CASE notes

BY BERNARD MCHARDY, SYDNEY

A Forum Non Conveniens Principle

The policy element in determining convenience

On 7 August 1998, two matters involving litigation by New Zealand residents in New South Wales Courts came before the High Court for Special Leave applications to appeal from the decisions of the New South Wales Court of Appeal. Those matters were: *Michael Peter Hall as administrator ad litem of the Estate of Desmond Milton Bishop Putt (Deceased) v James Hardie & Coy Pty Limited and James Hardie Industries Limited; and James Hardie & Coy Pty Limited and James Hardie Industries Limited v Grigor.*

Both applications were refused.

The Putt Case:

Mr Putt was a New Zealander who had been employed between 1947 and 1951 as a factory worker with James Hardie & Coy Pty Limited (JHNZ), a duly incorporated company in Auckland, New Zealand. That company manufactured asbestos cement building products. As a result of Mr Putt's exposure to asbestos dust and fibre during his employment by JHNZ, he contracted mesothelioma from which he ultimately died on 13 April, 1998. JHNZ had been established by its Sydney parent company in 1938. 95% of the shareholding in the company was Australian and the Board of Directors of the company at all relevant times conducted their meetings at Asbestos House, Sydney.

Bernard McHardy is a Partner at McLaughlin & Riordan, 4th Floor, 82 Elizabeth Street Sydney 2000, **PHONE** (02) 9223 2411, **FAX** (02) 9223 3958.

Mr Putt sued the Australian companies, James Hardie & Coy Pty Limited (JHC) and the parent holding company James Hardie Industries (JHL). The Plaintiff satisfied His Honour Judge O'Meally in the Dust Diseases Tribunal that relevant provisions of the New Zealand no fault legislation, the *Accident Rehabilitation & Compensation Insurance Act* 1992 (the ARCI Act), which bars the bringing of a common law action for damages, were procedural rather than substantive. On that basis, the Plaintiff overcame the Private International Law obstacle to suing in New South Wales.

His Honour also found that JHNZ was part of a single enterprise, though with separate legal personalities, and that there was no distinction between the plants or branches of the First Defendant, JHC in Australia and what was called its branch in New Zealand. He found that the Executive Committee of the First Defendant controlled the affairs of JHNZ and that the Defendants put themselves in a relationship of proximity with employees of JHNZ.

The evidence indicated supply of raw asbestos to JHNZ by JHC and that in shipping a commodity, the use of which was known to be dangerous so as to constitute a risk of foreseeable injury, Judge O'Meally found JHC had committed a breach of duty in New South Wales. His Honour relied on Lord Pearson's judgment in *Distillers Co (Biochemicals) Limited v Thomson* (1971) AC44A confirmed as appropriate for Australia in *Voth v Manildra Flour Mills* (1990) 171 CLR 538 in determining that the series of events, that is the acts of commission and omission which led to the Plaintiff's damage, in substance arose in New South Wales.

The Defendants in the Putt cases pleaded that New South Wales was an inappropriate forum for the determination of the Plaintiff's claim in that there were no connecting factors between the proceedings and New South Wales other than the incorporation of the Defendants. They further argued that it was not a legitimate juridical advantage for the Plaintiff to select the New South Wales forum to enable him to avoid the impact of the New Zealand legislation. The Plaintiff, for his part, raised the connecting factors with New South Wales.

The matter ran before the Tribunal on an urgent basis and it was agreed between the parties that the convenience of the forum would be determined ▶

as an ultimate matter. It was the conclusion of the trial judge that it would be highly unsatisfactory, after hearing all the evidence, to effectively throw away the costs and time taken in hearing the matter to say that the Tribunal was a forum non conveniens. In any event, in his view there were sufficient connecting factors with New South Wales and a legitimate juridical advantage to persuade him that the Tribunal was a convenient forum.

The Court of Appeal delivered its judgment on 27 May 1998. Despite an acceptance that JHC was responsible for supplying raw asbestos to JHNZ, it was found that any breach by the Australian Defendants was fundamentally a failure to warn and that such warning could only have occurred at the place where the Plaintiff worked.

Sheller JA. went on to consider the ARCI Act and determined that consistent with *McKain v R W Miller & Co (South Australia Pty Limited)* 1991 174 CR1 and *Thomson v Hill (1995)* 38 NSWLR 714, the New Zealand Act must be read as extinguishing any cause of action for damages and that the substantial effect was to substitute statutory cover for the right to recover Common Law damages whereby it is a substantive law. The Court therefore viewed Mr Putt's claim as failing to satisfy the second limb of the test in *Breavington v Godleman* (1988) 169 CLR 41.

As noted above, the High Court refused an application for leave to appeal from that decision.

The Grigor Case

On 1 May 1998, Dr Robert Grigor filed a Statement of Claim in the Dust Diseases Tribunal, naming James Hardie & Coy Pty Limited and James Hardie Industries Limited as Defendants. Dr Grigor, again was a resident of New Zealand and he claimed to have developed mesothelioma as a result of inhalation of asbestos dust emanating from the cutting and drilling of building materials manufactured by the Defendants, both in Australia and through its company in New Zealand. The Statement of Claim alleged negligence on the part of the Defendants in failing to warn the Plaintiff of the risks associated with inhalation of asbestos fibres and negligent supply and manufacture of the building materials with knowledge of the risks of injury.

In this case, the Defendants moved promptly seeking orders that the proceedings be permanently stayed or dismissed, contending that New South Wales was clearly an inappropriate forum. That Motion was dismissed in the Dust Diseases Tribunal and went on appeal the day after the Putt decision had been given in the Court of Appeal, that is 28 May 1998. The Court of Appeal's decision was handed down on 18 June 1998. The headnote in the Court of Appeal read as follows:

Held, dismissing the Appeal:

4. *Where the principal breaches of duty alleged are a failure to warn of the dangers of inhaling asbestos and failure to ensure a safe system of work, the place of commission of the tort is the place where the Plaintiff was exposed to the asbestos dust. Therefore the trial Judge's exercise of discretion miscarried as the tort was committed in New Zealand and not in New South Wales.*

James Hardie & Coy Pty Limited v Putt (Unreported Court of Appeal 27 May 1998) applied;

5. *(By Mason P, Beasley JA. concurring; Spigelman CJ dissenting).*

The current proceedings should not be stayed as their continuation cannot be regarded as oppressive, in the sense of "seriously and unfairly" burdensome, prejudicial or damaging; or vexatious, in the sense of being product of "serious and unjustified trouble and harassment"

Voth v Manildra Flour Mills Pty Limited (1990) 171CLR 538;

Henry v Henry (1996) 185 CLR 571;

Oceanic Sunline Special Shipping Company Inc v Fay 1998 165 CLR 1997, applied.

Discussion of principles stemming from Voth, including the need for possible legislation allowing Courts to have regard to the impact of claims by non-residents upon overcrowded Courts in New South Wales."

It was the Chief Justice in dissent who observed that, "it is by no means clear to me that a foreign resident suing on a foreign tort should be entitled to the advantages of a special regime developed for the benefit of Australian residents. The demand on judicial resources are now such that this should be a permissible element in the exercise of the jurisdiction to stay proceedings".

Both parties accepted in the Grigor appeal that the relevant test to be applied was that identified in *Voth v Manildra Flour Mills Pty Limited*, namely whether New South Wales was a "clearly inappropriate forum". The opponent relied on the passage from *Voth*:

> *The question whether the local Court is a "clearly inappropriate forum focuses ... upon the inappropriateness or comparative appropriateness of the suggested foreign forum". (page 565);*

and submitted that in determining inappropriateness of the local forum, no process of comparison with the foreign forum should be made. Spigelman CJ expressed the view that "this goes too far" and referred to a passage in *Voth* immediately proceeding that quoted where the High Court had indicated that matters of a broader character were relevant in the application of the ultimate test.

> *" ... The principles to be applied in applications to set aside service and in applications for a stay on inappropriate forum grounds are those stated by Deane J in Oceanic Sun (1988) 165 CLR at pages 247-248. In the application of those principles the discussion by Lord Gough in Spiliada (1987) AC at pages 477-478, 482-484 of relevant 'connecting' factors and 'a legitimate, personal or juridical advantage' provides a valuable assistance".*

His Honour went on to look at the reasoning of the Court in *Goliath Portland Cement Co Limited v Bengtell* (1994) 33 NSWR 414 and of the High Court in *Oceanic Sunline Special Shipping Company Inc. v Fay* as to where the Court might be persuaded that it is such an unsuitable or inappropriate forum for their determination that their continuance would work a serious injustice in that it would be "oppressive and vexa-

tious". Deane J observed in *Oceanic Sunline* that:

> *"On the traditional approach the clear inappropriateness of the local forum may justify dismissal or stay. The mere fact that some foreign Tribunal would represent a "more appropriate" forum will not". (Page 242).*

Spigelman CJ noted further that Deane J had gone on to indicate that the concepts of 'vexation' and 'oppression' should be flexibly and not rigidly construed to be understood as meaning seriously and unfairly burdensome, prejudicial or damaging or productive of serious and unjustified trouble and harassment. This led to His Honour in *Oceanic Sunline* favoring the "so inappropriate a forum" test, which was then adopted in the joint judgment in *Voth*.

Spigelman CJ observed that where the place of tort is New Zealand there was immediately signified a source of prejudice by reason of the need to prove the law of New Zealand as a matter of fact by means of expert evidence. His Honour stated that:

> *"there are significant policy elements in the determination of issues such as proximity and causation which may be significant in some cases. Cultural differences may also prove to be very important, although less so for New Zealand than any other foreign nation."*

His Honour observed that *"there will be some policy element in many 'failure to warn' cases"* and that *"judicial minds may differ"*. It was an issue *"best determined by a Judge in the place where the failure to warn occurred"*.

As noted, His Honour found on balance in Grigor that the continuation of proceedings would be 'oppressive' to the Claimants in the sense of "seriously and unfairly burdensome, prejudicial or damaging"; the reasons which prevailed in *Voth*.

Spigelman CJ then went on to consider the demands on judicial resources being such that this should be an admissible element in the exercise of the jurisdiction to stay proceedings and that that is a relevant factor in the United States doctrine of forum non conveniens. He observed that Deane J rejected the US doctrine in *Oceanic Sun*, that this was adopted in *Voth* and that as things stand public interest considerations such as Court congestion are rejected. He noted that Deane J concluded:

> *"If the law of this country is to be changed in that regard, it seems to me to be preferable that it be done by legislation enacted after full inquiry and informed assessment as well as domestic considerations of a kind which this Court is not equipped to make of its own initiative". (Oceanic Sun, page 255).*

Spigleman CJ concluded that:

"the parliament should, in my opinion, consider a reform of the law which would permit the diversion of limited judicial resources, and other matters of public interest, to be considered as an element in the discretionary balance, when resolving forum non conveniens claims. On my reading of the authorities, I am prevented from taking into account such matters of public interest." PL