

## Seminar 8 Personal Jurisdiction

### 2. Service of originating process of NSW SC outside NSW

#### A. General considerations

- Background
  - OP of NSW courts can only be served in NSW
  - **If serve outside NSW, must be statutory basis**
    - Outside NSW, fail at common law
- **Can OP of NSW courts be served on D?**
  - 1) If D in NSW
    - **YES**
  - 2) If D in another AU state
    - ◆ **YES (OP of any NSW court) s15(1) Service and Execution of Process Act [McEntee v Connor]**
    - ◆ AU regarded as one geographical area for this purpose
  - 3) If D in NZ
    - ◆ **YES (OP of any NSW court) s9(1) Trans-Tasman Proceedings Act 2010 (Com)**
      - ◇ Same as within AU
  - 4) If D outside AU and NZ - ONLY SC NSW can do so, other courts in NSW cannot UCPR 11.1
    - ◆ **If fall within Schedule 6, OP CAN be served on D WITHOUT leave of court UCPR 11.4**
      - ◇ UCPR Pt11 Schedule 6
        - ▶ A - tort
        - ▶ B C - contract
      - ◆ **If not covered by ABC, NEED leave to serve UCPR 11.5**
        - ◇ Leave when:
          - ▶ Claim has real and substantial connection with AU, and
          - ▶ AU is the appropriate forum, and
          - ▶ Court should assume jurisdiction
        - ◇ No case on this
      - ◆ **Once D served in a foreign country, what then?**
        - ◇ D can **object** to the existence/exercise of jurisdiction of SC NSW UCPR 11.6(1)
          - ▶ Without risk of voluntary submission UCPR 12.11
          - ▶ Court has **DISCRETION** to dismiss/stay proceeding/set aside service of OP if UCPR 11.6(2)
            - Service of OP not authorised under Pt11
            - **SC NSW inappropriate forum**
            - P's claim has insufficient prospects of success [Agar v Hyde]
        - ◇ What if **D does nothing?**
          - ▶ If D does not appear/object, then **P must obtain leave of court to proceed to default judgement against D UCPR 11.8AA**
            - ▶ **Leave will be granted if P show that P's claim as pleaded falls within ABC. Merits does not matter**
              - [Agar v Hyde]
                - ◆ Facts
                  - ◆ P NSW resident, rugby player
                  - ◆ Accident in NSW, personal injury in game
                  - ◆ D is international rugby board - UK org
                  - ◆ D negligent in failing to amend rules to avoid harm
                  - ◆ P sue D in NSW SC
                  - ◆ UCPR basis for service outside AU
                    - ◆ Tort damage suffered in NSW (Para A)
                    - ◆ Place of tort?
                      - ◆ In NSW, maybe
                  - ◆ D served, but does nothing
                  - ◆ P seek leave of NSW SC to proceed
                - ◆ Held:
                  - ◆ **P's claim as pleaded falls within one of the paragraphs of A,B,C, so leave granted, can proceed**
                  - ◆ **Merits of P's claim IRRELEVANT**
                - ◆ D object to exercise of jurisdiction
                  - ◆ Foreign D may object on 3 grounds. At this case time, only 2 grounds
                    - ◆ Service not authorised by the UCPR rules
                      - ◆ Here, not applicable
                    - ◆ Court inappropriate forum for the trial to proceed
                      - ◆ Here, personal injury in NSW by NSW resident. So no hope
                    - ◆ 3rd ground (common law) - at trial, P has no reasonable prospect of success
                      - ◆ **YES here - Damage too remote**
                      - ◆ Now, in rule 6
                - ◆ **Litigation permanently stayed**
          - ◆ **If has lawful basis for service under UCPR Pt11, person subject to NSW SC jurisdiction. SC may order substituted service within/outside NSW if personal service impracticable**
            - ◇ [ASIC v Sweeney]
              - ▶ Facts
                - ASIC civil proceeding against Sweeney, NSW resident for insider trading
                - The day before summons filed, S left AU
                - ASIC tried personal service, no success
                - Apply for order for substitute for service - serve OP on clerk etc.
              - ▶ Issue:
                - Can SC make substitute order?
              - ▶ Held:
                - Granted
                  - ◆ There is lawful basis for service under Pt11
                    - ◆ Cause of action arisen in NSW
                  - ◆ So, D subject to NSW jurisdiction, does not matter where D is

#### B. Schedule 6 (b) + (c) - CONTRACT - reference to AU, not NSW

- In K case, to serve OP outside:

1) **Breach committed in AU - (c)**

- ◆ Where is the place of breach depends on what parties agreed to do and where parties agreed to do it

- ◆ **Sale of goods K - place of breach is place of delivery**

- ◇ [Lewis Construction Co v M Tichauer]

- ▶ Facts

- P is V construction company, D is French manufacturer of crane
- K of supply of goods
- Made, delivered, put into use
- Accident happened since crane collapse
- P sue D that D did not comply with K term - crane not fit for use

- ▶ Issue:

- Can OP be served outside V on D in France?

- ▶ Held:

- YES
  - ◆ Place of breach?
    - ◆ Agreed place of delivery of crane is French port, so place of breach is France
  - ◆ Another ground - K made in V

- ◆ **If repudiation of K by D - regardless of mode of communication, place of repudiation is the place where the repudiatory communication originated**

- ◇ Phone call - place where words are spoken

- ◇ Letter - place where letter posted

- ◇ [Safran v Chani]

- ▶ Facts

- P in NSW, D in V
- D repudiate
- Methods
  - ◆ Words spoken in V, heard in NSW
  - ◆ Letter written and posted in V, seen in NSW
- K law rule
  - ◆ When a party repudiate, innocent party can choose not to accept it. If innocent party mitigates loss - may wait until K term (agreed time and place) and treat non-performance as breach

- ▶ Held:

- **Breached in V**

2) **K made in AU - (b)(i)**

- ◆ **Made in AU if communication of acceptance by offeree to offeror occurred in AU (last act to create binding obligation occurred in AU)**

- ◇ If accept via:

- ▶ **Instantaneous methods (fax/email/telephone/telex) - acceptance occur at place of receive**

- [Reese Bros Plastics v Hamon-Sobelco Australia]

- ◆ Facts

- ◆ Offeror in NSW, send offer by fax to offeree in NZ
- ◆ Offeree accepted in NZ, sent by fax to NSW

- ◆ Held:

- ◆ Fax is instantaneous, made where acceptance actually communicated, so in **NSW**

- [Dyer v Dyno Nobel Asia Pacific]

- ◆ Facts

- ◆ Employer in NSW, send letter of offer to employee in Qld
- ◆ Employee accept offer by fax, send fax from Qld to NSW
- ◆ Employer receive fax in NSW

- ◆ Held:

- ◆ **NSW**

- ▶ **Non-Instantaneous methods (letter/cable/telegram) - acceptance occur at place of send**

- Only applies if both party contemplates such methods can be used for acceptance

- [Lewis Construction Co v M Tichauer]

- ◆ Facts

- ◆ Non-instantaneous communication, like post
- ◆ D made counter-offer, received by P
- ◆ P accept in V, post to D in France

- ◆ Held:

- ◆ **K made in V, time and place cable dispatched**
- ◆ Both party contemplated mode of communication

- ◆ Law of K

- ◆ French law
- ◆ In F law, no postal acceptance rule. So K made in F
- ◆ Way out?

- ◆ **All matters of jurisdiction is governed by lex fori i.e. V law**

3) **K governed by AU law - governed by law of states of AU - (b)(iv)**

- ◆ Choice of law in K

- ◆ Governed if **K includes express choice, or inferred choice of that law, the law of AU will be proper law of K**

4) **K made by or through an agent of D, that agent is trading/residing in AU (b)(ii)**

- ◆ Made **BY** agent

- ◆ Made **THROUGH** agent

- ◇ **OK if agent DOES NOT HAVE AUTHORITY TO BIND D**

- ▶ [National Mortgage and Agency Co of New Zealand v Gosselin]

- Facts

- ◆ P in UK, D in Belgium, agent in UK
- ◆ Agent has no power contractually to bind D
- ◆ Just collect order, present to D, D decide whether to accept or not

- Issue:

- ◆ Whether K made through agent?

- Held:

- ◆ Through

C. **Schedule 6 (a) - TORT - reference to AU, not NSW**

- **Tort committed in AU**