

## 1 – PERSONAL JURISDICTION

---

- A person is subject to the jurisdiction of the NSWSC if, and only if, there is a lawful basis for the service of originating process on that person: *Gosper v Sawyer*
- Jurisdiction in the context of personal jurisdiction, refers to power or authority over a person

### Common law jurisdiction

- At common law, the court will have jurisdiction in two circumstances:
  - Where the defendant is present in the territory of the court; or
  - Where the defendant voluntarily submits to the court's jurisdiction
- The following are not bases of common law jurisdiction:
  - Defendant's ownership of assets in the lex fori
  - Tort committed in the lex fori (i.e. if the defendant was present when the cause of action arose)
  - Place of breach of contract was the lex fori
  - Proper law of the contract is the lex fori

#### A. Territorial jurisdiction based on the defendant's presence

##### i. *Individuals*

- Common law jurisdiction is clearly established if the defendant is served with the originating process while present in the forum
  - Presence when cause of action arises, but prior to the issuing of originating process does not establish jurisdiction: *Laurie v Carroll*
    - Defendant who is not present in the forum at the time of issue of the originating process is not subject to the common law jurisdiction of the court, unless the defendant later enters the forum and is served there with the originating process
  - Presence when served with the originating process establishing jurisdiction
    - Even if the defendant has a fleeting or transient presence in the forum, and subject matter has no connection with the forum: *HRH v Maharanee of Baroda*
  - Presence in the forum when the originating process is issued, but departs before service of originating process establishes jurisdiction if and only if (*Laurie v Carroll*):
    - Defendant left knowing the originating process had been issued; or
    - Left for the purpose of evading personal service
      - Consider *Laurie v Carroll* where the defendant left for the purpose of evading personal service, but did so prior to the originating process being issued
      - Cf. *Joye v Sheahan* where the defendant was in the jurisdiction (Australia) when the originating process was filed, and left for the purpose of avoiding service

##### ii. *Corporations*

- If the company is registered under the Corporations Act as a foreign company, local agent may accept service
- If not registered, the common law applies: *National Commercial Bank v Wimborne*
  - Three criteria to establish if a defendant corporation is 'present' on the forum for the purpose of common law jurisdiction
    - Agent with authority on behalf of the corporation to make contracts with persons in NSW binding on the corporation
    - Business must be carried on at some fixed/definite place within the State
    - Business continued for a sufficiently substantial period of time
- It is not sufficient to show the foreign corporation has a mere agent in the lex fori, or that the foreign corporation has a local solicitor to commence or defend proceedings in the lex fori

- Only if that agent is carrying on the business at that of the foreign corporation, and not as his own business, can that count as ‘carrying on a business’ in NSW: *National Commercial Bank*
  - Saudi Bank and Swiss entity wanted to bring proceedings in NSW for abuse of legal processes by NCB in Switzerland. As they had no assets in the jurisdiction and did not conduct business in NSW, it was held NCB was not carrying on business in NSW and was therefore not present

B. Personal jurisdiction based on the defendant’s submission

- An indication of willingness, in one way or another, by a defendant to be bound by the court’s decision.
  - i. *What constitutes a voluntary submission?*
    - A defendant makes a voluntary submission to the jurisdiction of the court if the defendant ‘takes a step in proceedings which in all the circumstances amounts to a recognition of the court’s jurisdiction in respect of the claim’: *The Messinaiki Tolmi*
    - Filing an appearance in the proceedings – the defendant thereby waives any objection that the defendant might otherwise have to the court’s jurisdiction: *Sabanathan*
      - Defendant’s had not been served with the originating process. This was a ‘fundamental defect’ that was cured by the fact the defendant’s filed an appearance
    - Agreement to submit to the court’s jurisdiction in the event of a dispute – presupposes a contractual relationship between the parties
      - An agreement that the law of a particular country is the proper law of the contract cannot be equated with a submission to that court’s jurisdiction in the event of a dispute. There must be an express agreement to submit to jurisdiction (it will not be implied): *Dunbee v Gilman*
  - ii. *Objection to jurisdiction*
    - Defendant who actively challenges the jurisdiction of the court must act consistently with a protest against jurisdiction. A tacit concession of the court’s right to hear and determine the merits of the case will be taken as a submission to jurisdiction
      - *The Messinaiki Tolmi* – defendant sought an order striking out the plaintiff’s statement of claim = voluntary submission
      - *Vertzyas v Singapore Airlines* – defendant solicitors chose to fight jurisdictional issues and the merits of the claim, manifesting an unequivocal intention to contest the case on its merits
        - Judge held the defendant had the option of fighting jurisdictional issues first, and if that failed, it was open to the defendants to fight the case on its merits
    - Objecting to the jurisdiction of the Supreme Court of NSW does not amount to a voluntary submission: r 12.11(4) *UCPR*
  - iii. *Cross-claims and amended claims*
    - Cross claims: If a foreign plaintiff commences proceedings in NSW, that foreign plaintiff voluntarily submits to any cross-claim the defendant might make: *Marlborough Harbour Board*
      - NB cross-claim must arise out of the same subject matter as the initial claim
    - Amended claims: If a foreign defendant voluntarily submits by filing an appearance, that voluntary submission is also a submission to any amendment to the plaintiff’s claim (so long as the amendment arises out of the same original claim)