

Subject Matter Jurisdiction – Courts Exercising Federal Jurisdiction

| <i>Fencott v Muller (1983) 152 CLR 570</i> | |
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| Facts | <ul style="list-style-type: none"> -Sale of a restaurant and wine bar in Perth -The purchaser alleged the seller made false representations as to profits -Sued for fraud, breach of contract, negligence and breach of the Trade Practices Act -The applicant brought the matter to the Federal Court -The respondent objected on the basis that torts and contracts are state matters |
| Issue | -Did the Federal Court have jurisdiction? |
| Held | -The Court had jurisdiction |
| Rationale | <ul style="list-style-type: none"> -The Court has jurisdiction to determine the whole of the controversy between the parties, even if some part of the controversy would otherwise be outside the jurisdiction -Matter included all causes of action arising from the same event/transactions |

Cross Vesting of Jurisdiction

| <i>Re Wakim; ex parte McNally (1999) 198 CLR 511</i> | |
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| Facts | <ul style="list-style-type: none"> -Involved a challenge to a cross-vesting scheme -State jurisdiction was conferred on federal or family courts -The Constitution clearly allows the Commonwealth to invest State courts with Federal jurisdiction (question of whether the principle was reversed) |
| Issue | <ul style="list-style-type: none"> -Can Federal Courts be vested with State jurisdiction? -Was the cross-vesting legislation valid? |
| Held | -Federal courts cannot be vested with State judicial power – the cross-vesting legislation was invalid |
| KLP | <ul style="list-style-type: none"> -State courts may be vested with federal judicial power pursuant to chapter III -<i>Federal courts may only exercise federal judicial power</i> -Federal courts may not exercise state judicial power |

| <i>BHP Billiton v Schultz (2004) 221 CLR 400</i> | |
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| Facts | <ul style="list-style-type: none"> -The first respondent contracted asbestosis while employed by the appellant -The appellant conceded liability for the injury subject to proof -During this period of employment, the first respondent resided in SA and it was agreed by both parties that SA was the only place where any alleged injury could have been suffered -The first respondent sought to initiate proceedings in the Dust Diseases Tribunal of NSW -The appellant filed an application requesting that the proceedings be removed and transferred to the Supreme Court of South Australia |
| Rationale | <ul style="list-style-type: none"> -When an application is made under s 5, determination of the application is to proceed on the basis of whether the potential transfer of proceedings is in the interests of justice -The phrase ‘interests of justice’ requires the decision-maker to determine a transfer application by identifying a more appropriate foru -In the present case, the dismissal by the primary judge of the application for removal and transfer was not in the interests of justice -The primary judge erroneously applied the forum non conveniens test, that is, the test of inconvenient forum, to the application made under s 5 -Forum non conveniens requires application of the test of clearly inappropriate forum -In the context of the Jurisdiction of Court (Cross-vesting) Act, however, there is a statutory requirement to exercise the power of transfer to the most appropriate forum in the interests of justice -It is not necessary for the purposes of the Act, that the first court be shown to be a clearly inappropriate forum |
| KLP | -For cross-vesting cases, the correct test to apply is to ask which form the most appropriate forum in the interests of justice is |

Commencing Proceedings
Limitation of Actions

| <i>Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541</i> | |
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| Facts | -Section 31(2) Limitation of Actions Act, permits an extension of time beyond the statutory periods for bringing actions, where it appears to the court: -(A) That a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and -(B) That there is evidence to establish the right of action apart from a defence founded on the period of limitation |
| Issue | -When is an extension available? |
| Held | -When it is shown that justice is best served by doing so |
| Rationale | <u>McHugh J:</u> -'The limitation period represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period' -The onus of proof for an extension on the limitation is a discretionary, but the applicant bears the onus of proof to establish that justice is best served by granting the extension -Once the legislature has enacted a specific period of limitation, for a court to allow the commencement of an action outside that period is prima facie prejudicial to the defendant |
| KLP | -'The limitation period represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period' |

Extension of Limitation Period

| <i>Caven v Women's and Children's Health (2007) 15 VR 447</i> | |
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| Facts | -12 May 1997: Ultrasound shows heart defect often associated with Downs Syndrome, the parents were not told that -24 September 1997: Jared born -Late September 1997: Diagnosed with Downs Syndrome -Early November 1997: Surgery for congenital heart defect -January 1998: Cardiologist asks if 'heart defect' picked up in ultra sound during pregnancy? (This is when the defendant claimed discoverability) -March 2000: Ultrasound for the second pregnancy and the mother now understands that a baby with that heart defect is more likely to have Downs Syndrome -24 March 2004: Sees lawyer -21 December 2004: Writ filed (out of time) -It was not until Jared started school that the extend of his disability hit home -Delays with Law Aid funding -The case will turn on expert evidence about what could be diagnosed from the ultra sound – which exists on video |
| Issue | -When ought the parents to have known the baby's heart defect indicated the baby had Down's Syndrome? (That is, when was the doctor's negligent failure to diagnose Down's Syndrome discoverable?) -What kind of events justifies an extension? -What factors are significant in determining prejudice to the Defendant? |
| Held | -Discoverability was in March 2000 when the mother understood the nature of the heart defect and its correlation with Downs Syndrome |
| Rationale | -The expert evidence, the video recorded ultra sound – meant that evidence was preserved -The plaintiffs were to show that an extension was just and reasonable |
| KLP | -To gain an extension on the limitations, the plaintiffs must show that such an extension will be just and reasonable |

CPA and Limitation Periods

| <i>Nelson v Geary [2017] VSC 228</i> | |
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| Facts | <ul style="list-style-type: none"> -The plaintiff failed to file a statement of claim in compliance with the rules (in 30 days) -On 7 February 2009, the Harveys operated a water pump in hot weather -The operation of the pump allegedly caused a fire which spread to the Nelson farm causing loss and damage to the property and pasture and leading to extensive loss of stock -In addition, Mr Nelson allegedly suffered a psychiatric injury |
| Issue | -Is an order for dismissal available? |
| Held | -It was not available in the circumstances |
| Rationale | <ul style="list-style-type: none"> -Three principles to consider: <ol style="list-style-type: none"> 1. Has there been an inordinate and inexcusable delay? 2. Have the defendants demonstrated serious prejudice may arise? 3. Should the proceeding be summarily dismissed? -Considering these, an order for dismissal was not in the interests of justice |

Personal Service

| <i>Ainsworth v Redd (1990) 19 NSWLR 78</i> | |
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| Facts | <ul style="list-style-type: none"> -A process server held out a writ and said 'these documents are for you' -The defendant looked at them but did not take them -His lawyer standing next to him took them -The defendant said, 'we'd better take a look at those' |
| Issue | -Was the service effected? |
| Held | -The service was effected |
| Rationale | -Personal service by leaving a copy of the document with the person to be served includes the person next to them and does not have to be served by a lawyer |

Substituted Service

| <i>Amos Removal & Storage v Small [1981] 2 NSWLR 525</i> | |
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| Facts | <ul style="list-style-type: none"> -In an action in tort alleging conspiracy to interfere with contractual relations, the plaintiffs sought, a representative order and interlocutory injunctions against 19 named defendants, members of the Committee of Management of the Sydney Shipping Section of the Federated Clerks Union of Australia (NSW Branch), in all comprising 800 members -Leave had been granted to effect substituted service on the defendants named by serving it upon a solicitor acting in other litigation on behalf of individual members of the section, but paid for by all members of the section |
| Issue | -Was substituted service available? |
| Held | -It was available |
| Rationale | <ul style="list-style-type: none"> -An order for substituted service in accordance with the Supreme Court Rules 1970 (NSW), Part 9, rule 10, may be made where: <ol style="list-style-type: none"> (a) It is impractical to effect prompt personal service upon the named defendants; and (b) The substituted service would with reasonable probability be effective to bring notice of the proceedings to the named defendants -In the circumstances— <ul style="list-style-type: none"> -The impracticability of prompt service upon 15 of the 19 named defendants geographically widely spread, with short notice was granted -The situation of the solicitor upon whom the service was effected, imposing upon him an obligation to bring notice of the process to the members of the Committee of Management of the section nominated as defendants thereby making service, with reasonable probability, effective |
| KLP | <ul style="list-style-type: none"> -Personal service must be impracticable and the proposed substituted method must be likely to bring the proceedings to the defendant's attention -Plaintiff must show that extensive efforts were made to effect personal service |

Summary Disposition – Discontinuance or Withdrawal

| <i>Smith v State of Victoria [2017] VSC 190</i> | |
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| Facts | <ul style="list-style-type: none"> -Smith was in a rough car accident where they were forced off the road by another car -In a 000 call, Smith was advised to drive straight to the police station, which she did -No assistance was given by the police, and Smith was injured -Proceedings were brought in negligence against the State of Victoria, holding the state responsible for the 000 call conduct and the conduct of the police -However the State made serious attempts to locate the parties to continue with the proceedings and they had disappeared -The State applied to have the proceedings dismissed for want of prosecution |
| Issue | -Can the proceedings be dismissed for want of prosecution? |
| Held | -The claim was struck out with the right of reinstatement |
| Rationale | <ul style="list-style-type: none"> -The State had established want of prosecution, but failed to demonstrate that they had been seriously prejudiced as a result of the delay -It was then considered whether summary judgment would be appropriate, arguing that Smith had no real prospect of success -However, the Court held that there was a real question to be tried -It was further noted by the Court that proceedings had commenced against the wrong defendant, but suggested that such a defect could be cured by amendment -Given the above, the appropriate order was to strike out the claim, with a right of reinstatement |

Judgment on Failure to Prosecute or Obey Order for Particulars or Discovery

| <i>Nelson v Geary [2017] VSC 228</i> | |
|--------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Facts | <ul style="list-style-type: none"> -The plaintiff failed to file a statement of claim in compliance with the rules (30 days) -On 7 February 2009, the Harveys operated a water pump in hot weather -The operation of the pump allegedly caused a fire which spread to the Nelson farm causing loss and damage to the property and pasture and leading to extensive loss of stock -In addition, Mr Nelson allegedly suffered a psychiatric injury |
| Issue | -Could the matter be dismissed for want of prosecution? |
| Held | -Not in this case |
| Rationale | <ol style="list-style-type: none"> 1. Has there been an inordinate and inexcusable delay? <ul style="list-style-type: none"> -It was conceded that there had been delay 2. Have the defendants demonstrated serious prejudice may arise? <ul style="list-style-type: none"> -Defendants failed to may submissions or provide evidence of specific prejudice (meaning are their chances of a fair trial compromised?) 3. Should the proceeding be summarily dismissed? <ul style="list-style-type: none"> -It would be premature to have summary judgment to dismiss the claim |

Summary Judgment

| <i>Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd [2013] VSCA 158</i> | |
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| Issue | -When is summary judgment available? |
| Held | -The defendant must show that there is no real question to be tried |
| Rationale | <ul style="list-style-type: none"> -The test when considering whether summary judgment is available asks whether the respondent has a real as opposed to a fanciful chance of success -The test is to be applied more liberally than the previous 'hopeless' or 'bound to fail' tests -It must be borne in the mind that the power to terminate proceedings summarily should be exercised with caution and this should not be exercised unless it is clear that there is no real question to be tried |
| KLP | -To obtain summary judgment, the defendant must show that there is no real question to be tried |