FEDERAL COURT OF AUSTRALIA

King (Trustee), in the matter of Zetta Jet Pte Ltd v Linkage Access Limited

[2018] FCA 1979

File numbers:	VID 1157 of 2018 VID 770 of 2018
Judge:	**PERRAM J**
Date of judgment:	11 December 2018
Catchwords:	**PRACTICE AND PROCEDURE** – application for summary dismissal pursuant to *Federal Court Rules 2011* (Cth) r 26.01(1)(a) – application to strike out statement of claim – whether reasonable prospect of successfully prosecuting proceeding **CORPORATIONS** – *Corporations Act 2001* (Cth) s 588FF – whether plaintiff 'company' for purposes of s 588FF – whether *Cross-Border Insolvency Act 2008* (Cth) alters definition of company – whether UNCITRAL Model Law on Cross-Border Insolvency Art 23 merely standing rule – where plaintiff foreign company not carrying on business in Australia **PRACTICE AND PROCEDURE** – *Anshun* estoppel – whether reasonable for plaintiffs not to pursue s 588FF claim in earlier proceeding – where second respondent became registered owner of ship after determination of first proceeding **PRACTICE AND PROCEDURE** – application to re-open – whether proposed case capable of succeeding – whether plaintiffs should be permitted to re-open
Legislation:	*Corporations Act 2001* (Cth) ss 9, 21, 581, 588FF, 588FG *Cross-Border Insolvency Act 2008* (Cth) ss 6, 8, 17, 22 *Federal Court Act 1976* (Cth) s 37M *Federal Court (Corporations) Rules 2000* (Cth) Div 15A *Federal Court Rules 2011* (Cth) r 26.01 UNCITRAL Model Law on Cross-Border Insolvency Arts 11, 19, 21, 23, 28
Cases cited:	*Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57; 223 FCR 8 *Australian Competition and Consumer Commission v Valve*

	Corporation (No 3) [2016] FCA 196 *F.Y.D Investments Pty Ltd v Promptair Pty Ltd* [2017] FCA 1097 *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 *Johnson v Gore Wood & Co* [2002] 2 AC 1 *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; 147 CLR 589 *Rubin v Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236 *Solak v Registrar of Titles* [2011] VSCA 279; 33 VR 40 *UBS AG v Tyne* [2018] HCA 45 *Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2)* [2018] FCA 1130 *Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2)* [2018] FCAFC 132
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Solicitor for Linkage Access Limited and Dragon Pearl Limited:	Mills Oakley

ORDERS

VID 1157 of 2018

IN THE MATTER OF ZETTA JET PTE LTD (UEN 201529010W)

BETWEEN:	**JONATHAN D KING IN HIS CAPACITY AS THE FOREIGN REPRESENTATIVE OF ZETTA JET PTE LTD (UEN 201529010W)** First Plaintiff
	ZETTA JET PTE LTD (UEN 201529010W) Second Plaintiff
AND:	**LINKAGE ACCESS LIMITED** First Defendant
	DRAGON PEARL LIMITED Second Defendant

JUDGE:	**PERRAM J**
DATE OF ORDER:	**11 DECEMBER 2018**

THE COURT ORDERS THAT:

1. Judgment for the Defendants with costs.
2. The Plaintiffs pay the Defendants' costs of their interlocutory application of 20 September 2018.
3. The Plaintiffs' application for interim relief claimed in prayer one of their originating process filed on 14 September 2018 be dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

VID 770 of 2018

IN THE MATTER OF ZETTA JET PTE LTD (UEN 201529010W)

BETWEEN:	**JONATHAN D. KING IN HIS CAPACITY AS THE FOREIGN REPRESENTATIVE OF ZETTA JET PTE LTD (UEN 201529010W)** Plaintiff
AND:	**ZETTA JET PTE LTD (UEN 201529010W)** Defendant

IN THE INTERLOCUTORY APPLICATION:

BETWEEN:	**JONATHAN D. KING IN HIS CAPACITY AS THE FOREIGN REPRESENTATIVE OF ZETTA JET PTE LTD (UEN 201529010W)** Applicant
AND:	**LINKAGE ACCESS LIMITED** Respondent

JUDGE:	**PERRAM J**
DATE OF ORDER:	**11 DECEMBER 2018**

THE COURT ORDERS THAT:

1. The Plaintiff's amended interlocutory process filed on 30 July 2018 be dismissed with costs.
2. The Plaintiff pay the costs reserved in Order 19 made on 24 August 2018.
3. The injunction ordered in Order 9 of the orders of 12 September 2018, as extended by Order 2 of the orders of 8 October 2018, be continued until noon on 12 December 2018 on the Plaintiff proffering the usual undertaking as to damages.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

PERRAM J:

1. Introduction

1 This case concerns a luxury yacht named "Dragon Pearl" that was bought for AU$4,492,034.82. Mr King is the Chapter 7 Trustee of Zetta Jet Pte Ltd ('Zetta Jet'), a Singaporean entity subject to a Chapter 7 insolvency proceeding in the United States ('US Insolvency Proceeding'). Linkage Access Limited ('Linkage') is the current owner of the Dragon Pearl. Dragon Pearl Limited ('DPL') is its previous owner. Mr King alleges that the Dragon Pearl was bought by misappropriated funds of Zetta Jet and seeks a transfer of the Dragon Pearl to Zetta Jet.

2 This dispute has been subject to an unusually large number of proceedings in this Court which I will refer to as follows:

- 'First Maritime Proceeding' (VID1104/2017) which was filed on 13 October 2017 and was dismissed by Burley J on 7 June 2018: *Zetta Jet Pte. Ltd v The Ship "Dragon Pearl"* [2018] FCA 878;
- 'First Maritime Appeal' (VID706/2018) which was filed on 12 June 2018 and in which the Full Court dismissed an appeal from the First Maritime Proceeding on 18 June 2018: *Zetta Jet Pte Ltd v The Ship "Dragon Pearl"* [2018] FCAFC 99;
- 'Second Maritime Proceeding' (VID737/2018) which was filed on 18 June 2018 and was summarily dismissed by me on 31 July 2018: *Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2)* [2018] FCA 1130;
- 'Recognition Proceeding' (VID770/2018) which was filed on 28 June 2018 and in which on 12 September 2018 an interim injunction preventing the removal of the Dragon Pearl from Australian waters was granted and recognition orders made: *King, in the matter of Zetta Jet Pte Ltd* [2018] FCA 1932;
- 'Second Maritime Appeal' (VID927/2018) which was filed on 2 August 2018 and in which the Full Court dismissed an appeal from the Second Maritime Proceeding but upheld an appeal from the Recognition Proceeding on 16 August 2018: *Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2)* [2018] FCAFC 132; and
- 'Corporations Proceeding' (VID1157/2018) which was filed on 14 September 2018.

3 For the sake of completeness, the Second Maritime Appeal (and by extension the Second Maritime Proceeding) are subject to an application for special leave to appeal to the High Court.

4 Before this Court remain the Recognition Proceeding and the Corporations Proceeding. Mr King seeks to continue injunctive relief against the Dragon Pearl in both proceedings in order to prosecute the Corporations Proceeding. Linkage seeks summary dismissal of the Corporations Proceeding or to strike out the statement of claim filed in the Corporations Proceeding and, in any event, to discharge the injunction restraining the removal of the Dragon Pearl from Australian waters.

5 These reasons assume familiarity with the disposal of the Second Maritime Appeal: *Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2)* [2018] FCAFC 132.

6 On 19 July 2018, Mr King filed an interlocutory application in the Recognition Proceeding which sought urgent relief by way of injunction under Art 19 of the UNCITRAL Model Law on Cross-Border Insolvency ('Model Law') as contained in sch 1 to the *Cross-Border Insolvency Act 2008* (Cth) ('*CBI Act*'). The application was made under Art 19 because at that time the US Insolvency Proceeding had not been recognised. On 19 July 2018, I granted an interim injunction under Art 19 restraining Linkage from removing the Dragon Pearl from Australian waters until 6 pm on 25 July 2018. I further extended the injunction to 31 July 2018 at 5pm. On 31 July 2018, I dismissed the application for the injunction with costs: *Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2)* [2018] FCA 1130.

7 That order was set aside by the Full Court on 16 August 2018: *Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2)* [2018] FCAFC 132. The Full Court reinstated the injunction I had dissolved, remitted the amended interlocutory process of 19 July 2018 to me to determine and continued the injunction until that occurred.

8 On 12 September 2018 this Court recognised the US Insolvency proceeding in relation to Zetta Jet as a foreign non-main proceeding. Accordingly, the Art 19 injunction was discharged and I granted an injunction in the same terms under Art 21 of the Model Law. The Art 21 injunction had previously been sought by an interlocutory process filed by Mr King on 30 July 2018 in the Recognition Proceeding.

9 That interlocutory process now stands to be determined again and is the first application before the Court. Apart from that interim relief, no substantive allegations are made in the

Recognition Proceeding and the injunctive relief sought in it under the Model Law is sought only to preserve the subject matter of the Corporations Proceeding.

10 In the Corporations Proceeding Mr King and Zetta Jet sue DPL and Linkage over the money expended by Zetta Jet on the purchase of the Dragon Pearl. The claims made in the Corporations Proceeding began life as a document titled 'Summary of Substantive Claims Against Linkage Access Limited' filed on 20 July 2018 in the Recognition Proceeding.

11 On 24 August 2018 I ordered that in the event that the US Insolvency Proceeding was recognised that Mr King should commence a separate proceeding to vindicate that claim. On 14 September 2018, after the US Insolvency Proceeding had been recognised, the Plaintiffs then filed the Corporations Proceeding. Initially, it proceeded by way of an originating application supported by an affidavit annexing a proposed points of claim. On 8 October 2018 I ordered that a statement of claim be filed setting out the Plaintiffs' allegations as set out in the proposed points of claim. This was filed on 16 October 2018.

12 The Defendants now seek, by interlocutory process dated 20 September 2018, to dismiss that proceeding summarily or to strike out the statement of claim. Certain costs orders are sought too. Conversely, the Plaintiffs seek as interim relief in the originating process an injunction which is effectively the same as those sought and heretofore granted in the Recognition Proceeding.

13 The issues raised by the parties' duelling interlocutory applications are not quite the same. They do, however, overlap to this extent: if the Defendants are entitled to have the Corporations Proceeding dismissed then the Plaintiffs' claims for injunctions must also be dismissed. As will be seen, that is in fact what should happen.

14 The issues which arise are these:

(a) ***The Company Issue*****:** The relief that Zetta Jet seeks in the Corporations Proceeding is relief under s 588FF of the *Corporations Act 2001* (Cth) ('*Corporations Act*'). The Defendants say that the provision only applies to companies; that, as defined in s 9 of the *Corporations Act*, a foreign corporation which does not carry on business in Australia and is not registered as a foreign corporation is not a 'company' and hence that the proceeding should be dismissed. In response, the Plaintiffs say that the operation of these definitions has been affected by the *CBI Act*.

(b) ***The Anshun Estoppel Issue*:** The Defendants point to the First and Second Maritime Proceedings and submit that the Plaintiffs' claim under s 588FF should reasonably have been raised in those proceedings. Consequently, the Plaintiffs should not be permitted now to raise it in the Corporations Proceeding. The Plaintiffs, on the other hand, say that they could not have raised the s 588FF claim in those proceedings because the US Insolvency Proceeding had not yet been recognised by this Court prior to the dismissal of each proceeding. Consequently, Mr King had no standing to pursue such a claim prior to dismissal. Further, the Plaintiffs point out that Linkage did not have title to the Dragon Pearl prior to and as at 7 June 2018 when Burley J dismissed the First Maritime Proceeding.

(c) ***The Pleading Issues*:** The Defendants say that a claim under s 588FF cannot be brought against a person who was not a party to the impugned transaction if that person has not benefitted from the transaction, citing s 588FG(1)(a). Linkage then says that there is no evidence that it benefitted from the transaction. The Plaintiffs, on the other hand, say Linkage received a $4 million ship for US$1. The Defendants also deny the adequacy of the pleading of Part I of the statement of claim where a composite transaction has been alleged.

(d) ***The Reopening Application*:** After judgment in this matter had been reserved, the Plaintiffs sought to reopen their case to raise a contention that Zetta Jet did, in fact, carry on business in Australia. If that contention were allowed to be raised and were correct it would mean that Zetta Jet was a company for the purposes of s 588FF. On 7 November 2018, I dismissed that application with costs. In this final section, I give my reasons for that decision.

15 In summary, I conclude that:

- Zetta Jet is not a company for the purposes of s 588FF and the Plaintiffs' Corporations Proceeding should be summarily dismissed.
- There is, in any event, an *Anshun* estoppel barring the Plaintiffs from bringing the s 588FF claims against DPL which arises from the dismissal of the First Maritime Proceeding by Burley J. I would not, however, summarily dismiss the Corporations Proceeding against Linkage on the basis of an *Anshun* estoppel.
- I would not strike out the various claims made under the *Corporations Act* merely because of the manner in which they have been pleaded.

16 Accordingly, in the Corporations Proceeding, I dismiss the Plaintiffs' application for interim relief and I will order that there be judgment for the Defendants under *Federal Court Rules 2011* (Cth) r 26.01(1)(a) on the basis that the Plaintiffs have no reasonable prospects of successfully prosecuting the proceeding. The Defendants should also have their costs of the Corporations Proceeding. The Plaintiffs must pay the Defendants' costs of the application for summary judgment.

17 In the Recognition Proceeding I dismiss the Plaintiffs' amended interlocutory process dated 30 July 2018 with costs. This will include the costs previously reserved by Order 19 made on 24 August 2018. By Order 10 made by the Full Court on 16 August 2018 it will also include the costs of the appeal to that Court. In relation to this last matter no separate order is required.

2. The claims under s 588FF of the Corporations Act

18 The Defendants' principal submission is that the allegations made by the Plaintiffs in the statement of claim all arise under the *Corporations Act* and cannot be maintained because the relevant provisions under that Act do not apply to a foreign company such as Zetta Jet which is not registered here and which does not do business in Australia.

19 Each of the Plaintiffs' claims is for orders to be made under s 588FF of the Act. That provision is contained in Part 5.7B of the *Corporations Act*. It is not suggested that any of the events giving rise to the Plaintiffs' entitlement to relief under s 588FF occurred in Australia with the possible exception of the fact that the five payments made by Zetta Jet for the vessel were received by the shipwrights here. However, nothing turns for present purposes on whether the facts occurred in Australia or not. The Defendants' submission does not rest on notions of extra-territoriality. Rather, their submission is that s 588FF is not engaged because, in terms, it only applies to companies and Zetta Jet is not, as that expression is defined and applied in Part 5.7B of the *Corporations Act*, a company.

20 The problem may be illustrated by the opening words of s 588FF(1):

> '588FF Courts may make orders about voidable transactions
>
> (1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:
>
> …'

21 The application of s 588FF turns on the presence of a 'transaction of the company'. Unless the contrary intention appears, 'company' is defined in s 9 to mean a company registered under the Act and also includes, specifically for the purposes of Part 5.7B, a 'Part 5.7 body'. Section 588FF and the associated provisions relied upon by the Plaintiffs are all contained in Part 5.7B so it is necessary also to have regard to the concept of a 'Part 5.7 body'. That expression is defined in s 9 to include, relevantly, a 'registerable body' that is a foreign company (as defined in s 9) with one of two characteristics: it must either be registered under Division 2 of Part 5B.2 or, if not so registered, it must carry on business in Australia (an expression defined in s 21).

22 Zetta Jet is incorporated under the laws of Singapore. It is, therefore, not a company registered under the Act but rather a foreign company. Further, it is agreed that it is not registered under Division 2 of Part 5B.2. At the hearing, it was also common ground that Zetta Jet did not carry on business in Australia. After the hearing, the Plaintiffs sought to reopen so as to resile from this position but, as I have said, I did not permit that to occur.

23 Consequently, viewed in isolation, I accept the Defendants' submission that the purchase of the Dragon Pearl could not be a transaction of the company within the meaning of s 588FF because Zetta Jet was not relevantly a 'company' under s 9.

24 In response the Plaintiffs invoked the *CBI Act*. The argument went as follows. On 12 September 2018, this Court made orders in the Recognition Proceeding recognising the proceeding opened in the United States Bankruptcy Court for the Central District of California, Los Angeles Division, under which, relevantly, Mr King was appointed Chapter 7 trustee for Zetta Jet.

25 By s 6 of the *CBI Act* the Model Law has the force of law in Australia 'with the modification set out in this Part'. The relevant provision of the Model Law is Art 23 but it is subject to modifications contained in s 17 of the *CBI Act*. Read together, their effect is that Art 23 applies as an Australian law as if it said, relevantly:

> 'Upon recognition of a foreign [insolvency] proceeding, the foreign representative has standing to initiate actions arising under the provisions of Division 2 of Part 5.7B of the *Corporations Act 2001* (Cth), with appropriate changes, as if the foreign [insolvency] proceeding in relation to a 'company' was an Australian [insolvency] proceeding in relation to a 'company'.'

26 What Art 23 appears to do is to give Mr King standing to pursue actions under Division 2 of Part 5.7B (which includes actions pursuant to s 588FF). The word 'standing' in Art 23 suggests

that it is a standing rule. Without s 17, the better view is that only the liquidator of a company appointed in the jurisdiction in which a company is incorporated has standing to pursue proceedings before Australian courts: see *Rubin v Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236 at 252 [13], 256 [29]-[31]. Since Zetta Jet is incorporated in Singapore and Mr King was appointed in the United States this would mean that he would have no standing before Australian courts without the Model Law. On that view, Art 23 solves that problem.

27 But does Art 23 do any more than to give Mr King standing in Australian courts? The Plaintiffs submit that the effect of Art 23 is broader and is to expand the operation of s 588FF so that it now applies to the transactions of Zetta Jet notwithstanding that it is not a company within the meaning of s 9.

28 There is no doubt that prior to the recognition order on 12 September 2018, s 588FF could not have been invoked with respect to Zetta Jet even by a liquidator appointed here (assuming that could be done). The effect of the Plaintiffs' submission, if correct, is to alter the substantive insolvency law of Australia so that voidable transaction claims of the kind referred to in Division 2 of Part 5.7B can now be brought with respect to the affairs of foreign corporations which do not conduct business in Australia and which are not registered here either. This takes Art 23 well beyond being a standing rule.

29 The Plaintiffs put their argument as follows. *First*, s 22 of the *CBI Act* makes provision for the interaction between it and the *Corporations Act* by providing, relevantly, that the Model Law prevails over Part 5.7 in the event of any inconsistency. *Secondly*, the better reading of Art 23 is that it is designed to create a substantive remedy. If not, there would appear to be no point to s 17 of the *CBI Act* if a foreign liquidator's standing to pursue relief under s 588FF of the *Corporations Act* were limited to, *inter alia*, Part 5.7 bodies. For example, if it were merely a standing rule then it would be quite unnecessary since the same outcome could be achieved by appointing a local liquidator in Australia. *Thirdly*, this view was said to be supported by certain passages in the explanatory memorandum which accompanied the passage of the *CBI Act*. The passages were at [2.66] and [2.67]:

> '2.66 The procedural standing conferred by article 23 extends only to the actions that are available to the local insolvency administrator in the context of an insolvency proceeding, and the article does not equate the foreign representative with individual creditors who may have similar rights under a different set of conditions. Such actions of individual creditors fall outside the scope of article 23.
>
> 2.67 The Model law expressly provides that a foreign representative has standing

> to initiate actions to avoid or otherwise render ineffective legal acts detrimental to creditors. The provision is drafted narrowly in that it does not create any substantive right regarding such actions and also does not provide any solution involving conflict of laws. The effect of the provision is that a foreign representative is not prevented from initiating such actions by the sole fact that the foreign representative is not the insolvency administrator appointed in Australia.'

30 *Fourthly*, the Model Law used the expression 'debtor' to describe the insolvent entities or persons to whom it applied. It did not, in that sense, distinguish between bankrupt individuals and insolvent bodies corporate and between different types of companies (e.g. corporations, Part 5.7 bodies).

31 *Fifthly*, reliance was placed on Art 11 which provides that:

> 'A foreign representative is entitled to apply to commence a proceeding under [identify laws of the enacting State relating to insolvency] if the conditions for commencing such a proceeding are otherwise met.'

32 Under s 8 of the *CBI Act*, the relevant laws referred to in Art 11 were proclaimed to be Chapter 5 of the *Corporations Act* other than Parts 5.2 and 5.4A. Hence, so that argument ran, s 588FF was a provision to which Art 11 applied and it authorised Mr King to commence the current proceeding.

33 *Finally*, the Plaintiffs drew attention to the differential way Art 23 operated in the case (as here) of a foreign non-main proceeding and Art 28 in the case of a foreign main proceeding. Essentially, the point was that under Art 23 the Court had to be satisfied that the action related to assets that under local law should be administered in the foreign non-main proceeding. By contrast, under Art 28 the assets had to be in the jurisdiction. Art 28 provides:

> 'Article 28 – Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] after recognition of a foreign main proceeding
>
> After recognition of a foreign main proceeding, a proceeding under [identify laws of the enacting State relating to insolvency] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.'

34 The overall effect of the above arguments was that, in the Plaintiffs' submission, 'transaction of the company' in s 588FF should be read as 'transaction of the debtor'. In this case, Zetta Jet

would be a foreign debtor and thus would be able to avail itself of the voidable transaction provisions.

35 I do not think any of these arguments is persuasive. Art 23 says it is a rule about standing. As a matter of ordinary language, I do not see how one can use a statement about standing to justify a substantive legal effect. The passages in the explanatory memorandum put forward by the Plaintiffs do not assist. Rather, they demonstrate the procedural nature of the article. I accept that the commentary on Art 23 in the explanatory memorandum appears in Chapter 2 of the explanatory memorandum which is entitled 'The UNCITRAL Model Law on Cross-Border Insolvency' and is part of a commentary on the Model Law rather than the *CBI Act*. But this is of no moment. Chapter 1 of the explanatory memorandum, which is concerned with the provisions of the *CBI Act*, contains equally clear statements. On the topic of Art 23 it says this:

> '1.29 Article 23 of the Model Law provides for a foreign representative having standing to initiate actions to recover assets when actions have been taken that are detrimental to the interests of creditors. Under Australian law, these are the voidable transactions provisions in Division 2 of Part 5.7B of the Corporations Act and sections 120, 121, 121A, 122, 128B, 128C and Division 4A of Part VI of the Bankruptcy Act.
>
> 1.30 The provisions listed for the purposes of article 23 of the Model Law relate to allowing for the reversal or avoidance of transactions that a debtor has entered into that prejudice the interests of creditors. *The effect of enacting article 23 of the Model Law is that the foreign representative is not precluded from commencing such actions by the sole fact that the foreign representative is not the insolvency representative approved in Australia.*
>
> 1.31 Under the Division 2 of Part 5.7B of the Corporations Act the liquidator of a company is given standing to make an application in relation to voidable transactions. It is intended that the foreign representative will have the same standing as if they were a liquidator in relation to all provisions within Division 2 of part 5.7B of the Corporations Act. The Bankruptcy Act provides for the trustee having certain rights in relation to transactions covered by the relevant sections. The foreign representative is to have the same rights as if they were the trustee in relation to those transactions.'
>
> (emphasis added)

36 This directly contradicts the Plaintiffs' argument as does, in my opinion, the plain text of Art 23. The various contextual matters pointed to by the Plaintiffs do not alter this conclusion. It does not matter, therefore, that s 22 of the *CBI Act* provides for the Model Law to prevail over Part 5.7 of the *Corporations Act* in case of inconsistency because I do not apprehend any inconsistency. Nor do I accept that Art 23 is pointless unless read substantively. It is true that one might achieve a similar outcome by appointing a local liquidator but that would require

the opening of fresh insolvency proceedings. This is what the enactment of the Model Law was intended to avoid.

37 Likewise I can perceive no merit in the suggestion that somehow the Plaintiffs' argument is advanced because the Model Law treats personal and corporate insolvencies through the same expression 'the debtor'. This merely reflects the fact that the Model Law deals with both topics. Nor do I see anything in the fact that Art 23 and Art 28 have different approaches to whether assets need to be in the jurisdiction. Finally, I do not think that Art 11 assists the Plaintiffs because it is explicit in only applying where the conditions for the commencement of such a proceeding have been met. The Defendants' point here is that they have not.

38 My view that Art 23 does not operate substantively is supported by the commentary contained in the *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* (UN 2014) which at [185] says this:

> 'Article 23 is drafted narrowly. To the extent that the enacting State authorizes particular actions to be taken by a foreign representative, they may be taken only if an insolvency representative within the enacting State could have brought those proceedings. No substantive rights are created by article 23, nor are conflict-of-laws rules stated; in each case it will be a question of looking at the national conflict-of-laws rule to determine whether any proceeding of the type contemplated under article 23 can properly proceed.'

39 This publication is a legitimate material for interpreting Art 23: *Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57; 223 FCR 8 at 18 [41]. To this the Plaintiffs rejoined that those remarks were commentary about Art 23 whereas the present question is about the operation of s 17 of the *CBI Act*. I accept that is so but I do not think that assists the Plaintiffs. The Parliament intended to give effect to Art 23.

40 It follows that the transactions which the Plaintiffs now seek to impugn cannot be transactions of the company under s 588FF. Consequently, the Plaintiffs' new case based on s 588FF cannot succeed under any circumstance and there are, in the language of r 26.01(1)(a) of the *Federal Court Rules 2011* (Cth), no reasonable prospects of the Plaintiffs prosecuting the proceeding. The Defendants are, therefore, entitled to the summary judgment they seek.

3. The Anshun Estoppel Issue

41 It is strictly unnecessary in light of that conclusion to consider the alternative grounds advanced by the Defendants as to why they should have summary judgment in the Corporations

Proceeding. However, out of deference to the detailed submission advanced by the parties and, in relation to the *Anshun* estoppel issues, because the Full Court remitted that issue to me to decide, it is appropriate that I deal with it.

42 To understand the Defendants' submission about this it is necessary to grasp the extensive procedural history of this unusual litigation. On 13 October 2017, the Plaintiffs began the First Maritime Proceeding and shortly afterward, on 31 October 2017, filed a statement of claim. The First Maritime Proceeding concerned a maritime claim in which the Plaintiffs asserted an entitlement to an *in rem* interest in the Dragon Pearl arising from the actions of Mr Cassidy.

43 Two plaintiffs were named, Zetta Jet and Mr King. The Dragon Pearl was the named defendant. DPL entered an appearance pursuant to r 23 of the *Admiralty Rules 1988* (Cth). On 20 November 2017, DPL filed a defence in which it put in issue Mr King's standing to bring the proceeding; that is to say, Mr King's standing was an issue from very near the outset of the First Maritime Proceeding.

44 The standing problem was a minor one, however, or perhaps it would be more accurate to say that it should have been a minor one. It could readily have been solved by Mr King promptly applying for recognition of the US Insolvency Proceeding under the *CBI Act*. That he did not is surprising given that the US Bankruptcy Court explicitly authorised him to seek recognition under the Model Law in Australia as long ago as 11 December 2017.

45 Further, it is apparent that Mr King understood the significance of recognition under the Model Law because almost immediately after that date, on 13 December 2018, he sought recognition from the High Court of Singapore and received it. Just why Mr King, in that circumstance, did not seek recognition in Australia is one of the enduring mysteries of this litigation. Even more difficult to understand is his refusal to accept that recognition was necessary when this was very plainly pointed out to him. For example, on 4 April 2018, DPL sought summary judgment against the Plaintiffs on precisely the basis that Mr King lacked standing. That application was returnable before the then docket judge, Burley J, on 12 April 2018 at which time Mr King's then counsel sought to explain why recognition was not necessary.

46 The Defendants submitted that the Plaintiffs' written submissions on the summary judgment application in the First Maritime Proceeding showed that the *Corporations Act* was central to the issues then being argued. As I apprehended it, the gravamen of this submission was to add ballast to the Defendants' later submission that the claims under the *Corporations Act* should

have been brought forward at an earlier time. Without passing on that issue at this stage, I do not think that the references to the *Corporations Act* in these earlier submissions assist. The submissions concerned s 581(2)(a) which deals with assistance in matters involving foreign insolvencies. It has little to do with, for example, s 588FF which is the claim now being asserted.

47 In fact, the application for summary judgment on the basis of Mr King's lack of standing did not go altogether ignored by the Plaintiffs. Whilst maintaining their position that it was unnecessary, the Plaintiffs nevertheless made an application for recognition on 28 May 2018. That was eight days before the matter was listed for trial before Burley J. The application was made in the First Maritime Proceeding by means of an interlocutory process and was not brought in accordance with Div 15A of the *Federal Court (Corporations) Rules 2000* (Cth). This is not a small matter. For example, an application for recognition has to be advertised and interested parties (such as creditors) given a chance to have their say. That did not occur. Ultimately, this non-complying application was made returnable on 30 May 2018, six days before the trial.

48 At trial, in circumstances which have been exhaustively stated elsewhere, the Plaintiffs did not pursue their case and it was dismissed (the non-complying recognition application nevertheless remained unresolved). It is not necessary to revisit those events save but to note two matters. *First*, the Full Court held in the Second Maritime Appeal that the merits of the then proposed s 588FF case 'must be evaluated on the basis that there has been a final adjudication that neither Zetta Jet nor Mr King as trustee had a claim *in rem* to the vessel at the time it was owned by [DPL]': *Zetta Jet Pte Ltd v The Ship "The Dragon Pearl" (No 2)* [2018] FCAFC 132 at [55]. *Secondly*, at no time did those appearing at the trial of the First Maritime Proceeding formulate any kind of case involving an allegation under s 588FF.

49 To foreshadow the debate which lies ahead, the question is whether it was reasonable for the Plaintiffs not to have advanced the s 588FF case in the First Maritime Proceeding because they could not do so in the circumstance where the US Insolvency Proceeding had not yet been recognised under the Model Law. The Defendants say, by contrast, that in assessing what is reasonable one must bring to account the Plaintiffs' failure to seek recognition under the Model Law in a timely fashion. The Plaintiffs submit that that is irrelevant and that the only fact which matters is that they could not bring the claim under s 588FF because the US Insolvency Proceeding had not yet been recognised under the Model Law.

50 Following the dismissal of the First Maritime Proceeding by Burley J, the Plaintiffs appealed to the Full Court which dismissed the appeal on 18 June 2018: *Zetta Jet Pte Ltd v The Ship "Dragon Pearl"* [2018] FCAFC 99. Shortly after the Full Court judgment was delivered, DPL transferred title to the Dragon Pearl to Linkage. The same afternoon the Plaintiffs commenced the Second Maritime Proceeding by filing a writ which was materially identical to the writ in the First Maritime Proceeding. An application for the arrest of the vessel in the Second Maritime Proceeding came before Middleton J on the afternoon of 19 June 2018 but his Honour declined to re-arrest the Dragon Pearl: *Zetta Jet Pte Ltd v The Ship "Dragon Pearl"* [2018] FCA 981. The proceeding was then docketed to me.

51 At this point, the Plaintiffs still made no claim under s 588FF.

52 On 28 June 2018, the Plaintiffs filed a statement of claim in the Second Maritime Proceeding which pleaded the case broadly along the lines of a claim under *Barnes v Addy* (1874) LR 9 Ch App 244. No claim was made under the *Corporations Act*.

53 On 28 June 2018, Linkage applied for summary judgment in the Second Maritime Proceeding. The same day Mr King commenced the Recognition Proceeding which, for the first time, complied with Div 15A the *Federal Court (Corporations) Rules 2000* (Cth). On 18 July 2018, the Plaintiffs applied in the Recognition Proceeding for an injunction under Art 19 of the Model Law to restrain the removal of the vessel from Australian waters pending determination of Mr King's recognition application which I granted on an interim basis on 19 July 2018. On 19 July 2018, I directed the Plaintiffs in the Recognition Proceeding to serve a summary of their substantive claims which they did on 20 July 2018. That document contained, for the first time, a reference to a claim under the *Corporations Act*.

54 On 27 July 2018, I heard the Defendants' summary judgment application in the Second Maritime Proceeding and the Plaintiffs' injunction application in the Recognition Proceeding. I found that the Plaintiffs' claims in the Second Maritime Proceeding were barred by a *res judicata* arising from the First Maritime Proceeding and I dismissed the proceeding. In the application for an injunction in the Recognition Proceeding which I dismissed I did not, however, deal with the foreshadowed s 588FF claim which had yet to be formally pleaded. On 16 August 2018, the Full Court upheld my conclusions on *res judicata* in the Second Maritime Proceeding but remitted to me to consider whether the s 588FF claim informally foreshadowed in the Recognition Proceeding provided an arguable basis for the injunction together with

Linkage's argument that the Plaintiffs were prevented from bringing that claim by an *Anshun* estoppel.

55 On 24 August 2018 I directed the Plaintiffs to provide points of claim to give some formal expression to what had been theretofore merely a conjectural assertion of the s 588FF claim as an aspect of the claim for the injunction. I also directed that in the event that orders were made recognising the US Insolvency Proceeding that the Plaintiffs file a new proceeding making that case formally by filing the points of claim. Recognition orders were made on 12 September 2018 and a fresh proceeding, the Corporations Proceeding, was filed on 14 September 2018 supported by an affidavit annexing a 'Proposed Points of Claim' (although I note that order 8 of 24 August 2018 required the document to be filed). At the hearing of the present application, I directed the Plaintiffs to file a statement of claim. This was done on 16 October 2018. I will deal with the Defendants' present interlocutory application as if it were directed at the statement of claim in the Corporations Proceeding.

56 The first issue is whether Linkage is entitled to rely upon an *Anshun* estoppel arising either from the First Maritime Proceeding or the Second Maritime Proceeding. The second issue is whether DPL can rely upon an *Anshun* estoppel arising from the First Maritime Proceeding.

57 The High Court's decision in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; 147 CLR 589 at 598 and 602 establishes that a party may be prevented from litigating an issue which, even if not determined in an earlier suit, was one that properly belonged to the subject matter of that suit if the party, exercising reasonable diligence, ought to have raised that issue.

58 As to the First Maritime Proceeding it may be observed that Linkage was not a party to that case and, since it did not come into ownership of the vessel until the determination of that proceeding (including the First Maritime Appeal), it could never have been a party to it. The fact that Linkage was not the owner of the vessel at the time of the First Maritime Proceeding might suggest that it was not unreasonable for the Plaintiffs not to have joined it to the First Maritime Proceeding. On this view, it could not be said that it was unreasonable for the Plaintiffs not to have sued Linkage under s 588FF at that time. That view of the problem characterises the current suit against Linkage as relating purely to its personality and in which its ownership of the vessel is merely a collateral matter. Another view, however, is that the current suit against Linkage under s 588FF only emerges out of the fact that it is the owner of the vessel, i.e. Linkage is currently a party in the same capacity that DPL was at the time of the First Maritime Proceeding.

59 The view one takes of that matter affects the availability of an *Anshun* estoppel. If, in truth, the case against Linkage under s 588FF only arises because it is the vessel's owner then it may relevant to ask whether the Plaintiffs ought reasonably to have raised the s 588FF claim against DPL in the First Maritime Proceeding as an *in personam* claim. If the answer to that question is 'yes' then there may be much to be said for the view that an *Anshun* estoppel is available. There is authority for the proposition that a defendant who is sued in the same capacity as a previous defendant can raise a plea of issue estoppel: *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 32 per Lord Bingham, quoting *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 at 515. It may be that the availability of the plea turns upon identifying some feature of the second suit which is inconsistent with the earlier determination (see, e.g., *Solak v Registrar of Titles* [2011] VSCA 279; 33 VR 40 at 55 [70].

60 To my mind, the question of whether Linkage is being sued because it is the owner of the vessel or whether it is being sued and happens to be the owner of the vessel is not free from doubt. For example, I think there may be some doubt as to whether, if the s 588FF claim against Linkage should succeed, this would necessarily be formally inconsistent with the outcome of the First Maritime Proceeding which stands for the proposition that DPL was the lawful owner of the vessel. On this view, the claim under s 588FF takes as its point of departure the fact that DPL was the owner of the vessel and, rather than contradicting that claim by the assertion of prior legal entitlements, seeks to unwind that ownership by subsequent curial order. On the other hand, if one asks oneself whether Linkage would be involved in this litigation if it had never owned the vessel then the answer would appear to be 'no' and this in turn would suggest that it ought to be able to rely upon the defence.

61 Given the summary nature of the present application, had this issue arisen I would not have prevented the Plaintiffs' case against Linkage proceeding to trial on the basis of an *Anshun* estoppel. In particular, I have in mind that the final form of the s 588FF relief actually granted may impact on some of these issues, especially those relating to consistency, and accordingly whether an *Anshun* estoppel would be made out. The defence would need to be run at trial.

62 Linkage also submitted that an *Anshun* estoppel arose from the Second Maritime Proceeding. It will be recalled that in that case Linkage had entered an appearance. It is not self-evident to me than an *Anshun* estoppel is available where the first proceeding has been determined without a trial. There is, however, authority for the proposition that it is available when the first proceeding has been compromised: *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 32-33

per Lord Bingham. Recently the High Court has held that the discontinuance of an earlier proceeding may make a subsequent proceeding an abuse of process: *UBS AG v Tyne* [2018] HCA 45. The *Anshun* doctrine and notions of abuse of process are closely related.

63 Although I am not aware of any direct authority on the application of *Anshun* where an earlier proceeding has been summarily dismissed, I propose to proceed on the assumption that the doctrine is available in that situation. Since the s 588FF claims could reasonably have been raised against DPL in the First Maritime Proceeding (as discussed below), it is difficult to see why the same is not true of the Second Maritime Proceeding against Linkage. That ought to lead one to the straightforward conclusion that an *Anshun* estoppel is available.

64 Matters are complicated in this case, however, by the fact that there is an argument available that the Plaintiffs *did* attempt to raise the s 588FF claims in the Second Maritime Proceeding. Whilst the claims were not formally pleaded prior to summary dismissal they were certainly alluded to in the concurrently heard Recognition Proceeding. The Plaintiffs were prevented until 12 September 2018, when the US Insolvency Proceeding was recognised, from amending to add the s 588FF case because Mr King lacked standing. Two views of this disability are available. The first is that in assessing what the Plaintiffs could reasonably have done in the Second Maritime Proceeding one should bring to account their procedural shortcomings in the First Maritime Proceeding. On this view, the Plaintiffs had failed to bring a timely recognition application in the First Maritime Proceeding. It would follow that they also failed unreasonably, therefore, to bring that application in the Second Maritime Proceeding. On that view, their inability to amend to add claims under s 588FF to the Second Maritime Proceeding would not be seen as excusing their failure to raise the s 588FF claim more promptly.

65 The second view, which I favour, is that in assessing what could reasonably have been raised in the Second Maritime Proceeding, one takes as given facts which had occurred up until that proceeding was commenced. On that view, the inquiry is into what could reasonably be done in that proceeding. Viewed from that perspective, the Plaintiffs acted reasonably because recognition was sought quite quickly after the Second Maritime Proceeding was commenced.

66 Because this issue is not dispositive for the present application (on the view I take of the 'company' point in §2 above) I will not explore this point further. Were it to matter, I would prefer the second view. Unlike the *Anshun* estoppel issues arising from the First Maritime Proceeding, I do not think that the trial of the action would or might affect this argument.

Consequently, I would not accept that Linkage can rely upon an *Anshun* estoppel arising from the Second Maritime Proceeding.

67 It follows that Linkage is not entitled to summary relief on the basis of an *Anshun* estoppel against the Plaintiffs arising from either the First or Second Maritime Proceeding although for somewhat different reasons.

68 I do accept, on the other hand, that the Plaintiffs cannot now pursue the s 588FF claim against DPL because an *Anshun* estoppel arises in its favour from the First Maritime Proceeding. The only matter submitted to thwart that conclusion was a submission that it was reasonable for the Plaintiffs not to sue DPL under s 588FF until the US Insolvency Proceeding was recognised on 12 September 2018.

69 The submission has little merit. It was the Plaintiffs who controlled the timing of the recognition application. The time for Mr King to seek recognition was shortly after the US Bankruptcy Court authorised him to do so last December. It was certainly well in advance of the trial before Burley J. No real explanation has ever been given to this Court as to why Mr King refused for so long to take this straightforward and obvious step. I do not accept, therefore, that the s 588FF issue could not reasonably have been raised in the First Maritime Proceeding. It could have been raised by the simple expedient of Mr King seeking recognition under the Model Law at a far earlier time. He alone controlled the timing of that application.

70 Consequently, I conclude that DPL is entitled to plead the dismissal of the First Maritime Proceeding in bar to the claims under s 588FF now made in the Corporations Proceeding. For completeness, I would note that it was not suggested that there was any issue apart from the absence of recognition orders which bore on the reasonableness of the Plaintiffs' action in not pursuing the claim in the First Maritime Proceeding.

4. The Pleading Issues

71 The Defendants alternatively sought to strike out the statement of claim by raising some discrete pleading issues about the manner in which the Plaintiffs had pleaded their case in the Corporations Proceeding. This issue matured during the hearing. Initially the Plaintiffs relied upon the proposed point of claim served but not filed in the Corporations Proceeding. At the hearing, the Defendants criticised the use of a points of claim and sought to compel the Plaintiffs to file a statement of claim. Coincidentally, Dr Bigos, for the Plaintiffs, explained some aspects of the actions under the *Corporations Act* in ways which went beyond the points

of claim. I saw force in the Defendants' criticism and also in the desirability of having the Plaintiffs' case (as now explained by Dr Bigos) reduced to writing. At the hearing on 8 October 2018 I directed, therefore, the Plaintiffs file a statement of claim which set out the claims made in a fully pleaded fashion in the Corporations Proceeding. This was filed on 16 October 2018.

72 The Statement of Claim pleads four claims under the *Corporations Act.* The first of these is in Part F. It contains a set of allegations about the five payments made to the shipwright Maritimo by Zetta Jet in respect of the Dragon Pearl. The five payments are alleged to have been as follows:

18 April 2016	AU$20,000
31 May 2016	AU$549,018.87
31 August 2016	AU$910,031.45
30 September 2016	AU$910,031.45
16 December 2016	AU$2,102,953.05

73 The pleading does not allege that Zetta Jet itself bought the vessel. Instead, it is alleged that Mr Cassidy entered into a written contract for the purchase of the Dragon Pearl for $3,660,125.82 (later varied to AU$4,492,034.82 payable by instalments), i.e., the agreement was with him not Zetta Jet.

74 Part F of the pleading alleges that the payments made by Zetta Jet to Maritimo constituted an unreasonable director-related transaction of Zetta Jet within the meaning of s 588FDA and ought to be set aside. It is also said that Linkage or DPL (that latter of which received the vessel as the nominee or representative of Mr Cassidy) should be directed to pay Zetta Jet an amount representing the benefits they have received because of the transaction.

75 For its part, Linkage submits that it has available to it the defence conferred by s 588FG(1). It provides:

> '588FG Transaction not voidable as against certain persons
>
> (1) A court is not to make under section 588FF an order materially prejudicing a right or interest of a person other than a party to the transaction if it is proved that:
>
> (a) the person received no benefit because of the transaction; or
>
> (b) in relation to each benefit that the person received because of the transaction:
>
> (i) the person received the benefit in good faith; and
>
> (ii) at the time when the person received the benefit:

(A) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and

(B) a reasonable person in the person's circumstances would have had no such grounds for so suspecting.

…'

76 Linkage submits that it received no benefit because of the transaction. The transaction is pleaded to be the payments by Zetta Jet to Maritimo. It says that it did not exist at the time of the transaction and could not have benefited from it. In particular, the payments were made between April and December 2016 whereas Linkage was not incorporated until 22 August 2017.

77 In terms of s 588FG(1), I accept Linkage's submission that it was not a party to the transaction constituted by the payments. However, its submission is that it has a defence under s 588FG(1)(a) and that requires it to demonstrate that it has not received any benefit because of those transactions. I am unpersuaded, at this stage, that Linkage's defence on that basis is so likely to succeed at trial that the Plaintiffs' case should be peremptorily terminated. As the Plaintiffs pointed out, the bare facts appear to be:

(a) Zetta Jet paid Maritimo AU$4,492,034.82;

(b) this was in satisfaction of Mr Cassidy's obligation to pay for the Dragon Pearl;

(c) there was no benefit for Zetta Jet in this and it was not authorised;

(d) DPL acquired the ship without paying any money for it; and

(e) Linkage acquired the vessel from DPL for US$1 and other unidentified consideration.

78 The Defendants say these transactions can be explained and are innocent. Maybe so. It suffices to say that I would regard the issues of whether Linkage has benefitted from the taking of the Dragon Pearl as worthy of trial. Consequently, I do not accept that its defence under s 588FG(1) must inevitably succeed.

79 The conclusion disposes of the Defendant's argument in relation to Part F of the proposed statement of claim. The same reasoning also applies to Parts G and H.

80 The Defendant's next objection was to Part I of the pleading. The allegation in that part is as follows. The pleader points to three, heretofore separate, transactions and contends that they

may be viewed as a composite transaction. It is then said that this composite transaction was uncommercial. The three transactions are:

(1) the transaction between Zetta Jet and Maritimo under which Zetta Jet paid Maritimo between April and December 2016 and thereby allowed Mr Cassidy to complete the purchase of the Dragon Pearl;

(2) the transaction between Maritimo and DPL under which Maritimo transferred title to the Dragon Pearl to DPL on 5 December 2016; and

(3) the transaction between DPL and Linkage on 18 June 2018 under which DPL transferred title to Linkage for US$1.

81 At ¶68 it is pleaded that these three transactions taken together themselves constituted a transaction, that is to say, a composite transaction. Extensive particulars are provided for the allegation of the composite transaction. They are as follows:

> ‘PARTICULARS
>
> The matters referred to in paragraphs 13 to 16 and 20, 23, 27, 29, 31, 36, 38, 40, 43 and 45 above, looked at in their totality, were a series of events in a course of dealings initiated by Cassidy with the common purpose, aim and/or effect of (i) moving assets away from Zetta Jet and into other entities associated with Cassidy or Wu Kebo or both, and (ii) depriving Zetta Jet and its creditors of the assets.
>
> There were no benefits to Zetta Jet from the transaction because it made payments for which it received nothing in return. There was a detriment to Zetta Jet from the transaction, as the effect of the payments was to diminish Zetta Jet's assets. The transaction conferred benefits on entities associated with Cassidy or Wu Kebo, including DPL and Linkage, to which they would not have been otherwise entitled, namely obtaining ownership of the Ship. As set out in paragraph 22 above, Wu Kebo is associated with Du Yan, NT, DPL and Linkage. The benefit to Wu Kebo was that he (or his associates) received the value of the Ship (through the transfer of the shares in DPL to Du Yan), and has retained the value of the Ship (through its transfer from DPL to Linkage).
>
> Although Cassidy is not named as a director or shareholder of Linkage, it may be inferred that Cassidy and Linkage are associated having regard to, inter alia, (i) the consideration for the transfer of US$1; (ii) the timing of the transfer, which was half-an-hour after dismissal of the appeal by the Full Federal Court in VID 706/2018; (iii) their use of the same law firms (Holman Fenwick in Hong Kong and Mills Oakley in Sydney); (iv) the participation of Linkage's director in supporting an application by New Target Investments Ltd (a company to which Cassidy was purportedly indebted) to delay the US bankruptcy proceeding in relation to Zetta Jet; (v) the misappropriation of Zetta Jet's funds to acquire the Ship as described in paragraph 18 above; (vi) the submissions made by Mills Oakley (which previously acted for DPL and now acts for Linkage), in the context of the Plaintiffs' application for injunctive relief, that the owner of the Ship has been unable to use it since its arrest; (vii) the admission in paragraph 32 of the affidavit of Maurice Lynch dated 19 September 2018 filed in this proceeding, which quotes Henry Fung of Holman Fenwick Willan as stating that NT (Wu Kebo's

> company), which through Du Yan controlled DPL, wished to and did transfer the Ship to a new 'clean' company controlled by it in case there were any claims against DPL, whether by Cassidy or third parties; (viii) the statements in the email from Catherine Smith of Holman Fenwick Wilson sent on 18 June 2018 at 6:57am and in the email from Catherine Smith sent on 12 June 2018 at 7:27am that the designated persons / authorised representatives of the Ship are Henry Fung and Fiona Chow, and they would not change, and would continue to be the designated persons / authorised representatives of Linkage (pages 169.3 and 169.17 further folder of documents tendered by the Plaintiffs at the hearing on 8 October 2018).
>
> Further particulars may be provided after discovery.'

82 The particulars pick up earlier allegations in the pleading. These allegations are not straightforward. They begin with the transfer to DPL on 5 December 2016 following the payment by Zetta Jet of the purchase price. At this time Mr Cassidy was the owner and controller of DPL. Next there was a transfer of the shares in DPL to a Chinese actor, Ms Du Yan, on 28 September 2017 for US$1. The reasons Mr Cassidy would transfer his ownership of the Dragon Pearl via DPL to a Chinese actor are not at once obvious (although, given the other elements of this litigation, this curiosity can hardly be described as surprising either). The answer appears to be that Ms Du Yan is an associate of a Hong Kong businessman, Mr Wu Kebo, and ownership of DPL is to be seen as having something to do with him.

83 Mr Wu Kebo and Mr Cassidy were connected by a guarantee which Mr Cassidy had given Mr Wu Kebo in relation to certain debts of Zetta Jet. The debts owed by Zetta Jet to Mr Wu Kebo (or his companies) appear somewhat irregular. Part of them includes the purchase of a plane from Mr Wu Kebo's interests at a price of US$11 million when it was arguably worth only US$6-8 million. There were also a number of agreements under which Zetta Jet agreed to allow Mr Wu Kebo's interests to use the plane. It was Zetta Jet's obligations under these which it appears Mr Cassidy guaranteed.

84 Next it appears that Zetta Jet defaulted on these obligations with the consequence that Mr Cassidy's guarantee obligation was enlivened. It was this obligation under the guarantee to Mr Wu Kebo's interests which was subsequently to be seen as the consideration provided to Mr Wu Kebo for the transfer to the Chinese actor of the Dragon Pearl (by means of the shares in DPL). Then it is alleged that it was Mr Wu Kebo who was behind the incorporation of Linkage on 22 August 2017. It was, of course, to Linkage that the vessel was transferred on 18 June 2018 (immediately after the Full Court's dismissal of the First Maritime Appeal).

85 The Plaintiffs submit that this shows that there is an arguable case that the steps which have resulted in Zetta Jet's money being used to buy the Dragon Pearl (and its subsequent passing through DPL and on to Linkage) may be seen as a single elaborate transaction orchestrated by Mr Cassidy and Mr Wu Kebo to take money from Zetta Jet. It is for that reason that the three transactions are to be seen as composite in nature.

86 There is a difficulty with this. It lies in the final step where Linkage is tied into the transaction by the allegation that Mr Wu Kebo (or his associates) lay behind the incorporation of Linkage. The particulars provided for this are:

> 'The certificate of incorporation is at page 63 of the exhibits to the affidavit of Maurice Lynch dated 19 September 2018 filed in this proceeding.'

87 Recourse to that certificate of incorporation, however, provides no support for the allegation that it was Mr Wu Kebo or his associates who incorporated Linkage. Despite that, I do not think that I would reject the composite transaction case at this stage. The transfer to Linkage appears to have been for US$1. Assuming, as appears to be asserted, that there was some non-cash consideration as well, this would suggest an antecedent relationship between Linkage and Mr Wu Kebo. That suggests part of the picture is missing. There is enough – just enough – for this to proceed to trial (if it were otherwise tenable).

5. The Reopening Application

88 During the hearing, the difficulties with Zetta Jet's status as a company for the purposes of s 588FF became reasonably clear. Following the hearing, the Plaintiffs applied to reopen their case now to allege for the first time that Zetta Jet was a company because it was a Part 5.7B body under s 9. As discussed above at [21], this required it to prove that it had carried on business in Australia.

89 I refused that application with costs on 7 November 2018 and said I would deliver reasons later.

90 The application was supported by an affidavit of Plaintiffs' solicitor, Mr Tsiakis. The affidavit included another version of the statement of claim which contained a new ¶9 which now alleged that Zetta Jet was a Part 5.7 body because, *inter alia*, it carried on business in Australia within the meaning of s 21 of the *Corporations Act*. The particulars for that allegation were as follows:

> 'Particulars

> The Ship was used for business development purposes and to entertain clients of Zetta Jet in South East Asia and around the world. In about October 2016 Zetta Jet employed a crew of 3 staff (including 1 Australian national) to sail the Ship in water off the Australian coastline, from the time of taking possession of the Ship on or around 23 December 2016 from Maritimo's shipyard in Queensland, until about mid February 2017.
>
> Between July 2015 and September 2017, Zetta Jet incurred charges for aeronautical services provided at Great Barrier Reef Airport (invoiced in July 2015 by AVData Pty Ltd), Brisbane Airport (invoiced in June 2017 and September 2017 by Brisbane Airport Corporation Pty Ltd), Broome International Airport (invoiced in August 2017 by Aerocare New Zealand Ltd), and Adelaide Airport (invoiced in September 2017 by National Jet Express Pty Ltd).
>
> Further particulars may be provided after discovery and the service of subpoenas.'

91 The case thus disclosed is that Zetta Jet was carrying on business because (a) it was using the Dragon Pearl to entertain its clients and 'business development purposes'; and (b) and it was incurring charges for 'aeronautical services' at four Australian airports. These charges appear to have included landing charges and other charges relating to the operation of an aircraft (such as catering and laundry).

92 The Plaintiffs central allegation in Corporations Proceeding is that Mr Cassidy and Mr Wu Kebo took Zetta Jet's money without its authority to buy the Dragon Pearl. That allegation is inconsistent with the contention now proposed to be advanced at ¶9 that the vessel was 'to be used for business development purposes and to entertain clients of Zetta Jet in South East Asia and around the world'. The Plaintiffs cannot say in the one breath that Zetta Jet never authorised the purchase of the Dragon Pearl and that it was using the Dragon Pearl for business development and client entertainment purposes. Such a case is internally inconsistent and would be struck out. Unless Mr King wishes to ratify the actions of Mr Cassidy in acquiring the vessel he simply cannot run such a case. During the hearing I invited Dr Bigos to say whether Mr King accepted the authority of Mr Cassidy to acquire the Dragon Pearl but he demurred. Without that being accepted, I will not permit such a case to be run.

93 That leaves the aeronautical charges incurred by the visit of one or more Zetta Jet aircraft to four Australian airports. The Plaintiffs submitted that these charges showed that Zetta Jet was providing services in Australia. I do not agree. What they show is that Zetta Jet was incurring debts in Australia as a result of its aircraft landing at an airport. That does not show, however, that the aircraft was being chartered by a customer of Zetta Jet. I accept the Defendants' submission that these charges show that Zetta Jet owned an aircraft that was in Australia at

various points. I would also accept that they demonstrate that Zetta Jet operated the aircraft in Australia.

94 Section 21 of the *Corporations Act* provides:

> '21 Carrying on business in Australia or a State or Territory
>
> (1) A body corporate that has a place of business in Australia, or in a State or Territory, carries on business in Australia, or in that State or Territory, as the case may be.
>
> (2) A reference to a body corporate carrying on business in Australia, or in a State or Territory, includes a reference to the body:
>
> (a) establishing or using a share transfer office or share registration office in Australia, or in the State or Territory, as the case may be; or
>
> (b) administering, managing, or otherwise dealing with, property situated in Australia, or in the State or Territory, as the case may be, as an agent, legal personal representative or trustee, whether by employees or agents or otherwise.
>
> (3) Despite subsection (2), a body corporate does not carry on business in Australia, or in a State or Territory, merely because, in Australia, or in the State or Territory, as the case may be, the body:
>
> (a) is or becomes a party to a proceeding or effects settlement of a proceeding or of a claim or dispute; or
>
> (b) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs; or
>
> (c) maintains a bank account; or
>
> (d) effects a sale through an independent contractor; or
>
> (e) solicits or procures an order that becomes a binding contract only if the order is accepted outside Australia, or the State or Territory, as the case may be; or
>
> (f) creates evidence of a debt, or creates a security interest in property, including PPSA retention of title property of the body; or
>
> (g) secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts; or
>
> (h) conducts an isolated transaction that is completed within a period of 31 days, not being one of a number of similar transactions repeated from time to time; or
>
> (j) invests any of its funds or holds any property.'

95 The Plaintiffs relied on s 21(2)(b) but it is not applicable since it is not suggested that Zetta Jet's activities were those of an agent, legal personal representative or trustee.

96 One must return, therefore, to the words of s 21(1) 'carrying on business.' Flying a plane through Australian airspace, landing at four airports at various times and incurring charges relating to its use of services at those airports is not the carrying on of a business. What is missing from the Plaintiffs' evidence is any suggestion that it was conveying its customers using the plane. That was unquestionably Zetta Jet's business but it has not proved that it was engaged in that business whilst in Australia: cf *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196 at [197] per Edelman J. Here the aeronautical charges do not reveal 'activities undertaken as a commercial enterprise in the nature of a going concern'. They are consistent with it but they do not prove it.

97 For those reasons the proposed case that the Plaintiffs wish to raise by reopening is either liable to be struck out for inconsistency with their substantive claims or is incapable of succeeding. In that circumstance, the proposed reopening has no significance for the application I am reserved on. The administration of justice does not require that the Plaintiffs be given the opportunity to put a claim which cannot succeed: cf *F.Y.D Investments Pty Ltd v Promptair Pty Ltd* [2017] FCA 1097 ('*F.Y.D Investments*') at [30] per Kenny J.

98 I would, in any event, also refuse leave because the manner in which the Plaintiffs are now conducting themselves is unfair. They have had more than enough opportunities to formulate their case. These have included:

(1) the trial before Burley J in the First Maritime Proceeding where the Plaintiffs declined to advance their case;

(2) the Second Maritime Proceeding;

(3) the first hearing of the present application for an injunction; and

(4) this (second) hearing of the same application.

99 In short, the Plaintiffs have had the best part of thirteen months and several hearings to work out what their case is.

100 Further, and perhaps more importantly, their explanation for why the point was not raised earlier, whilst frank, is inadequate. The Plaintiffs say that the 'company' point was 'alluded to' in the Defendants' written submissions. This is an understatement. In their written submissions of 28 September 2018 the Defendants said that their *first* ground for summary judgment was that 'the provisions in Part 5.7B of the *Corporations Act* do not apply in respect of Zetta Jet as it is not a 'company' for the purposes of the *Corporations Act*'. I do not see how

this could be clearer. The hearing was ten days later on 8 October 2018. The Plaintiffs now say that it was not until the hearing that they focussed their attention on whether there was evidence that Zetta Jet conducted business in Australia. Maybe so, but that, with respect, would appear to be their problem. Commercial litigation could hardly be sensibly conducted if every hearing was defeasible in the event that one of the parties or their advisers realised that they had overlooked something.

101 I accept, of course, that inadvertence is a ground for permitting a party to reopen (*F.Y.D Investments* at [31]). But there comes a time when it must be said that a party has had its fair share of procedural opportunities. In this case, I do not think that the Defendants are much prejudiced by reopening application but theirs are not the only interests involved. There is the efficient use of the judicial resources of the Court (*Federal Court Act 1976* (Cth) s 37M(2)(b)) and the Court's efficient dispatch of its overall caseload (*Federal Court Act 1976* (Cth) s 37M(2)(c)). These factors, amongst others, inform the overarching purpose of civil procedure referred to in s 37M (that is, the facilitation of the just resolution of proceeding according to the law and as quickly, inexpensively and efficiently as possible). The Plaintiffs have had more than their fair share of this Court's time. Enough is enough.

6. Result

102 In those circumstances, I will give the Defendants summary judgment in the Corporations Proceeding with costs. The Plaintiffs are to pay the Defendants' costs of their application for summary judgment. I dismiss with costs the Plaintiffs' interim claims for relief in their interlocutory process dated 19 July 2018 and as also sought in prayer one of their originating process in the Corporations Proceeding.

103 I will continue the Art 21 injunction to noon tomorrow to facilitate in an orderly fashion any application for leave to appeal (on the Plaintiffs proffering an undertaking as to damages). I would not be disposed to grant leave to appeal. Nor would I grant any further injunctive relief to preserve the subject matter of any such leave application beyond noon tomorrow.

I certify that the preceding one hundred and three (103) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

Dated: 11 December 2018