

PRIVATE INTERNATIONAL LAW A (LAWS2018/LAWS5017)

INTRODUCTION

(a) CASE STUDIES

Oceanic Sun Line Special Shipping Co v. Fay [1988] HCA 32

- Case is about Dr Fay's personal injury in a shipboard accident during a Greek islands cruise and his attempt, as a Queensland resident, to litigate a common law negligence action in NSW against a Greek shipping line.
- Details see below.

Venter v Ilona MY Ltd [2012] NSWSC 1029

- Case is about the death at sea in a work-related accident off the coast of Thailand of the chief engineer of an Australian registered ship.
- Details see below.

(b) Commentary

As an introduction of the course, in the above two cases, reference is made to two persistent issues in private international law: choice of law (which system of law should the court apply?) and personal jurisdiction (is the defendant subject to the authority of the court and, if so, is there a discretionary ground on which the court may decline to exercise jurisdiction?).

PERSONAL JURISDICTION

(a) COMMON LAW

(i) Territorial jurisdiction based on defendant's presence

Individuals

Gosper v Sawyer (1985) 160 CLR 548

- An employee applied to the Industrial Commission of NSW to avoid the variation of a superannuation fund of which he was a member under Industrial Arbitration Act 1940 (NSW).
- Membership of the fund was a condition of his employment.
- The fund was administered by trustees who were ordinarily resident in Victoria.
- The Registrar ordered that process to be served on the trustees in Melbourne.
- Held the Industrial Commission had no power under NSW law to order service outside of NSW.
- General rule is that Supreme Court will have power to hear and determine an action when the defendant is **physically present** in the relevant state or territory **at the time of service**.
- Similarly, the Federal Court and the HC will have power to hear and determine an action when the defendant is physically present in Australia at the time of service.
- Here, the Industrial Commission was not Federal Court or HC and therefore the registrar could not enlarge jurisdiction by permitting service out of NSW.

Laurie v Carroll (1958) 98 CLR 310

- There was a contractual dispute between Laurie (a theatrical agent in London) and Carroll (a theatrical entrepreneur in Melbourne).
- The writ was issued one day after Laurie had left Melbourne.
- Laurie was aware that Carroll might sue. He left Australia on 20th June, at that time the writ was not served.
- After Laurie left Australia, the plaintiff (Carroll) applied for a substitute service of the writ on Laurie's solicitors in Melbourne.
- Laurie then applied to have the substitute service order set aside.
- The important point for this case is that **Laurie left the jurisdiction before the writ was issued**.
- Held Laurie had left Victoria one day before the writ was issued, and therefore outside the jurisdiction of the Victorian Supreme Court.
- Jurisdiction is established **when the defendant is served within the forum, even if he subsequently leaves**.
- It follows that, jurisdiction is **not generally established** over a person **who is in the forum at the time initiating process is issued** but **who leaves before it can be served**.

Joye v Sheahan (1996) 62 FCR 417

- Sheahan applied to FCA for order that Joye attend examination about company affairs.
- Court issued summons directing Joye to attend examination under s 596B of the Corporations Act on 25 November 1994. On this day, Joye was still in Australia.
- On December 9, Sheahan's solicitor faxed Joye's solicitor, telling them that the summons had been issued and asking whether they had instructions to accept the service on behalf of Joye.
- The summons were posted and received on 13 December.
- On 13 December Joye departed Australia.
- On 16 December, Joye's solicitor told Sheahan's solicitor that they had no instructions to accept the service.
- On 2 February 1995, Sheahan sought order for substitute service
- On 7 February, Registrar ordered that personal service be dispensed with and that service be effected by posting sealed copy of summons to Joye's solicitor and accountants.
- Joye then applied to have the substituted service order set aside.
- Held, a person who left the place **after initiating process** was issued and who either knew that process had been issued or who **left to evade service** of process will be regarded as within the jurisdiction.
- Here, there was strong suggestion that Joye knew of the summons and left the country in order to evade its serve, hence order for substituted service was granted.

Perrett v Robinson [1985] 1 Qd R 83

- Robinson had caused injury to Perrett (the plaintiff) in a motor accident in NT.
- Damages for future economic loss is not available in NT legislation.
- Agreed with Robinson, plaintiff sued Robinson in Qld where full common law damages could be awarded.
- The plaintiff asked Robinson to travel to Qld in order to accept the service. R willingly complied.
- Damages award would ultimately be borne by the insurer (FAI).
- FAI objected to Queensland jurisdiction on the basis of fraud.
- Purpose of the visit irrelevant, unless D is tricked/fraudulently enticed or coerced into the jurisdiction.
- No fraud committed here because Robinson came willingly.

HRH Maharanee of Baroda v. Wildenstein [1972] 2 QB 283

- Both M and W lived in Paris.
- M bought from W, in Paris, a painting made by a famous painter.
- Later M found out it was a fake one.
- M claimed rescission of the contract and repayment of the price in England.
- The writ was served on W when he came from France to England to pay a fleeting visit.
- Held, did not matter if it is a fleeting visit.

Personal service

Uniform Civil Procedure Rules 2005 (NSW) r 10.20-10.21

Substituted Service

Uniform Civil Procedure Rules 2005 (NSW) r 10.14

Corporations

National Commercial Bank v Wimborne (1979) 11 NSWLR 156

- NCB was a corporation established under Saudi Arabian law.
- NCB had no branch office, agency or place of business in NSW.
- NCB had arrangement with NSW bank which involved bank collecting proceeds from NSW importers and remitting proceeds to NCB in Saudi Arabia.
- NCB was requested by the plaintiff to honour its guarantee to the full amount that was owed by the principal.
- Three indicia to prove presence of a corporation:
 - Has an agent with authority to make contracts with people in NSW on behalf of the company;
 - The business has been carried on at some fixed and definite place within the state;
 - The business must have continued for a sufficiently substantial period of time.
- Here, facts indicated NCB was not present in jurisdiction, claim struck out.
- Agency — a corporation will not have presence if the agent is 'a mere ministerial agent' or is carrying on his own business and not that of the foreign corporation.
 - Accordingly, here presence is not established by showing that the foreign corporation has appointed a local solicitor to commence or defend particular legal proceedings in the jurisdiction — i.e., not the business of the corporation.
- Indicia as to presence by agent:
 - Name of the foreign corporation displayed at the agent's place of business;
 - Foreign business pay rent/office expenses or employ staff for the agent.

Adams v Cape Industries [1990] Ch 433

- Cape Industries was a UK company, head of a group.
- Its subsidiaries mined asbestos in South Africa and shipped it to Texas, where a marketing subsidiary, NAAC, supplied the asbestos to another company in Texas.
- The employees of NACC became ill. They sued Cape and NACC in a Texas court.
- Here, not proved that NACC was Cape's subsidiary.

- Following indicia for agency relationship:
 - Whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling him to act on behalf of the overseas corporation;
 - Whether the overseas corporation has **directly reimbursed** him for
 - ▶ the cost of his accommodation at the fixed place of business;
 - ▶ the cost of his staff;
 - What other contributions, if any, the overseas corporation makes to the financing of the business carried on by the representative;
 - Whether the representative is remunerated by reference to transactions, e.g. by commission, or by fixed regular payments or in some other way;
 - What **degree of control** the overseas corporation exercises over the running of the business conducted by the representative;
 - Whether the representative reserves
 - ▶ part of his accommodation,
 - ▶ part of his staff for conducting business related to the overseas corporation;
 - Whether the representative **displays the overseas corporation's name** at his premises or on his stationery, and if so, whether he does so in such a way as to indicate that he is a representative of the overseas corporation;
 - What business, if any, the representative transacts as principal **exclusively on his own behalf**;
 - Whether the representative makes contracts with customers or other third parties **in the name of the overseas corporation**, or otherwise in such manner as to bind it; if so, whether the representative requires specific authority in advance before binding the overseas corporation to contractual obligations.

Corporations Act 2001 (Cth), ss. 601CD, 601CT and 601CX

Service and Execution of Process Act 1992 (Cth), ss 9 and 15

Uniform Civil Procedure Rules 2005 (NSW), r 10.22

(b) JURISDICTION BASED ON DEFENDANT'S SUBMISSION

Submission by Agreement

Uniform Civil Procedure Rules 2005 (NSW) rr 10.6, 10.13 and 11.2 and Sch 6, para (h)

A voluntary submission?

Howard v National Bank of New Zealand Ltd (2002) 121 FCR 366

- Plaintiff commenced proceedings against National Bank of New Zealand in FCA.
- OP was issued in Queensland Federal Court, but served on Bank in NZ without leave of court.
- Respondents in New Zealand instructed their New Zealand solicitors to accept service in New Zealand, therefore, this was a Service out of jurisdiction within Federal Court Rules 1979 O 7 r 14.
- Held, service was effective due to the instruction to the solicitors.
- In this case, lawyers had **'unqualified instructions'** from the defendant to receive OP on behalf of bank and they received it. They had also told this to the plaintiff's lawyers. This was enough to bring the defendant within the juris of the FCA.
- The agreement can be made either formal or informal ad hoc way.
- Whether the defendant is within jurisdiction is irrelevant.

Vertzys v Singapore Airlines (2000) 50 NSWLR 1

- The plaintiff bought return ticket in Athens to travel to Sydney.
- The plaintiff was injured when the plane encountered turbulence.
- The plaintiff initiated proceedings in NSW against the defendant, an international air carrier which had its head office and principal place of business in Singapore.