *forum non conveniens*. The general demand is that the local plaintiff show that he or she will be subject to some injustice if the foreign proceedings are not ended and, further, that the local defendant will not be unjustly deprived of advantages available in the foreign court.[103] Specifically, there is nothing inherently vexatious and oppressive about multiple concurrent proceedings. However, foreign proceedings will be regarded as vexatious and oppressive if the only material gain to the local defendant in pursuing them is also available in local, pending proceedings. So, a local court concluding that it is the *forum conveniens* will find vexation and oppression in a case of precisely equivalent proceedings. Once more, *lis pendens* inevitably leads to an order against the plaintiff in the *forum non conveniens*.[104]

The second procedural consequence that considerations of comity suggest is that the plaintiff may have some obligation to use the processes of the foreign court to end proceedings there. In *Amchem* Sopinka J, for the Supreme Court of Canada, held that it was "preferable" that the plaintiff first apply for a stay of proceedings (or its equivalent) in the foreign court before being allowed to seek an anti-suit injunction in the local court.[105] The rationale is that, so far as comity between courts is concerned, it is better that a foreign court make a decision about the suitability of proceedings before it than that the local court impose its will on the foreign court. The point was developed further by the majority of the High Court of Australia

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101 *SNI Aerospatiale,* above n 89, 899; *CSR,* above n 91, 390.

102 *SNI Aerospatiale,* above n 89, 896, 899; *CSR,* above n 91, 390, 393.

103 *SNI Aerospatiale,* above n 89, 896. In Canada, this same demand is made, but without interposing the language of vexation and oppression: *Amchem,* above n 23, 932.

104 *Bank of Tokyo Ltd v Karoon* [1987] AC 45, 60; *CSR,* above n 91, 393-4.

105 *Amchem* ,above n 23, 931.

in *CSR*. Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ pointed out that, even in *Amchem*, it was not thought to be a "general rule" that a plaintiff be required first to apply in the foreign court for a stay of the foreign proceedings. Nor could it be, when the different circumstances in which an interlocutory injunction could be granted were taken into account. The *CSR* majority thought that this step could not be expected when the injunction was granted to protect the integrity of the local court's processes or when the defendant had brought proceedings in the foreign court in breach of contract.[106] However, they added that "[t]here may be cases – for example, cases based on contentious or novel claims of unconscionable conduct – in which it is appropriate or desirable that an anti-suit injunction not be granted until an application has been made for a stay or dismissal of the foreign proceedings."[107] So, whether there is a duty on the local plaintiff to apply for a stay of the foreign proceedings depends on the circumstances of the case. It is situational.

B The Mount Kasi litigation

The High Court of Fiji appears to have been the first in the Pacific to issue an anti-suit injunction, in *Mount Kasi Limited v Range Resources Limited*.[108] Here the dispute arose from the looming insolvency of Mount Kasi Limited (MKL) - a gold exploration and mining company incorporated in Fiji and operating on Vanua Levu - and the efforts of one of its creditors, Range Resources Limited, a Western Australian company, to enhance its status from unsecured to secured.[109] This claim centred on a share acquisition agreement made in 1990 between Range and MKL's holding companies, Pacific Islands Gold NL and Nationwide Pacific NL, under which those companies agreed to cause MKL to execute a charge over its assets and undertaking in Range's favour. Pacific Islands Gold and Nationwide Pacific were both incorporated in Western Australia. An agreement amending the 1990 agreement was made between Range and the same companies in 1997, and again, though somewhat more ambiguously, those companies promised to cause MKL to execute a charge in Range's favour. The 1997 agreement fixed MKL's liability to Range at A$1.4 million. However, Pacific Islands Gold and Nationwide Pacific never made MKL execute the charge, and MKL itself was not a

106 *CSR,* above n 91, 396.

107 *CSR,* above n 91, 397.

108 (11 August 1999) unreported, High Court of Fiji, HBC 0166/1999 [*Mount Kasi*].

109 For another creditor's efforts to secure debt at the time MKL's insolvency became evident, see *Labasa Blue Metal Supplies Limited v Mount Kasi Limited* (3 July 1998) unreported, High Court of Fiji, HBC 0322/1998.

party to either the 1990 agreement or the 1997 amending agreement.[110] The litigation therefore raised questions whether Pacific Islands Gold and Nationwide Pacific could be compelled to cause MKL to execute the charge, and whether MKL also had an obligation to do so. It also raised the question as to where this litigation should be conducted: Fiji or Western Australia.

Significantly, proceedings to establish Range's secured status first arose in Western Australia. On 7 October 1998 Range was given leave by the Supreme Court to serve MKL in Savusavu, Fiji. It is unclear when MKL was actually served, although service was eventually effected on the company at its registered office in Suva. By the time that Range's status was raised in the High Court of Fiji, MKL and its directors undoubtedly had notice that the Western Australian proceedings had been commenced against the Fiji company.[111]

Following an order of the High Court of Fiji, MKL held a meeting on 29 October 1998 at which a scheme of compromise with its creditors was suggested. This was accepted by most creditors, and approved by the High Court on 23 December 1998. Throughout, Range objected to the compromise and applied to the court for either an exemption from the scheme, or its suspension until the Western Australian proceedings were determined. The court rejected both applications on 23 December, holding that MKL had no obligation to execute a charge that would secure Range's debts and that, even if it did, Range had lost its right of enforcement by reason of its delay in litigating.

This decision made no difference to Range, which continued to pursue an order in Western Australia for MKL to execute a charge. So, in an action begun in the High Court of Fiji on 9 April 1999 MKL sought an injunction to restrain Range from continuing the Western Australian proceedings. It seems that there was no possibility of serving Range with the writ locally, and the company was served at its offices in Perth on 12 April. It never entered an appearance in Fiji in response to this writ and, therefore, never had lawyers argue against the application for the anti-suit injunction. The Fiji court nevertheless granted the injunction on 11 August 1999.[112]

The judgment in *Mount Kasi* gives a broad sketch of the principles relating to the granting of anti-suit injunctions, and largely draws on those developed by Commonwealth courts over the previous two decades. Byrne J recognised that there is an equitable jurisdiction to restrain

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110 *Range Resources Ltd v Pacific Islands Gold NL* [1999] WASC 38, paras 12-21 [*Range I*].

111 *Range I,* above n 110, paras 3-5.

112 *Mount Kasi,* above n 108, 3, 7.

proceedings in a foreign court, and an inherent jurisdiction in the High Court to restrain foreign proceedings in order to protect its own proceedings and processes.[113] No explicit decision was made on this point, although the allegation made by MKL formally raised both the equitable and inherent jurisdictions of the court.[114] It was nevertheless only dealt with as a question of equity, and one arising in the exclusive jurisdiction at that. Thus the implicit allegation was that Range's proceedings in Western Australia amounted to unconscionable conduct, or an unconscientious exercise of a legal right. The judge said:[115]

> In order to warrant the grant of an anti-suit injunction in the exclusive jurisdiction it will generally be necessary to demonstrate that the institution or maintenance of the foreign suit is vexatious or oppressive.

Slightly adjusting *SNI Aerospatiale* and Brennan CJ's dissent in *CSR*, he concluded that "the commencement of proceedings in a forum having little or no connection with the subject matter of the dispute is generally regarded as an indication of vexatiousness or oppression".[116]

The question of MKL's obligation to apply for a stay in Western Australia then arose. However, the court rejected the approach taken in *Amchem*, concluding that it "has no application where the foreign proceedings clearly constitute conduct entitling the Applicant to equitable relief or where the injunction is sought to protect the integrity of the local proceedings or the processes of the local court."[117] The court referred to the English case of *Airbus Industrie*, interpreting it as holding that the local court must have a sufficient interest in the dispute before an anti-suit injunction can be granted, and that this required the local court to identify the natural forum for dealing with the dispute.[118] In the result, the judge held that the central issue was whether the Fiji court was the natural forum.[119]

> Applying these principles to the facts of the instant case I am satisfied that this court is the natural forum for the resolution of the dispute based on the facts I have enumerated above namely the fact

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113 *Mount Kasi,* above n 108, 6.

114 *Mount Kasi,* above n 108, 2.

115 *Mount Kasi,* above n 108, 6.

116 *Mount Kasi,* above n 108, 6; see *SNI Aerospatiale,* above n 89, 894; *CSR,* above n 91, 379-81.

117 *Mount Kasi,* above n 108, 7.

118 *Mount Kasi,* above n 108, 7; see *Airbus,* above n 95, 134-5.

119 *Mount Kasi,* above n 108, 7.

> that the Plaintiff is a registered company in Fiji; that its business also is based in Fiji; that the decision of this court approving the scheme of arrangement has not been appealed by the Defendant and lastly that the Defendant has not served on the Plaintiff either an intention to defend the Writ of Summons or any defence to the Statement of Claim.

For those reasons, the injunction was granted.

C The Mount Kasi approach: anti-suiting the forum non conveniens

1 Absent defendant

The approach taken to the granting of anti-suit injunctions in *Mount Kasi* is the most pre-emptive exercise of this jurisdiction taken by a court in the Commonwealth in recent times. This has two sources. First of all is the willingness of the Fiji court to issue an injunction against an absent defendant. The third of the principles that Lord Goff said in *SNI Aerospatiale* was "beyond dispute" is that "the injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy".[120] In *Mount Kasi* the injunction was granted despite the defendant, Range, having made no appearance before the High Court in response to the writ seeking the injunction, or responding to the application in any other way. The High Court of Fiji relied on the rules allowing judgment to be entered when the defendant had failed to give a notice of intention to defend the proceedings.[121] It nevertheless remains doubtful whether anything is gained by allowing the injunction to issue against an absent defendant. The rules of court in Fiji do allow an equitable remedy to be granted when the defendant does not intend to defend, but this is a matter for the court's discretion. The order is only to be made if the court thinks the plaintiff is entitled to it,[122] and presumably the plaintiff's entitlement is determined by established principles of equity. In any case, Lord Goff's principle of amenability to jurisdiction is unsurprising. It would normally require the most exceptional circumstances for a court to grant any kind of injunction against a person who was not subject to its orders. Chitty J explained the position of a defendant "who could not be reached" in *In re the North Carolina Estate Company Limited*:[123]

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120 *SNI Aerospatiale,* above n 89, 892.

121 O 13 r 6, O 19 r 7 High Court Rules 1988 (Fiji); *Mount Kasi,* above n 108, 3-5.

122 Corrin Care, above n 82, 131.

123 *In re the North Carolina Estate Company Limited* (1889) 5 TLR 328.

> Supposing, for instance, the case was one of a French creditor suing [an English debtor] in a French Court, or of an American creditor suing in an American Court, the Court, of course, could not grant an injunction, the reason being that the order would be ineffectual.

The principle is merely an example of the more general proposition that an equitable remedy will not normally be awarded where there is no measurable benefit to the plaintiff, or where it would not realise the purpose for which it was sought.[124] Naturally this is not a conclusive defence. Ineffectual orders are made in rare cases if the risk of injury to the plaintiff is so great that it would be unjust to refuse the application.[125] But in *Mount Kasi* the injunction proved useless. Despite the order restraining Range from continuing in the Supreme Court of Western Australia,[126] its lawyers were in that court more than a week later hearing that the proceedings against MKL and its holding companies were being programmed for trial. MKL's efforts to maintain home-ground advantage were not only pointless: MKL itself was aware of that, for it continued to participate in the Western Australian proceedings.[127]

2 *Asymmetry with forum non conveniens*

The second source of a more pre-emptive approach to the granting of anti-suit injunctions in *Mount Kasi* is its revival of the principle of symmetry. For the injunction to issue, the judge claimed he only had to be satisfied that the High Court of Fiji was the natural forum. So, in circumstances where a court would not, on a plea of *forum non conveniens*, grant a stay of proceedings, it would be prepared to grant an anti-suit injunction. This is precisely the doctrine of *Castahno v Brown & Root (UK) Ltd*, applied to the principles for stays adopted in *Spiliada* and *Translink Shipping*. As has been seen, the Fiji court referred to the English case of *Airbus Industrie* and claimed that its "general rule" was that the local court must have a sufficient interest in the matter before an injunction is granted. In practice the judge treated this as sufficient for the injunction, which was granted on a factual determination that the Fiji court was the *forum conveniens*, and nothing else.[128]

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124 ICF Spry *Equitable Remedies* (4 ed, Law Book Company, Sydney, 1990) 396-8.

125 *Attorney-General v Guardian Newspapers Ltd* [1909] 1 AC 109, 259, 270-1.

126 *Mount Kasi,* above n 108, 7.

127 *Range Resources Ltd v Pacific Islands Gold NL* [1999] WASC 131, para 16 [*Range II*].

128 *Mount Kasi,* above n 108, 7.

Mount Kasi is, however, an incomplete reading of *Airbus Industrie.* The House of Lords in *Airbus Industrie* certainly focused on the question whether the English court was a *forum conveniens* and accepted that, as a general rule, this would be necessary before an anti-suit injunction would be granted. Lord Goff was at pains to note that this had been the law since *SNI Aerospatiale*, though not prominently emphasised in that case.[129] However, it is also plain that, in *Airbus Industrie*, the House of Lords confirmed the broader principles of *SNI Aerospatiale* that, although a finding that the local court is the natural forum is necessary before an anti-suit injunction is granted, it is not sufficient. In particular, the need to show that the foreign proceedings are vexatious and oppressive and to exercise the jurisdiction with caution was highlighted.[130]

No attempt was made in *Mount Kasi* to show that the Western Australian proceedings were vexatious and oppressive. Directly contradicting *SNI Aerospatiale*'s rejection of the principle of symmetry, the proceedings were deemed to be vexatious and oppressive by reason of the conclusion that they were not, from the Fiji court's perspective, being conducted in the *forum conveniens*.[131] Independently of this assumption, a number of reasons suggest that it would be more difficult to reach the conclusion that the Western Australian proceedings were vexatious and oppressive. The Western Australian court had a jurisdiction over MKL's shareholders - companies incorporated in the State - that the Fiji court did not have. It could hear the related and, for Range, the more promising claims against them to cause MKL to grant the charge. The Western Australian court was therefore better positioned to give "complete relief" than the Fiji court.[132] In addition, the Western Australian proceedings predated the raising of the question of Range's status in the High Court of Fiji. On a conventional analysis of the relevance of *lis pendens*, that was more likely to lead to the conclusion that the proceedings in Fiji were vexatious and oppressive.[133] However, the critical point is that the Fiji court treated MKL as having no duty to establish vexation and oppression, by evidence showing both that it would

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129 *Airbus,* above n 95, 134-5; *SNI Aerospatiale,* above n 89, 894, 896.

130 *Airbus,* above n 95, 133.

131 *Mount Kasi,* above n 108, 6.

132 Compare *Carron Iron Company v Maclaren* (1855) 5 HLC 416, 437; 10 ER 961, 970; *CSR,* above n 91, 393-4.

133 See above nn 35-39; see also *Carberry Exports (NZ) Ltd v Krazzy Price Discount Ltd* (1985) 1 PRNZ 279, where the New Zealand court deferred to earlier proceedings in Fiji.

be exposed to injustice if the Western Australian proceedings were to continue and that Range would not be deprived of advantages available in Western Australia.[134]

3 Applying for a stay in the foreign court

The cautionary principle espoused in *SNI Aerospatiale* is also the source of any duty on the plaintiff to apply to the foreign court for a stay of the foreign proceedings before applying for an anti-suit injunction from the local court. As explained in *Amchem* and *CSR* the existence of this duty is situational.[135] However, in *Mount Kasi* the court was deeply influenced by Bell and Gleeson's more complete scepticism of the existence of this duty altogether.[136] Bell and Gleeson argued that this duty rested on tenuous or false assumptions, amongst which they included the widespread belief that the foreign court is insulted when proceedings before it are restrained.[137] More practically, they added that the plaintiff cannot be expected to apply for a stay where the relevant foreign court does not have a doctrine of *forum non conveniens*.[138] This could not have been relevant to the existence of the duty in *Mount Kasi*, as the Western Australian court plainly had powers to stay proceedings on the ground of *forum non conveniens*.[139] However, a third consideration raised by Bell and Gleeson (though not in *Mount Kasi*) is certainly relevant to conditions in Fiji. This is that the application for a stay of proceedings on the ground of *forum non conveniens* can sometimes be regarded in the forum as an act of submission to the jurisdiction of the foreign court. If so, the making of the application itself can, if the foreign court denies it, result in the judgment of the foreign court becoming

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134 See above nn 101-104.

135 See above n 105-107.

136 AS Bell and J Gleeson "The Anti-suit Injunction" (1997) 71 ALJ 955, 968; *Mount Kasi,* above n 108, 6-7.

137 Bell and Gleeson above n 136, 968. Certainly, the foreign court's awareness of proceedings before it is often overstated. The injunction can require a discontinuance of proceedings that, so far as the foreign court's administration is concerned, is indistinguishable from a discontinuance brought because the litigation is compromised before trial. However, where proceedings have been before the court for some period, judges have openly expressed irritation at the effect of a foreign anti-suit injunction: *Laker Airways v Sabena, Belgian World Airlines* (1984) 731 F 2d 909, 939-42; *Amchem Products Inc v Workers' Compensation Board* (1989) 42 BCLR (2d) 77, 102-5.

138 Bell and Gleeson, above n 136, 968. To this could be added the US minimum contacts requirement that can serve as an equivalent: *Amchem,* above n 23, 937-8; see also *Airbus Industrie GIE v Patel* [1997] 2 Lloyd's LR 8, 14.

139 *Skin-Plex Laboratories Pty Ltd v Baker* [1999] WASC 81; *Douglas v Philip Parbury & Associates (A Firm)* [1999] WASC 15.

enforceable in the forum.[140] This is probably the position in Fiji.[141] It would be inappropriate - even unjust - for the local court to expect the local plaintiff to undertake an act of submission to the jurisdiction of the foreign court. The very reason why there is litigation over venue is that the plaintiff thinks that, for one reason or another, the prospects in the foreign country are poorer. The plaintiff should not be expected to ease the enforcement of the foreign judgment in the territory of the forum as well. This may be why, before the Supreme Court of Western Australia, MKL raised only a trifling objection to jurisdiction that was bound to fail. It argued that it had not been served in accordance with the order for service, which had specified that MKL be served in Savusavu. MKL had been served in Suva, where its registered office had been relocated between the time of the order and actual service. The court rejected this, and found there had been no unfairness to MKL.[142] Had MKL refused to participate in the Western Australian proceedings after that, it probably would not have been taken in Fiji to have submitted to the jurisdiction of the Western Australian court.[143] Oddly, MKL continued

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140 Bell and Gleeson, above n 136, 969. The High Court's order of 23 December 1998 may have made the question between Range and MKL res judicata in Fiji. This would probably make any subsequent judgment against MKL in Western Australia unenforceable in Fiji: Foreign Judgments (Reciprocal Enforcement) Act 1978 (Fiji) (Cap 40) s 6(1)(b). Indeed, the order of 23 December 1998 could possibly make the question between Range and MKL res judicata in Western Australia, though this was not raised in *Range I* and *Range II*: *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853. The following discussion relates only to the increased risk that a Western Australian judgment could become enforceable in Fiji by reason that the duty to plead *forum non conveniens* in Western Australia could be imposed on MKL.

141 In Fiji, the common law rule of *Henry v Geoprosco International Limited* [1976] QB 726 is likely to represent the law. This is that an application for a stay of proceedings assumes the jurisdiction of the foreign court to determine them and, therefore, enables any judgment made by the foreign court in those proceedings to be enforced. Foreign judgments can be enforced at common law in Fiji: *Narain Shipping Company Limited v Government of Samoa* (28 November 1979) Unreported, Fiji Court of Appeal, Civil Appeal 33/79, 3. However, a judgment of the Supreme Court of Western Australia is currently enforceable under the Foreign Judgments (Reciprocal Enforcement) Act 1978 (Fiji). Under the Act, the judgment debtor is not taken to have submitted to the jurisdiction of the Western Australian court if 'contesting the jurisdiction of that court': s 6(2)(a)(i). An application for a stay does not, strictly, amount to a contest to jurisdiction: see North & Fawcett, above n 12, 355. The position in the United Kingdom and Australia is different. In those countries, an application for a stay or dismissal of proceedings on the ground of *forum non conveniens* is not, for that reason, taken to be a submission to jurisdiction: Civil Jurisdiction and Judgments Act 1982 (UK), s 33; Foreign Judgments Act 1991 (Cth) s 11(e).

142 *Range I,* above n 110, paras 3-6.

143 Compare *Henry v Geoprosco International Limited* [1976] QB 726, 747-8.

to be represented in the Western Australian proceedings,[144] and that raises the real possibility that, by its conduct, MKL did accept the Western Australian court's jurisdiction.[145] In the particular circumstances of Mount Kasi, therefore, at the time the anti-suit injunction was sought the local plaintiff may have already submitted to the jurisdiction of the foreign court. That being so, pleading *forum non conveniens* in the foreign court may not have enhanced the marginal risk of enforcing the foreign judgment in Fiji. It may have still been possible to expect MKL to meet the demands of international comity, and to have applied for a stay in Western Australia. Still, this would seem to be an unusual case and that, so long as in Fiji a plea of *forum non conveniens* in a foreign court improves the enforceability of the foreign judgment, this is one duty that normally would not be expected of plaintiffs applying for anti-suit injunctions.

IV CONCLUSION

Fiji and Vanuatu have joined other common law countries in endorsing the central idea that there are limits to a litigant's right to choose a court that can exercise jurisdiction in a dispute. To some extent, parties must ensure that the court is also, in one sense or another, *forum conveniens* for the determination of proceedings. This is more evident in the Fiji cases, but even in Vanuatu, where the more plaintiff-oriented doctrine of *Voth* has been accepted, the appropriateness of the court for hearing the proceedings is recognised as providing some limitation on the plaintiff's right to have it exercise jurisdiction. However, once it is accepted that the doctrine of *forum non conveniens* and the granting of anti-suit injunctions are aimed at realising procedural fairness for both parties, some need for reconsidering the subordinate principles stated in the Pacific island cases seems to arise.

Foremost amongst these is the statement of the foreign plaintiff rule in *Naylor v Kilham.* As applied in conjunction with the more neutral American doctrine of *forum non conveniens*, the greater deference shown to the citizen's choice of his home court probably tilts procedural advantages towards the citizen or resident plaintiff. This becomes even more pronounced in *Naylor* where, exceptionally, the court coupled the foreign plaintiff rule with the plaintiff-oriented principles of *Voth.* This marriage makes it difficult to envisage when a stay would ever be granted against a citizen or resident plaintiff. *Naylor* itself, a strong case of *lis pendens*, proves that. The same person was plaintiff in the United States and Vanuatu. The US proceedings were commenced and would be concluded first. The Vanuatu proceedings

144 See *Range II,* above n 127.

145 *Boissiere v Brockner & Co* (1889) 6 TLR 85.

precisely replicated one of the US claims. In any other case, all of these would lead to a stay. In *Naylor*, despite the court's assertion that the foreign plaintiff rule was subordinate to the question of vexation and oppression, it would appear that the plaintiff's Vanuatu residence trumped all else. In effect, *Naylor v Kilham* suggests that the resident plaintiff has little or no obligation to answer a claim that the chosen court was inappropriate.

Indeed, it is possible to suggest that the Pacific cases dilute the significance of *lis pendens* altogether. The circumstances of *Naylor*, if replicated anywhere else in the Commonwealth, would almost certainly lead to the granting of a stay or, at the least, the plaintiff being put to an election. In *Mount Kasi* also, the High Court of Fiji appears to have given no weight to the prior Western Australian proceedings.

The devaluation of *lis pendens* may be symptomatic of a more general reluctance in Pacific courts to do anything more than glance briefly at the foreign court or the proceedings before it. Practically, this means that the forum shopper has little obligation to prove what is so procedurally unsatisfactory about the foreign court or, in the stranger circumstances of *Translink Shipping*, the local court. However, as a matter of practice some comparison between the local and foreign courts must be made when considering the suitability of one or the other for trial. Even in the application of the *Voth* principles, which formally allow conditions before the foreign court to be ignored, Australian courts have been unable to avoid comparisons. Quite simply, a court is unlikely to consider itself a clearly inappropriate forum if no other court is available, and the procedural pros and cons of the foreign court will be relevant to the local court's assessment of its own appropriateness.[146] No one claims that this comparison allows the local court to compare the quality of its own substantive justice with that of the foreign court.[147] But the Pacific cases reveal a number of factors that are relevant to any decision on the appropriateness of one court or another. These include: the mere existence and amenability of the foreign court (*Translink Shipping*); whether parallel foreign proceedings have been brought by the plaintiff (*Naylor*) or the defendant (*Mount Kasi*); the point reached in the foreign proceedings (*Naylor*, *Mount Kasi*); the material purpose of the local proceedings (*Naylor*); the relative capacities of the local and foreign courts to give complete relief to all interested parties (*Mount Kasi*); the local court's ability to deal with the defendant (*Mount Kasi*); and the relative effectiveness of any local and foreign judgments (*Naylor*). For an anti-suit injunction, where real vexation and oppression from the foreign proceedings must be shown,

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146 Garnett, above n 31, 39; Gallacher, above n 23, 610.

147 See above n 33.

the appropriateness of the foreign court under its own or local rules should also be considered (*Mount Kasi*). In all of these cases it is perfectly understandable that, hearing novel points in interlocutory applications that require prompt decisions, under-resourced trial courts will overlook these considerations or give them a heterodox application. Nevertheless, it could be hoped that, when an appellate court in the Pacific comes to consider *forum non conveniens* or anti-suit injunctions at greater length, forum shopping will not be allowed without stronger guarantees that the litigation be conducted in a procedurally neutral setting.