Interstate claims / forum shopping - where to now?

Haddow v Hepburn & Thorpe (Qld) Pty Ltd, unreported, McLauchlan QC DCJ, 3rd June 1998

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A recent decision by the District Court of Queensland in the above matter has reaffirmed, at least in the short term, earlier decisions such as ***Goliath Portland Cement v Bengtell*** *(1994) 33 NSWLR 414, that the important consideration of a Plaintiff's "legitimate juridical advantage", can in conjunction with a prima facie right to commence proceedings in one jurisdiction, outweigh an otherwise overwhelming majority of connecting factors linking the plaintiff's claim to another.*

The facts

The Plaintiff commenced a claim in the Queensland District Court in damages for personal injuries, loss and damage suffered in the course of his employment with the Defendant on or about 2nd June 1994. He was a resident of New South Wales and was injured in the course of his employment with the Defendant whilst laying pipes in a trench at a building site in New South Wales. He was a resident of New South Wales at date of application. The Plaintiff received all his treatment in New South Wales. Although the Defendant was a company incorporated in Queensland, having its principal office on the Gold Coast, it carried on business in several States of Australia, including New South Wales. The company was served in Queensland.

The Defendant brought an application to have the plaint struck out or alternatively stayed indefinitely on the ground that the commencement of the action in Queensland was an abuse of process or vexatious and, more particularly, that the District Court in Queensland was not an appropriate forum for the action. It was not in dispute that the Court had inherent jurisdiction to stay or strike out proceedings, if the Court considered itself "a clearly inappropriate forum to entertain those proceedings".

The Plaintiff had pleaded particulars of alleged negligence, breach of contract or breach of statutory duty of the Defendant including those imposed by Section 9 of the *Workplace Health & Safety Act* 1989 (Qld), breach of the statutory duty imposed by Section 15(1) of the *Occupational Health & Safety Act* (NSW) and breach of the *Construction Safety Act* (NSW) and the Construction Safety Regulations (NSW). The Defendant in its Entry of Appearance and Defence pleaded, amongst other things, a cap on the damages entitlement of the Plaintiff pursuant to the terms of the *Workers' Compensation Act* 1987 (NSW).

Proceedings had been commenced immediately prior to the close of the three year limitation period in Queensland. No proceedings had been instituted in New South Wales. His Honour Judge McLauchlan Q.C. noted the terms of the *New South Wales Limitations Act* and the terms of an Affidavit filed by the Defendant's Solicitors. In that Affidavit, a Solicitor deposed that she had received instructions from the Defendant's workers' compensation insurer "... that there will be no objection on the basis of limitation of action, to the issue of common law proceedings by the Plaintiff in either the District or Supreme Court of New South Wales". In *Voth v Manildra Flower Mills Pty Ltd* (1990) 171 CLR 538, the Defendant in similar circumstances (that is, where the Plaintiff's claim was statute barred in the alternative jurisdiction) had been able to tip the Court's decision in its favour by undertaking not to plead the limitation defence in the alternative jurisdiction.

Clearly this is a tactic which defendants will employ in such cases given that few, if any, Judges are likely to strike out an action where they appreciate that it is statute barred elsewhere.

In the present case, His Honour commented that -

"So far as the limitation point is concerned, although prima facie it is a reason not to stay proceedings in Queensland, it could I think be dealt with upon the basis of an undertaking on behalf of the Defendant in terms of the instructions which it apparently provided to its Solicitors, and an appropriate condition could be formulated as part of the stay order."

His Honour then examined *Voth* and outlined the principles relevant to applications such as this. He adopted as accurate, the headnote to that case to the effect that a defendant will ordinarily be entitled to an order for a stay or dismissal, where the local court is persuaded in the circumstances of the particular case and the availability of a foreign tribunal to whose jurisdiction the defendant is amenable which could hear the matter, that the local court is "a clearly inappropriate forum for the determination of the dispute". The primary enquiry ought be directed to the inappropriateness of the local court rather than to the appropriateness or comparative appropriateness of a suggested foreign forum.

His Honour noted that this onus rested upon the Defendant. He went on to find that the Defendant had established the availability of a foreign tribunal, being either the District or Supreme Courts of New South Wales. The question then he said was "whether, having regard to the circumstances of the particular case, the District Court of Queensland is a clearly inappropriate forum". His Honour then noted reference in *Voth* to the relevant "connecting factors" as well as "a legitimate personal or juridical advantage" which might also come under consideration in a particular action.

He listed the "connecting factors" relevant in the case before him as:

1. The Plaintiff was and remained, resident in New South Wales.
2. The Defendant, although incorporated in Queensland and having its registered office there, was carrying on business in New South Wales at the time and at the location of the accident.
3. The accident occurred in New South Wales.
4. Witnesses on the issue of liability would be resident in New South Wales.
5. Many of the medical witnesses would be located in that State.
6. The substantive law to be applied would be the law of New South Wales, being the place where the wrongs alleged against the Plaintiff occurred (see *Breavington v Godleman* (1988) 169CLR41). His Honour also noted the point made by Kirby P. (as he then was) in *Goliath* that the courts most familiar with the substantive law of a State and the approaches to it, would be the courts of that State.
7. The particulars of negligence alleged against the Defendant have little if any connection with Queensland and the whole of the damage suffered by the Plaintiff occurred in New South Wales not in Queensland.

His Honour noted that the "connecting factors" linking the action to Queensland were far fewer in number. The principal one was clearly that the Defendant was incorporated in Queensland and had its registered office there, giving rise at least to a prima facie right of the Plaintiff to commence proceedings within the jurisdiction. However, added to that was the important consideration of a "legitimate juridical advantage to the Plaintiff suing in this State". Again, he referred to Kirby P. in *Goliath* at 436 where he had in turn referred to High Court decisions such as *McKain* and *Stevens v Head*. His Honour noted that in *Goliath* by majority, the Court of Appeal had upheld the decision of the Judge at first instance to refuse a stay of proceedings instituted in New South Wales, although it was patent that the overwhelming majority of "connecting factors" linked the Plaintiff's claim to another jurisdiction. In *Goliath* of course, the juridical advantage which was considered in bringing the action in New South Wales was a more liberal limitation law within that State.

His Honour went on to determine that-

"In the present case and on the basis of the authorities mentioned above, I consider that the Plaintiff is entitled to pursue a personal or juridical advantage by proceeding in Queensland to avoid the statutory damages "cap" which would apply to the litigation if instituted in New South Wales. That, combined with the fact that the Defendant is a Queensland company having its registered office in this State, persuades me that in the exercise of my discretion I should dismiss the application for a stay".

Conclusion

This decision was of course only related to the hearing of a summons to strike out or stay proceedings. Moreover, it was a District Court decision. It does however highlight for plaintiff lawyers particularly, an extremely valuable argument which ought be considered where actions are considered or commenced in similar circumstances. The case, when combined with higher, earlier authority such as *Voth* and *Goliath*, highlights the issues which might be relevant, including the connecting factors to alternative jurisdictions, and other considerations such as a personal or juridical advantage to be gained from proceeding in the local jurisdiction, as the case may be. As well, it exemplifies that only a brave defendant would make such an application without providing to the Court a reliable undertaking to forbear from pleading a limitation, if relevant.

It remains to be seen however whether such alternatives will endure for Plaintiff lawyers. Given the thin margins in some of the High Court's decisions relating to "forum shopping" and the clear distaste for the practice voiced by certain present judges, it is possible to predict significant tightening of such opportunities, should the High Court have the opportunity to re-visit the issue in future proceedings. ■

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