

The Future of Private International Law in Australia

Speaker: Dr Andrew Bell SC

Thank you very much and thank you to Professor Andrew Dickinson for organising and driving this seminar. It reflects the increasingly recognised importance of this subject both on the syllabus and in practice. My focus is going to be the focus of a practitioner - we've had the judicial perspective, subject to the constraints which attach to a sitting judge. We've had the legislative executive perspective from Thomas. I'm less constrained, I suppose. I'm going to focus on what I see as where the developments and the case law are likely to be going forward.

I'll start with this. When launching the 8th edition of *Nygh's Conflict of Laws in Australia*, Chief Justice Spigelman drew attention to the fact that this edition began with this sentence:

"The majority of cases that are litigated in our courts are domestic in character."

He pointed out that every previous edition began with the sentence:

"The overwhelming majority of cases that are litigated in our courts are domestic in character."

This was an amendment which Martin Davies slipped through when taking responsibility for chapter one, but he was absolutely correct to do so. It's an important point and in a sense it's the premise for anything I say academically or practically about this subject, namely that it follows as the night follows day, that as the world becomes more integrated which it does through technology, which it does through electronic payment systems, which it does through travel, which it does through the liberalisation of trade barriers, there will be more international movement and more international trade. And as there is more international movement and more international trade, what goes with international movement and international trade? Disputes of an international character. It is an inevitability.

Since the 8th edition of Nygh was published about 15 months ago, according to my notes (and I've been keeping notes for the next edition), there have been 50 decided cases by Australian superior courts dealing with the subject of this text, either pure conflict of law cases or other international cases which we deal with such as Hague Evidence Convention cases and sovereign or state immunity cases.. That's quite a rate of emerging case law - 50 cases in just over 12 months.

In that period, there have also been extensive amendments to the *International Arbitration Act*, there has been the introduction of the *Cross-Border Insolvency Act*, there are important private international law provisions in the personal property securities legislation, there have already been implemented trans-Tasman changes (with more to come), there is the possibility of accession to the Hague Choice of Court convention. All of these developments, as is inevitable, will spawn their own case law. So that's the starting point - this is a growth area and the growth is at an exponential rate.

Can I just pause, and I do it not only for the purposes of flattery but for another purpose as well, to echo Justice Brereton's observation about the contribution Chief Justice Spigelman has made to this

area. There are at least a dozen significant speeches on globalisation that he has given which deal with, inter alia, private international law issues - the practice, the theory, and the practicality. But also he has participated in, on my rough count, at least seven very significant appellate decisions in the area. I'm going to list them and just note their content because it will lead me into my next point.

An early decision was *James Hardie Ltd v Grigor (1998) 45 NSWLR 20* dealing with a forum non-conveniens issue between Australia and New Zealand, arising as a result of the export by Australian companies, in that case James Hardie (but also CSR), of asbestos products. We had two countries involved in that case – Australia and New Zealand. Of course, New Zealand with the Accident Compensation Act regime - a different regime, a fundamentally different regime, a statutory regime for replacing common law liability - you have an inducement to people coming to Australia to litigate because of the existence of that different way of dealing with the social problem. That was one of the first cases in the chain.

Other cases in which he gave leading judgments include *British American Tobacco Australian Services v Eubanks (2004) 64 NSWLR 83*, which was the very important letter of request case which is the leading Australia authority and I think the only real appellate authority on the Hague Evidence Convention in this country, adopting very important principles for its interpretation and implementation. That case, apart from anything else, reflects the mobility of executives. The reason why the Department of Justice needed to examine the former company secretary of British American Tobacco was that he'd effectively retired to Australia, and there was no way he was going to set foot in the United States for fairly obvious reasons. So he was a critical witness but the DOJ needed to come here to examine him. But that notion of mobility of executives and mobility of people generally will often mean that you have witnesses in transnational litigation who aren't in the forum and who for a variety of reasons may not want to be in the forum.

Another case, a very important case, *Murakami v Wiryadi (2010) 268 ALR 377* illustrates another phenomenon - that was a *forum non conveniens* stay case, but in the context of a forum non-conveniens case you had a consideration of choice of law in equity. Very often in these jurisdictional challenges or discretionary challenges, you have subsidiary points being decided so in *Murakami* it was really the virgin territory of choice of law in equity, just as the High Court when it dealt with *Renault v Zhang (2002) 210 CLR 491* - a *forum non conveniens* case - decided the choice of law rule for international torts.

Going back to the New South Wales' cases, *Garsec (2008) 250 ALR 682*, the case involving the Sultan of Brunei and the Koran, dealt with issues of substance and procedure of the kind in some respects not dissimilar from the sort of substance and procedure issues Justice Brereton had to deal with in the *Michael Wilson* case (*Michael Wilson & Partners Ltd v Robert Colin Nicholls [2008] NSWSC 1230*) which concerned how local rules, which might be procedural or might be substantive, affect decisions and affect procedural decisions. Other important cases included *Global Partners Fund Ltd v Babcock & Brown Limited (2010) 79 ACSR 383* involving the enforcement of a jurisdiction clause but in a multi-party situation and the extent to which a bit of artful pleading could be used as a jurisdictional anchor.

Interestingly, one point to take out of that, other than as a further illustration of the volume of case law and of the Chief Justice's contribution, is that much, but by no means all, of the contemporary litigation, arises in a jurisdictional context. As I've said, other important issues are decided along the way but typically the issues are thrown up in the context of a battle over venue or a battle over forum. The four High Court decisions of the last seven or eight years: *Zhang*, *Gutnick*, *Nielson*, *Puttick*, three of the four were *forum non conveniens* cases. But they did decide incidental questions: *Zhang* – choice of law in tort; *Dow Jones & Co Inc v Gutnick (2002) 210 CLR 575* – where an internet defamation takes place, and *Puttick* which dealt with the topic of location - how do you "locate" a tort which is a very important issue sometimes for grounding jurisdiction, sometimes for choice of law purposes.

Now, as to what the future holds for *forum non conveniens*, the High Court made it very plain in *Puttick (Puttick v Tenon Ltd (2008) 238 CLR 265)* that it is not interested in revisiting that question. It would take a radically differently constituted High Court to again entertain a challenge to seek to implement the position which prevails in every other common law country, the *Spiliada* test, i.e. a more international "natural forum test". That will not happen in the next 10 years in the High Court of Australia. If ever there was a choice or a chance to do so, it was *Puttick* and it was hit over the boundary or (probably more accurately), I was clean bowled in my attempt to restate the law.

That issue of *forum non conveniens* and what the appropriate test was or should be is actually a matter that could be dealt with by the rules committees of the courts. As a matter of fact, the rules could be amended to reflect a more internationalist view. It hasn't happened, and there is probably not any momentum for it to happen. If it were to happen, there might be a difficult decision to make as to whether there should be a differentiation between commercial cases and personal injury cases. The case for the more parochial *forum non conveniens* test, the *Voth* test, is I think a little more compelling in personal injury cases because of often tragically injured people who cannot physically manage litigation abroad. Of course, in most of these cases those sort of considerations are pretexts. What the parties really want to do is to be in the forum in which they are going to get the best result. *Puttick* was a case where it was a choice between the New Zealand Accidents Compensation legislation or possibly Australian common law. *Union Shipping v Morgan (2004) 54 NSWLR 690*, the maritime tort case in the Court of Appeal involved precisely the same choice. Arguments about relative convenience, connection with the forum etc were put up, as was appropriate under the rubric of the *Voth* test, but what was really driving the litigants was the choice of law outcome.

So, not likely to be much development in *forum non conveniens* jurisprudence, but I would make two observations. The first is that there will be first instance decisions or examples of people initiating litigation, where the envelope is really being pushed. That is to say, there will be cases with really extremely tenuous connections to the forum, but where the lawyers seek to take advantage of what on its face is a very onerous test ("vexatious and oppressive" and sometimes when the High Court wants to use the expression "abuse of process"), a very difficult test for a foreign defendant to get over. Now, there is if I might say so in Justice Brereton's decision in *McGregor v Potts (2005) 68 NSWLR 109* a very deep and I think absolutely correct analysis of how the *Voth* test was meant to operate by looking at that test in the context of that case and the context of the result in that case. But the formula which the High Court has employed makes it very tempting for plaintiffs to start

cases here with only the slightest connection to the forum. A connection can be extremely slight especially when one considers that at least in personal injury cases you might be injured overseas but so long as you have a single visit to your treating doctor in Australia, you have suffered damage in New South Wales or Australia for the purposes of jurisdiction and you're in.

A couple of recent cases though have shown judges doing that rare thing, granting a forum non-convenience stay. One was the decision of Justice Siopis in the Federal Court in the *PCH Offshore v Dunn* case ([2010] FCA 897). That was a case which came out of the Caucasus. Siopis J was powerfully influenced by the real difficulties he saw with the translation of documents and the giving of evidence by a large number of witnesses needing translations. Now it was a very practical view of the world - it would have been a nightmare to hear that case. I submitted to the judge that it would be an absolute nightmare to hear that case, and I think that was right - it would have been: all the documents would have needed to be translated. There were issues about whether judgments given by Azerbaijani courts gave rise to *res judicata*; of course, that then meant you had to understand the judgments, understand the context of the judgments and understand the foreign law. And when all of those matters need to be litigated in an Australian court, it adds hugely to the impracticality or inconvenience, including the added court time.

So, one observation is that I think that, because of the status of the *Voth* test, there are likely still to be a fair number of stay applications partly reflecting the fact that there will be plaintiffs seeking to push the boundaries and bring cases with very tenuous connections to this country and its several jurisdictions.

The second observation and consequence of the *Voth* test is that properly advised defendants will be told they don't have much chance of getting a stay, so if they're going to appear, there may well be issues of foreign law being determined in New South Wales or elsewhere in Australia in contrast to the *Spiliada* "natural forum" test which tends to push litigation back to the same place whose law will govern the outcome of the dispute. That's a happy consequence of the *Spiliada* test. In contrast, we will have increasingly in Australia transnational litigation where the governing law is not Australian law or not New South Wales law. That then pulls in some of the real issues of which Justice Brereton has spoken this evening concerning the proof of foreign law - the expense of that, the mechanics of it, the optimal ways of doing it, and we've had reference to the initiatives with the bilateral treaties. We had actually in the *Ace v Moose* case ([2009] NSWSC 724), which Justice Brereton referred to, a phenomenon I'd never experienced before. Not only did we have the expert evidence by video link, we had a video link "hot tub" where one tub was in San Diego and one tub was in L.A. and our tub was in Hospital Road. It worked, but I think there are probably better ways, and there's plenty of scope for rethinking the manner of proof and ascertainment of foreign law in the future.

I should say that, in terms of the case law, there is a well-established principle that evidence as to how foreign law will be applied is not permitted. That is a doctrine well established, but I think it's a doctrine that there's a strong case for revisiting. Obviously, it's ultimately for the local court to decide questions of law, but if for example the foreign law involves a discretion and there are

principles relating to the exercise of discretion, it may be legitimate to take that one step further. Anyhow, that's a topic which is up there for consideration.

On a related point, I think there is some scope for movement of the thinking in cases where there are parallel proceedings or extant foreign proceedings. The High Court deals with this in *Henry v Henry (1996) 185 CLR 571*. They say you should strive to avoid multiple proceedings to the extent that the *Voth* test permits this. This is not a very helpful statement at all - there are a range of factors which the Court says are relevant, but it doesn't really give any guidance as to a hierarchy or the significance of the individual factors. And so another consequence of our very welcoming (to plaintiffs) *forum non conveniens* test is that Australia courts will find themselves dealing with cases where there are multiple proceedings on foot and will need to deal with that.

In the remaining time, I'll make two other points. First, one of the big unresolved issues is the area of jurisdiction agreements, where there are foreign jurisdiction agreements and foreign choice of law agreements in tandem, and they usually area in tandem. What happens where a party has a *Trade Practices Act (now Competition and Consumer Act 2010 (Cth))* claim and wants to take advantage of what, for example, to English law is a very radical statute and a very radical set of principles when applied to a commercial law context? What happens when somebody takes the *Trade Practices Act* point in a case and starts proceedings in Australia in a case governed by English law contractually and governed by an English exclusive jurisdiction clause? *Prima facie* it would be stayed to give effect to the jurisdiction agreement, but what if the English court as a result of the application of its choice of law rules will not pick up the *Trade Practices Act*? Is that, nominating English jurisdiction and English choice of law, a contracting out of the *Trade Practices Act* and therefore anathema? If it is, and if the consequence of litigation in England is the *Trade Practices Act* claim will not be given a run on the merits, is that a reason for not following the *prima facie* position and enforcing the jurisdiction clause? Now that issue was almost decided in a case in the Federal Court in *Clough Engineering v Oil and Gas Corporation Limited* [2008] FCAFC 136, but didn't need to be decided. It is potentially thrown up in the *Qantas v Rolls Royce* case, but I won't say anything about that at the moment. It is an issue, for those interested, in which there is some discussion in some of the recent articles in the area.

The final case law development point I want to mention relates to enforcement of judgments in Australia. I think that, while we've had focus on what I call the front end of transnational litigation - the fights over jurisdiction, the establishment of jurisdiction, whether to stay proceedings or not - there will be (and I'm beginning to see it in the cases) a rise in the number of cross-border enforcement cases outside the context of the convention or a bilateral arrangement. The Canadians have taken a very different route to the other common law jurisdictions - the Canadians essentially say that if the litigation has taken place in the natural forum, they will enforce that judgment irrespective of whether the defendant was present or submitted to the jurisdiction (*Beals v Saldahna* [2003] 3 SCR 416). The conventional wisdom is that, if a foreign defendant doesn't submit either contractually or by appearance and doesn't participate, a default judgment against him may be enforceable against assets in that jurisdiction, but it generally won't be enforceable in another common law country because there was no "international" jurisdiction. The Canadians have rejected that approach - it was a very expensive surprise for the defendant in the first case which applied that

approach because, on orthodox principles, the decision which was enforced worth millions of dollars would not have been enforced. Now I don't think anyone has yet argued that the Canadian line of authority should be followed in Australia, but in terms of potential case law developments, that's an area where there would be some scope for a fresh argument being put. When analysed, a very important and interesting philosophical question about what underpins conflict of laws is at the heart of that argument: is it comity, as the Canadians have said, or is it some more territorial orthodox basis of jurisdiction.

They're my points. Thank you.