OCEANIC SUN - A FALSE DAWN

by

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To the average practitioner, international law is of no interest. It is regarded as something which does not intrude into the problems of daily practice and is best left to academics in search of a topic for a Ph.D. Yet, international law may impact both on one's daily life and in relation to perfectly everyday transactions in unexpected ways. All Mr Fay did was to buy a ticket in Australia to go on a cruise in Greece and he has propelled himself straight into Australian legal history. Even for the less adventurous, it is easy enough to become at least a footnote if not a leading case. The Tasmanian motorist who has an accident in the Northern Territory and then bring an action in the Supreme Court of Tasmania is confronted with all the difficulties of principles of private international law.

It is probably not appreciated by the average Australian that, by taking the sixty minute journey by aeroplane from Melbourne to Sydney, an Australian citizen does, for the purposes of private international law, enter a foreign country. As the High Court has held, each State is a distinct and separate country or law area.

A neat game of Trivial Pursuit for academic lawyers might include the following question: Which two legal international personalities are the forum shoppers' paradise? The answer is: Texas and the Australian States. Section 71.031 of the Texas Civil Code gives a foreign litigant a right to sue in a Texas court no matter how slight the connection with the State. This right may not be overridden by forum non conveniens considerations. As Justice O'Connor in the Supreme Court of the United States remarked: "It is possible Texas has constituted itself world's forum of final resort". Perhaps we have not gone quite that far in Australia but we have certainly made a valiant effort in that regard in Oceanic Sun Line Special Shipping Co Inc v Fay 79 ALR 9. By a narrow majority of three to two, the High Court has held that the rapid advances towards international comity achieved by the House of Lords in recent years and the acceptance into English law of the doctrine of forum non conveniens did not apply in

Australia. The facts are commonplace in the extreme. At a time when, ranging from the young student to the recently retired, Australians are availing themselves of relatively cheap overseas air travel, any of us could find ourselves in Mr Fay's position. Mr Fay, who lives in Queensland, arranged a cruise on a Greek vessel operated by Oceanic, a Greek company. He made his arrangements through a Sydney travel agent. The agent made the necessary bookings, paid the fare to the Australian agent of the shipping company and received an exchange order which he duly exchanged for a Sun Line ticket in Athens shortly before the cruise. During the cruise, he was badly injured when a shot gun exploded during a shipboard entertainment of trap shooting. No doubt attracted by the prospect of recovering limitless damages, Mr Fay first commenced proceedings in New York. A judge there had no hesitation in telling him to go away on the basis of forum non conveniens. Undeterred, our Queensland resident then started an action in the Supreme Court of New South Wales. This was in exercise of what is delicately termed my court's "exorbitant" jurisdiction. In this respect, New South Wales claims wider territorial imperatives than the Queensland Supreme Court. Jurisdiction was founded on a rule which allows for service of process outside New South Wales where the proceedings are for the recovery of damage suffered at least partly in New South Wales, caused by a tortious act wherever occurring.

It was hardly surprising in the circumstances that the shipping company asked for a stay of proceedings, particularly as one of the conditions of the ticket was that any action be brought only before the Courts of Athens. The shipping company failed at first instance and by a majority in both the Court of Appeal and the High Court.

What then is the forum conveniens? The doctrine comes from Scottish law and provides for an action to be desisted or sisted if there is a foreign forum which is more "conveniens" in the sense that it is "more suitable for the ends of justice". Until recently, the test for a stay in England had been and still in Australia, is that laid down by Lord Justice Scott in 1936. A mere balance of convenience was not sufficient ground for depriving a plaintiff of the advantages of prosecuting action in an English court. It was insufficient that England was not the natural forum. Two conditions had to be satisfied. First, the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way and, secondly, the stay must not cause an injustice to the plaintiff. In both, the burden of proof was on the defendant. This approach was reflected both by Lord Denning and Lord Donaldson in more recent times when, in answer

to the claim that a plaintiff was forum shopping, they replied that England was a very good shop to be shopping in.

Allegations that proceedings were oppressive or vexatious were regarded as grave and, even in the case of blatant forum shopping, it was very difficult for a defendant to prove. It has been said that "the absence of any real connection between the proceedings and England does not itself make it vexatious and oppressive for the action to be continued". Also, it was not sufficient to show that the injustice caused by a stay was less than the injustice by the refusal. It was necessary to show a total absence of injustice. Further, it was thought sufficient injustice that the plaintiff bona fide believed that there was a real advantage in suing in England even if this belief was unsubstantiated.

The law was radically reformed by the decision of the House of Lords in the Spiliada decided in 1987. There it was held that the loss of a legitimate personal or juridical advantage was no longer relevant.

The test has been stated by Lord Goff in the Spiliada as follows:

> "The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum having competent jurisdiction which is the

> appropriate forum for the trial of the action that is in which the case may be tried more suitably for the interests of all the parties and the ends of justice..."

The majority of the High Court held that this was not for Australia. We were to stay with the test of vexatious and oppressive. We were to stay with the opportunity for a plaintiff to bring an action in this country if there was any personal or litigious advantage to him in so doing.

Why did the majority decide this way? Brennan J thought that the latest English formulation of forum non conveniens was uncertain. There were no fixed guidelines and the English judges now had a broad discretion to be exercised, not according to tolerably precise principles, but simply according to a judge's view of what is suitable for the interests of all the parties and the ends of justice. The difficulty thus perceived by His Honour has its amusing side. Under the new cross vesting legislation, the tests formulated are almost precisely those laid down by Lord Goff. Thus, judges, in Australia, will have to grapple with precisely tests and concepts rejected by Brennan J in the international sphere.

His Honour further considered that courts are at the service of litigants and are obliged to exercise jurisdiction where it is invoked and the right of a litigant to such exercise of jurisdiction cannot be defeated by the exercise of a judicial

discretion. His view may be summarised in the following quote:

> "Once a court assumes a wider discretion to refuse to exercise its jurisdiction as the English cases show there is no turning back short of the point where the court guided by no more specific touchstone than the ends of justice assumes the power to affect the parties substantive rights."

The Australian Parliaments have identified precisely that touchstone as the engine which drives the cross vesting legislation.

Deane J thought that relief from the traditional formulation may be granted to the extent of giving a liberal interpretation to the words "oppressive, vexatious or an abuse of process". His Honour identified the English test as enquiring which "is the natural or more appropriate forum". Once again, it may be observed that the test of the "more appropriate" forum is the test identified by the cross vesting legislation. In his view, arguments of international comity supporting adoption of the forum non conveniens principle were persuasive but not compelling. Gauldron J considered that the English developments were due to circumstances such as the United Kingdom's membership of the EEC which had no counterpart in Australia.

Let us then see where this traditional approach takes us. Mr Justice Clarke in the Supreme Court of New South Wales refused to stay proceedings brought in the Supreme Court of New South Wales against a large international firm of chartered accountants. The work complained of was carried out in one of the United States offices of the firm. The defendant lives in Kansas and works as a partner in the firm's Kansas office. He has never been to Australia. Clarke J held that the natural forum was Kansas. The plaintiff in Australia identified certain advantages which were available to it in this country but were unavailable in the United States. These were matters such as costs and interest. The judge considered that he had no option but to allow the proceedings to be maintained here. There is an appeal now pending to the Court of Appeal but its outcome must be doubtful in the light of the High Court's decision in the Spiliada.

What fell from the majority in Oceanic Sun has provided the foundation for the argument for the respondent in the first contested application for transfer from one Supreme Court to another. I am a member of the court that heard that application and it would be inappropriate to do more than draw attention to this fact.

Today, due to ever increasing international trade, ease of travel, ease of communication, a plaintiff often has a choice of the forum in which proceedings should be instituted. As well, courts have generally tended to broaden their jurisdictional bases. This, again, has enlarged the available fora. As Professor Pryles has pointed out, theoretically one Frenchman could sue another Frenchman in respect of damage sustained in a motor car collision in Paris, providing the plaintiff took the trouble to travel to New South Wales or Victoria and continued to suffer some consequential damage in the relevant State.

The great danger in permitting such an exercise of jurisdiction is that foreign courts will no longer enforce Australian judgments given in exercise of such jurisdiction.

The decision of the High Court is in disharmony, not only with the cross vesting legislation which, of course, applied only within Australia, but also with rules relating to transnational disputes. Thus, both Commonwealth and State arbitral legislation mandates a stay of proceedings where action is commenced in an Australian court in breach of a written agreement to arbitrate.

The minority in the High Court has suggested that the decision will need to be reviewed. Is Oceanic Sun to prove a false dawn?