

## B. PERSONAL JURISDICTION

Evolution of doctrines from “double actionability” to “place of the tort”.

Threshold question:

- Does the court have the competence/jurisdiction to hear and determine the cross-border dispute in question?
- Court determines this under its own law/rules

Multiple meanings of the word “jurisdiction”:

1. Personal jurisdiction over the parties, i.e. the amenability of a person to the court's processes
2. Subject matter (and remedial) jurisdiction: over the particular claims and defences
3. Territory
  - Note: not necessary the same as “jurisdiction in the international sense” (relevant for recognising the jurisdiction of foreign courts especially for judgments recognition and enforcement”

### Options for service

- Common law – service
  - Individuals
  - Corporations
  - Personal service
  - Substituted service
- Jurisdiction based on D's submission
  - Submission by agreement: choice of court, service
  - By procedural conduct
  - Objection to jurisdiction
- Service elsewhere in Australia: SEPA
- Service in NZ: TTPA

### 1. Common law – service based on the D's presence within the court's territorial jurisdiction

N.b. res judicata: issue has been resolved, cannot bite the apple twice

#### 1.1 Individuals

##### (a) Personal service

- Originating process in all courts (except local courts) must be personally served (UCPR r10.20(2)(a))
  - The delivery of a document or process personally to a party
  - In NSW = UCPR rr10.20-21
- How is service effected? (UCPR r10.21)
  - Leaving copy of document with person
  - If person does not accept, then put copy down in person's presence and tell them of nature of document
  - If person serving is prevented by violence/threat of violence from serving, then leave it as near as practicable to person being served
- Cases – open to parties to agree on a mode of service different from those in the rules

##### (b) Substituted service (only applies to service in Australia)

- In certain circumstances, the Court may make an order to the effect that acts falling short of personal service on a defendant as constituting sufficient notice to the defendant of court proceedings. Such orders are described as being orders for “substituted” or “informal” service. (UCPR r10.14)
- An important consequence of this “substituted (deemed personal service)” is that an order for substituted service cannot extend the court's jurisdiction. This is an important feature of the decision in *Laurie v Carroll*
- **Same jurisdictional scope as personal service – do not confuse with service outside the jurisdiction**

#### ***Laurie v Carroll (1958) 98 CLR 310***

Facts:

- **Critical date when writ was issued (does not matter whether it has been sent out)**
- Writ was issued out of the Supreme Ct of Victoria on 14th June 1957
- Laurie (D – Appellant): left Vic on 13th June 1957, that he did not intend returning there, that he had not left Vic for the purpose of evading service of process, his itinerary having been planned before his departure from London for Australia. The Ct had no J
- Carroll (P – Respondent): Laurie had been within Vic for 2-3 days in connexion with a transaction portion of the profits whereof arose in Vic and had left the State in anticipation of the issue of the writ and to avoid service

Held:

- Substituted service in category of within AU. But **L left AU one day before the crucial date.**

- The D must be amendable or answerable to the command of the writ
  - His amenability depended and still primarily depends upon nothing but presence within the J at the time for the service of the writ.
  - Where a writ cannot legally be served upon a D the court can exercise no J over him.
  - It does not matter why, so long as he has not been enticed there fraudulently for the purpose.
  - It does not matter how temporary may be his presence
  - His motive to leave the forum does not matter
- The order for substituted service could not be sustained and should be set aside. Substituted service is only allowed if the court has personal jurisdiction over the D.
- The Court has no jurisdiction.
- Critical date that the writ was issued by VICSC Laurie had already left Australia.

### ***Gosper v Sawyer (1985) 160 CLR 548***

Facts:

- **Territorial limits**
- Mr Sawyer was hired in NSW. He applied in the Industrial Commission of NSW to avoid a superannuation fund of which he was a member. The membership was based on his employment. All trustees were ordinarily resident in VIC.

Issue:

- Whether the process of the Commission could validly be served on the trustees in VIC by virtue of the NSW law

Held:

- The commission has no jurisdiction.
- Reg 157 of the Industrial Arbitration (General) Regulations provides:  
Where there is no established practice or usage of the Commission...then the practice for the time being of the SC shall...regulate the practice of the Commission
- Gibbs CJ, Wilson & Dawson JJ:
  - Going back to *Cook*, embrace English law if they can provide instruction and assistance to AU law.
  - The regulation is indistinguishable in material respects from s. 70 of the Companies Act 862 (U.K.) which did not give the court jurisdiction to give leave to serve notice out of J
  - Service outside of J is not practice or usage but an extension of J. If you would like to serve outside jurisdiction, you need to have special rules that allow you to do so. None in this case, so you cannot extend it.
  - 'Practice' in the context of reg. 157 has no meaning wide enough to render applicable Pt. 10 of the Rules of the Supreme Court. Pt 10 talks about personal service.
  - Reg. 157 did not render Pt. 10 of the Supreme Court Rules applicable to proceedings in the Commission, and the law of New South Wales did not authorize service of the process in the present case out of the jurisdiction
- Mason & Deane JJ:
  - Assume that the Supreme Court of NSW enjoy powers to order service outside the jurisdiction which would enable the Commission to order the service in Victoria of the originating process in the proceedings instituted by Mr. Sawyer in NSW.
  - The answer to that question turns upon whether the conferral of powers to order service of process out of the jurisdiction can properly be seen as a matter of "practice" or "practice or usage" of the Commission.
  - "Practice" or "practice or usage": are inadequate and inappropriate to encompass the provisions of the "institutional part" of civil procedural law which confer or define the actual J of the relevant court or tribunal
  - That involves attributing to the regulation an operation which would effect an expansion of the Commission's jurisdiction... such an operation is something which the provisions of reg. 157, properly understood, are simply inadequate and inappropriate to encompass.

### ***Joye v Sheahan [1996] FCA 1361***

Facts:

- **Critical date comparison with Laurie**
- The original letter and copy order and summons were posted to Messrs Speed and Stracey and apparently **received by them** on 13 December 1994
- On 13 December, Mr Joye left Australia. He has not subsequently returned
- On 14 February 1995, substituted service was effected as authorised by the order of the Registrar.
- On 17 March 1995, Mr Joye applied for an order to set aside the substituted service and for a declaration that the order and summons had not been duly served upon him.

Held:

- The primary judge concluded that mere presence at the time of issue of the order and summons was sufficient to confer jurisdiction to make an order for substituted service.
- After the issue of the Order and Summons, and **with knowledge of those proceedings**, Mr Joye departed the jurisdiction.
- The appeal should be dismissed. Substitute service is proper.

<ul style="list-style-type: none"> <li>Holding: 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 J of the court. The court may order substituted service on the D.</li> </ul>
<p><b><i>HRH Maharanees of Baroda v Wildenstein [1972] 2 QB 283</i></b></p> <p>Facts:</p> <ul style="list-style-type: none"> <li>Dispute as to authenticity of artwork</li> <li>Both parties reside in France</li> <li>Both parties owned properties in UK, and were connected with social life in UK</li> <li>Maharanees served writ on Mr W when he popped in briefly for a horse race. Served at races</li> </ul> <p>Held (Denning MR):</p> <ul style="list-style-type: none"> <li><b>Doesn't matter if short visit, just that D was served in the jurisdiction.</b> Court should not strike it out unless <b>vexatious/oppressive/abuse of process</b></li> <li>D would probably have to have no knowledge of the summons</li> </ul>
<p><b><i>Perrett v Robinson [1985] 1 Qd R 83</i></b></p> <p>Facts:</p> <ul style="list-style-type: none"> <li>Robinson injured Perrett in car accident in NT</li> <li>NT law did not allow claim for future economic loss</li> <li>P wanted to sue in Qld, where he could get full common law damages</li> <li>P drove R to Qld where he served process on him (Robinson didn't complain as FAI were ultimately liable as insurers)</li> <li>FAI objected to Qld jurisdiction on basis of fraud.</li> </ul> <p>Held:</p> <ul style="list-style-type: none"> <li><b>No fraud committed</b> (D had come in willingly) <ul style="list-style-type: none"> <li>Purpose of visit irrelevant, unless <b>D tricked/fraudulently enticed or coerced into the jurisdiction</b> by P to be served</li> <li>Valid if came into jurisdiction specially to be served</li> <li>In the insurance contract, FAI had agreed to be liable for damages in QLD, plus had presence in QLD, so fell within jurisdiction of QLD SC anyway</li> </ul> </li> </ul>

### Summary

- A person who left the territory after initiating process was issued and who either **knew that the process had been issued** or who left to **evade service of process** will be regarded as within the jurisdiction of the court. The court may order **substituted service** on the defendant (**Joye**)
- If the person **knew of the issue of writ** but **left jurisdiction before issue to evade service**, court probably still has **no jurisdiction** (**Laurie**)
  - Possible exception if **solicitors** at time of issue of writ **authorised to accept service** even if later withdrawn – see *Laurie* at 332, *Joye*
    - Re Mustang Marine [2013] NSW 360*: D in jurisdiction (NSW) at time of service on solicitors (VIC), therefore jurisdiction in NSW
- What if person only temporarily within the jurisdiction (***HRH Maharanees of Baroda v Wildenstein [1972] 2 QB 283*** – present at Ascot Races)
  - Valid if came into jurisdiction specially to be served (***Perrett*** – getting advantage of longer limitation period)
  - But arguably not valid if tricked into coming within jurisdiction (very strictly construed)

## 1.2 Corporations

### (a) Corporations registered in AU – statute

- UCPR r10.22 Personal service on corporation
  - Personal service of a document on a corporation is effected:
    - (a) by personally serving the document on a principal officer of the corporation, or
    - (b) by serving the document on the corporation in any other manner in which service of such a document may, by law, be served on the corporation.
- S 109X of Corporations Act (Cth) (for corporations generally):
  - Leaving at or posting to registered office (or at liquidator's or administrator's office if in liquidation/administration)
  - Personal service on director who resides in Australia
- S 601CX of Corporations Act (Cth) (for foreign corporations):
  - Leaving at/sending to registered office or local agent
  - Personally delivering copy to 2 directors if 2 or more live in Australia
  - Personally delivering to sole director of foreign proprietary co who resides in Australia.
- The Service and Execution of Process Act 1992 (Cth), ss 9 & 15:
  - Where a company is registered in a different state or territory

### (b) Corporations not registered in AU – common law

- At common law:
  - The unregistered foreign co needs to be 'present in the jurisdiction' i.e. '**carrying on business in the forum**'

#### **National Commercial Bank and Anor v Wimborne and Ors**

- The test for presence within the jurisdiction in respect of a body corporate or artificial legal entity separate from its members is whether the foreign corporation carries on its business within the territory of NSW: the question is one of fact for the court to determine according to the following indicia:
  - **Agent** – (a) whether it carries on business here, and this it can only do by an agent and will not be doing unless the agent has **authority on behalf of the corporation to make contracts with persons in New South Wales binding on the corporation**;
  - **Place** – (b) whether the business is carried on at some **fixed and definite place within the State**;
  - **Time** – (c) **whether the business has been continued for a sufficiently substantial period of time**

#### **Adam v Cape Industries**

##### Facts:

- Further illustrates **Agent (see Wimborne)**
- Decides whether a local dealer should be considered a dealer under *Wimborne*
- Asbestos class actions
- Tyler 1 Action: settled in the US court
  - D1 Cape (English corp)
  - D2 Capasco (English corp)
  - D3 NAAC (US sub)
  - D4 South African Mine
- Tyler 2 action: went to trial and P won
  - D1 Cape (default)
  - D2 Capasco (default)
  - D3 NAAC (insolvent – moved assets overseas)

##### Held:

- English Courts will recognize a foreign court as competent to give a judgment in personam capable of enforcement in the UK: if the judgment debtor was, at the time the proceedings were instituted, **resident** (or, perhaps, **present**) in the foreign country.
- The mere fact that the cause of action had arisen in one country did not operate to confer J on the courts of that country over a D not otherwise subject to it
- Does the agent in carrying on the foreign corporation's business make a contract for the foreign corporation, or does the agent, in carrying on the agent's own business, sell a contract with the foreign corporation? In the former case, the corporation is and, in the latter, it is not carrying on business at that place.
- The English courts will be likely to treat a trading corporation incorporated under the law of one country (an overseas corporation) as present within the jurisdiction of the courts of another country only if either:
  - It is established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its services or agents (a "branch office" case), or
  - A representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporation's business in the other country at or from some fixed place of business
- Consider the following (not exhaustive, or necessarily conclusive)
  - 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

<ul style="list-style-type: none"> <li>○ If so, whether the representative requires specific authority in advance before binding the overseas corporation to contractual obligations</li> </ul>
<p><b>Vautin v BY Winddown, Inc (No 2) [2016] FCA 1235</b></p> <p>Facts:</p> <ul style="list-style-type: none"> <li>• <b>Consumer</b></li> <li>• V purchased from Eagle Yachts, the second respondent, the exclusive dealer in Australia appointed by Bertram Yacht, a yacht <ul style="list-style-type: none"> <li>○ D1 Bertram Yacht (US) (manufacturer)</li> <li>○ D2 Eagle Yachts (AU) (D1's exclusive dealer)</li> </ul> </li> <li>• The limited warranty contract: <ul style="list-style-type: none"> <li>○ Exclusive J clause – Florida court</li> <li>○ Choice of law clause – Florida court</li> </ul> </li> <li>• B has applied to set aside the service of the proceedings on it</li> <li>• Item 20 reads: Proceeding properly brought against a person who is served, or is to be served, in Australia, if the person to be served has been properly joined as a party.</li> <li>• r 10.43(4)(c) of the Federal Court Rules – That service of an originating application on a person in a foreign country is effective for the purpose of a proceeding, if and only if the party has a prima facie case for all or any of the relief claimed in the proceeding.</li> <li>• Para 9: Mr Vautin argued that r 10.43(4)(c) of the Federal Court Rules should be construed so that jurisdiction would be established if he demonstrated a prima facie case against Eagle Yachts for any of the relief claimed in the proceedings regardless of whether he can establish, at the present time, a prima facie case against Bertram for any relief sought against it.</li> <li>• Para 26: Bertram argued that r 10.43(4)(c) should be construed as requiring an applicant for service out of the jurisdiction to establish a prima facie case for all or any of the relief claimed in the proceeding against the person to be served outside the jurisdiction.</li> <li>• Court: reject Bertram.</li> </ul> <p>Held:</p> <ul style="list-style-type: none"> <li>• The question, whether a person out of the jurisdiction is a 'proper party' to an action against a person who has been served within the jurisdiction, must depend on this, – supposing both parties had been within the jurisdiction would they both have been proper parties to the action? If they would, and only one of them is in this country, then the rule says that the other may be served, just as if he had been within the jurisdiction.</li> <li>• Where damage is said to have been suffered as a result of the use of defective goods, the joinder of the manufacturer of the goods to a claim made by a purchaser against the local distributor is a routine application of the principle that all parties involved in a controversy should be before the Court in order that the controversy may be determined having regard to all relevant rights and interests</li> <li>• There is a sufficient nexus to serve Bertram out of the jurisdiction, as the manufacturer of the yacht, in the capacity of being a person properly joined as a party.</li> <li>• <b>When</b></li> <li>• <b>DO NOT CONSIDER 3 SCENARIOS IN WIMBORNE AND ADAM.</b> "Carrying business in Australia" usually involves (by the words "carrying on") a <b>series or repetition of acts</b>. Those acts will commonly involve "activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the <b>purpose of profit on a continuous and repetitive basis</b>" <ul style="list-style-type: none"> <li>○ Which imply the repetition of acts ...and activities which possess something of a permanent character.</li> </ul> </li> <li>• Accordingly, I am satisfied that Bertram did carry on business within Australia for the purposes of <b>s 5(1)(g) of the Competition and Consumer Act</b>. <ul style="list-style-type: none"> <li>○ Bertram requires Eagle to provide service facilities to all owners of Bertram yachts, on any limited warranty claims wherever the yachts were purchased and require Eagle to provide the document recording the limited warranty to first use purchasers from Eagle that it had bought from Bertram for on sale.</li> </ul> </li> <li>• <b>S 5(1)(c) &amp; (g) Competition &amp; Consumer Act 2010 (Cth):</b> <ul style="list-style-type: none"> <li>○ Broadly interpreted to protect consumers</li> <li>○ A series or repetition of acts for profits</li> </ul> </li> </ul>

## 2. Common law – jurisdiction based on defendant's submission

3 types of submission:

1. P positively indicates submission by agreement – for choice of court
  - a. For mode of service, see above
  - b. Jurisdiction-selection clauses
2. Submission **inferred** from D's procedural conducts
  - a. Takes a step in proceedings which in all the circumstances amounts to a recognition of the court's jurisdiction in respect of the claim'. Having submitted, a party is precluded from objecting to jurisdiction
    - i. Summary dismissal: *Garsec*
    - ii. Counterclaims on the same subject matter as P's claims (*Wimborne, Marlborough*)