

Strike Out for Breach of Anti-Suit Injunction

What are the options open to a plaintiff where a foreign defendant, who files an appearance and a defence, subsequently commences and continues foreign proceedings in breach of an anti-suit injunction, where the defendant has no assets in the jurisdiction? That was the circumstance that confronted the plaintiffs in the Supreme Court of Victoria in *Cocoon Data Holdings Pty Ltd v K2M3 LLC* [2011] VSC 355. Among the counsel for the plaintiff was my Australian co-editor, Perry Herzfeld.

After filings its unconditional appearance and defence in Victoria, the defendant K2M3 commenced proceedings of its own in the USA, in response to which the Victorian court issued an anti-suit injunction. Significantly, the US court refused K2M3's application for an injunction against Cocoon, and the US proceedings were stayed on *forum non conveniens* grounds. K2M3 appealed against that decision, and it was that act of appealing and continuing to prosecute the appeal in the US that constituted the ongoing breach of the Victorian anti-suit injunction.

In the exercise of the inherent jurisdiction of the Victorian Supreme Court, Ferguson J struck out the defendant's defence and gave judgment for the plaintiffs. Her Honour quoted *Derby & Co Ltd v Weldon* [1990] 1 Ch 65 at 81 (CA), where Lord Donaldson of Lynton MR referred to the possibility of barring the right to defend of a defendant with no assets within the jurisdiction who breaches a *Mareva* injunction freezing those assets. Her Honour concluded (at [21]-[22]):

Non compliance with an anti-suit injunction is a grave matter. There must be compliance with such orders. If there is not, and no proper explanation for their breach is given, then severe sanctions may be warranted. Any such sanctions which are imposed are not aimed at punishing a defaulting party but rather are necessary to safeguard the administration of justice.

Whilst the remedy sought by [the plaintiffs] is drastic, in the circumstances, it is appropriate for orders to be made striking out the defence of K2M3. No practical alternative course is available. Such orders are necessary to maintain

the authority of the Court. On the evidence before me, K2M3 has deliberately breached the terms of the orders on multiple occasions without explanation, despite opportunities being given to it to provide an explanation. It did so in circumstances where it had chosen to submit to the jurisdiction of this Court; it had taken steps in this proceeding by filing an unconditional appearance and defence; it had been represented by counsel on the application when the first anti-suit injunction was granted; it did not appeal from any of the orders made in the proceeding; after breaching the orders, it instructed counsel to appear on a further hearing but failed to instruct counsel as to the reason(s) for non-compliance with the orders; it has had notice of this application and chose not to be represented on either this occasion or when the application first came on for hearing.