

### Cases on submission

- Rimini v. Manning Management [2003] 3 NZLR 22
  - Defendant agreed to allow substantive claim to be heard
- Boyle v Sacker (1888) 39 ChD 249
  - Defendant's lawyer made oral submission on the merits
- Nat. Comm. Bank v. Wimborne (1979) 11 11 NSWLR 156
  - Defendant counterclaimed on a ground related to the plaintiff's claim
- Esal (Commodities) v Pujara [1989] 2 Lloyd's Rep. 479
  - Defendant consented to interlocutory orders in the cause
- Portelli v Seltsam Ltd [1988] VR 377
  - Defendant argued against extension of limitation period
- Walker v Newmont Australia Ltd [2010] FCA 298
  - Defendant produces documents in response to a subpoena
- Lhoneux, Limon and Co v. Hong Kong and Shanghai Banking Corp (1886) 33 Ch D 446
  - Defendant applied for an order for security for costs
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### forum non conveniens

- The most important for of submission: *forum non conveniens*; defendant is conceding jurisdiction, but asking to have the case heard elsewhere. (See ch4 for much more detail)
- Such a claim is made **ON THE BASIS** that the defendant acknowledges jurisdiction, but that the Court should, in its discretion, decline to exercise that jurisdiction.
  - But see UK case of *Williams and Glyn's Bank Plc v Astro* [1984] 1 All ER 760, where fnc + actual denial (in the alternative) held did not amount to submission.
  - Williams v Society of Lloyds [1994] 1 VR 274 at 294
    - (It is) probably not a submission to make requests for further and better particulars (of Plaintiff's claim) when (the requests) are not filed in the court or the subject or orders it makes

### Personal Jurisdiction in interstate cases

- Federally – HCA and FCA naturally have personal jurisdiction over persons present in Australia
  - HCA: has original jurisdiction in certain (small number of) matters - see s. 75 Constitution ("diversity jurisdiction")
  - *Narrow* interpretation – HC will usually remit to federal, state and territory trial courts
  - Residence is key; *Howe*: held only applies to natural persons, thus excluding companies, and thus greatly narrowing the jurisdiction.

- States & Territories – requires service outside the State or Territory under legislation (SEPA)
  - *Narrow* interpretation – HC will usually remit to federal, state and territory trial courts

#### Which law?

- ... in diversity cases?
- Obviously, apply federal law, if there is any
- But what if there are **two** state laws? See Judiciary Act ss.79 and 80: Apply the law of the State or Territory in which it (HCA) is sitting (including that State or Territory's PIL)
  - Can lead to forum shopping – e.g. limitation periods
  - **Power to remit:** Section 44 Judiciary Act (and then becomes the source of the lower court's power to hear (jurisdiction))
  - See *Gardner v Wallace* (1985) 184 CLR 95 [2.23]
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#### Service and Execution of Process Act 1992 (Commonwealth) "SEPA"

- GENERAL:
  - Exception to the common law rule requiring presence or submission of defendants.
  - Because state rules have extraterritorial effect, a defined nexus must exist: *HC Sleigh v Barry Clarke* [1954] SASR 49 at 52. (see also later at 2.49)
  - Correct service is essential to foundation of Court's jurisdiction.
- Governs interstate service of any initiating process issued out of a state or territory court
  - Applies to all superior and inferior tribunals having the status of a court under state or territory law (s.3)
  - 'Initiating process' issued out of any state or territory court can be served anywhere in Australia (and is to be served as the rules of the court of issue require it) (s15)
- Some details:
  - Must be accompanied by certain notices (advising of their rights as to jurisdiction and to right contest the action) (s16)
  - Failure to include notice is mere irregularity that can be waived
  - Defendant is required to enter an appearance (usually 21 days)
  - Any challenge must be done in accord with issuing court's rules
- The scheme:
  - This simple regime effectively extends the personal jurisdiction of all state and territory courts to **the whole of Australia** and its external territories, and

gives them all the right to compel the appearance of any person anywhere in the country or an external territory.

- Interstate vs international: SEPA renders state rules obsolete; SEPA expressly prohibits use of state rules for interstate service, so Supreme Court rules now now only provide for **service outside Australia**.
- When preparing agreements, you should ensure that **choice of jurisdiction** and **choice of law** clauses are included. These clauses should identify:
  - (a) the jurisdiction preferred;
  - (b) whether the choice is exclusive or non-exclusive;
  - (c) the choice of law for the agreement; and
  - (d) possibly provide for an indemnity for breach of that clause.

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