DISCRETION IN THE EXERCISE OF JURISDICTION: RECENT DEVELOPMENTS

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Oceanic Sun Line Special Shipping Inc v Fay

There have been significant recent developments in the law as to the exercise of jurisdiction by a Western Australian court. The starting point is the High Court's decision in *Oceanic Sun Line Special Shipping v Fay.*[1] The most important aspect of that decision is the discussion of the principles for the exercise of a court's discretion in deciding whether or not to exercise jurisdiction. Such a discretion exists whatever the basis for the court's jurisdiction: be it presence, submission, or one of the heads of Order 10 of the Western Australian Rules of the Supreme Court, 1971 or section 11 of the Commonwealth Service and Execution of Process Act, 1901. The basis of jurisdiction does, however, affect the principles upon which the discretion is to be exercised. The relationship between the applicable principles for the various bases of jurisdiction is itself a question upon which the High Court's decision bears.

In *Oceanic Sun Line* the respondent Fay, a Queensland resident, engaged a Sydney travel agent to arrange an overseas trip. He received a brochure concerning a cruise of the Aegean on a Greek vessel operated by the appellant, a company incorporated in Greece. His agent made a booking, paid the fare to the appellant's Australian agent and was given an "exchange order" in New South Wales which

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The author would like to thank Ms Valerie Kerruish for her many helpful comments on earlier drafts of this work.

1. (1988) 62 ALJR 389.

was exchanged for a Sun Line ticket in Athens before the cruise. The ticket, but not the exchange order, contained conditions of which the respondent was unaware, including a clause (clause 13) stipulating a Greek forum for any action against the appellant.

During the cruise Fay was seriously injured when a shot gun exploded during shipboard entertainment. He was hospitalised and received treatment in New South Wales (having initially spent time in a hospital in Greece) before returning to Queensland. He commenced proceedings for damages in the Supreme Court of New South Wales obtaining ex parte leave to serve outside the jurisdiction under order 10 rule 1(e) of the New South Wales Rules of the Supreme Court, 1970 — an action based on tort where all or part of the damage occurred in New South Wales. The appellant moved to set aside or stay proceedings, failing at first instance and before the Court of Appeal.

By a 3:2 majority the High Court dismissed the appeal and refused to set aside or stay proceedings. The Court unanimously rejected the appellant's first ground for a stay based on clause 13, holding that the contract was made in New South Wales at the time of issue of the exchange order and that clause 13 was not incorporated into the contract. The question of where and when the contract was concluded was determined by New South Wales law: as the law of the forum by Brennan J[2] and Gaudron J[3]; and as the law of the place where the contract was made by Deane J.[4] This approach may be open to criticism[5] but detailed analysis of that aspect of the decision will not be undertaken here.

The other ground for a stay relied on was that New South Wales was an inappropriate forum for the case; it was on this ground that the Court split. That split reflected fundamental differences in view as to the principles upon which a stay is to be granted. Three main approaches appear in the judgments of the Court; no one approach commanded majority support.

In order to appreciate the different approaches within the High Court it is desirable to explain in outline the recent developments

2. Ibid, 400-401.
3. Ibid, 416-417.
4. Ibid, 414.
5. M Pryles "Judicial Darkness on the Oceanic Sun" (1988) 62 ALJ 774, 788-790.

in this area of the law in the United Kingdom. Those developments have been the subject of considerable academic comment;[6] accordingly here the treatment of them will be brief. The traditional rule, where jurisdiction was being exercised on a common law basis, gave a court a very narrowly circumscribed discretion to refuse to exercise jurisdicton. The judgment of Scott LJ in *St Pierre and Others v South American Stores (Gath And Chaves), Limited, and Others* provides the classic statement of the traditional rule:

> The true rule about a stay under section 41, so far as relevant to this case may I think be stated thus:
> (1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that 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 (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.[7]

In 1974 in *Atlantic Star (Owners) v Bona Spes (Owners)*[8] a majority of the House of Lords held that the words "vexatious and oppressive" should be interpreted liberally. In *Rockware Glass Ltd v MacShannon*[9] a majority held that the words "vexatious and oppressive" should be dropped from the test. Lord Diplock reformulated the test,[10] and that reformulation was adopted and applied in several cases.[11] The applicable principles continued to evolve further in other cases, with developments culminating in the House of Lords adopting the principle of forum non conveniens in *Spiliada Maritime Corporation v Cansulex*. In that case Lord Goff stated the applicable rule:

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

6. A Briggs "Forum non Conveniens — now we are ten?" (1983) 3 LS 74; "The staying of actions on the ground of forum non conveniens in England today" [1984] LMCLQ 227; and R Schuz "Controlling forum-shopping: the impact of MacShannon v Rockware Glass Ltd" (1986) 35 ICLQ 374.
7. [1936] 1 KB 382, 398.
8. [1974] AC 436.
9. [1978] AC 795.
10. Ibid, 812.
11. *The Hollandia* [1982] 3 All ER 1141, 1148; *Gadd v Gadd* [1985] 1 All ER 58, 62.

> forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice.[12]
>
> If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions.[13]

The principles set out Lord Goff's judgment have been accepted and applied in English cases since *Spiliada*.[14]

The majority of the High Court in *Oceanic Sun Line* refused to accept the forum non conveniens doctrine adopted by the House of Lords. The three main approaches to be found in the judgments of the Court range from Brennan J's retention of the traditional, very narrow, test[15] to the minority's adoption of the *Spiliada* forum non conveniens principles,[16] with Deane J's approach providing a middle ground.[17] In a separate judgment Gaudron J expressed her agreement with the test stated by Deane J.[18]

Brennan J[19] held that the *St Pierre* test should remain the law of the country, and that the words "oppressive and vexatious" should be understood according to their ordinary meaning.

Deane J[20] also held the *St Pierre* test to be applicable, but held that the words "vexatious" and "oppressive" did not import a requirement of moral delinquency on the part of the plaintiff. Those words should be read as "characterising the objective effect of a continuation of the particular forum as the venue of the proceedings rather than as describing the conduct of the plaintiff in selecting or persisting with that forum".[21] His Honour further stated that a

12. [1987] AC 460, 476.
13. Ibid, 478.
14. *Charm Maritime v Minas Xenophon Kyriakov and Anor* [1987] 1 L1 LR 433, *EI Du Pont De Nemours & Co & Anor v I C Agnew & Others* [1987] 2 L1 LR 585; *Seashell Shipping Corporation v Mutualidad De Seguros Del Instituto Nacional De Industria (The "Magnum" ex "Tarraco Augusta")* [1989] 1 L1 LR 47.
15. Supra n 1, 404-408.
16. Ibid, 395.
17. Ibid, 410-411.
18. Ibid, 419.
19. Ibid, 407.
20. Ibid, 411.
21. Ibid, 410.

defendant would ordinarily succeed in establishing vexation and oppression by "persuad[ing] the local court that, having regard to the circumstances of the particular case and the availability of a foreign tribunal, it is a *clearly inappropriate* forum for the determination of the dispute between the parties" [22] (emphasis added). This test was to be distinguished from the "more appropriate forum" test of the new English approach.[23]

In making that distinction I suggest His Honour has not accurately restated the *Spiliada* approach. As the following passage suggests, Lord Goff's approach does not contemplate that in the event of two potential fora being very closely matched it is enough to show that, on balance, forum A is marginally more appropriate than forum B:

> There are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions or in admiralty in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case where the jurisdiction has been founded as of right. It is significant that in all the leading English cases where a stay has been granted there has been another *clearly more appropriate* forum ... In my opinion the burden resting on a defendant is not just to show that England is not the natural or appropriate forum for the trial but to establish that there is another available forum which is *clearly or distinctly more appropriate* than the English forum.[24] (emphasis added).

This is significant in several respects. It makes the arguments of Deane J against the *Spiliada* approach less convincing, and means that there is less difference between that approach and Deane J's approach than the judgment of Deane J would suggest. (This is not to deny that there is any difference between the two approaches, as will be discussed below.)

In a joint dissenting judgment Wilson and Toohey JJ[25] adopted the principles stated by Lord Goff in *Spiliada*, and held that a stay of proceedings should be granted.

Two principal questions arise from the High Court's decision in *Oceanic Sun Line*. The first is as to the relationship between cases where jurisdiction is based on the defendant's presence and those

22. Ibid, 411.
23. Ibid.
24. Supra n 12, 477.
25. Supra n 1, 395.

where service out of the jurisdiction is effected under order 10 of the Rules. The second is as to the ratio decidendi of the case.

Jurisdiction had been founded on part 10 rule 1(e) of the New South Wales Rules of the Supreme Court, 1970. Subsequent to the ex parte granting of leave the defendant had applied to have proceedings stayed. All of the judgments appear to proceed on the basis that a stay in such a case is to be granted on the same principles as in a case of a stay where jurisdiction is founded as of right. Certainly, this is so of the majority judgments, all of which apply a version of the "vexatious and oppressive" test.

There is considerable authority, mostly English, making a distinction between the principles and onus of proof for a stay where jurisdiction is founded on presence and cases where leave to serve outside the jurisdiction is sought.[26] The High Court appeared to recognise this distinction, but treated a subsequent application for a stay in an order 10 case in the same way as a stay in a case where jurisdiction is founded on presence. As Pryles has argued[27] this is open to criticism. There is considerable force in the argument that a stay where jurisdiction is founded on order 10 should be ordered on the principles governing the granting of leave to serve ex juris, not on the principles governing the ordering of a stay where jurisdiction is founded on the defendant's presence.

As to the ratio of *Oceanic Sun Line*, no single approach commanded majority support. As Wilson and Toohey JJ pointed out in their dissent:

> [T]he decision of the Court, while resolving the immediate dispute between the parties, does not yield a precise and authoritative statement of the principles that should be applied in dealing with an application to stay proceedings. That decision must await another day.[28]

Until that precise and authoritative statement of principle from the High Court, it may be that the approach of Deane J will be taken as pivotal and will be applied. If the clearly inappropriate forum test is satisfied then so too is the more appropriate forum test of the minority; thus a stay would have been granted by a minori-

26. *McKender v Feldia* [1967] 2 QB 590; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] 1 AC 50.
27. Supra n 5, 790.
28. Supra n 1, 398.

ty of the Court in *Oceanic Sun Line* if the clearly inappropriate forum test had been satisfied.

In *Kimberley NZI Finance Ltd v Ferguson*[29] Master Staples applied the principles set out in the judgment of Deane J without expressly recognising that those principles had not commanded majority support in *Oceanic Sun Line*. The case concerned an action for negligent misstatement by a shareholder of a company against the company's directors and its auditors. It was alleged that in reliance on false statements in the directors' report and auditor's report the plaintiff subscribed for certain rights to convertible redeemable preference shares in the company, thereby causing loss to the plaintiff. The action was commenced in Western Australia where the plaintiff carried on business and where it had received and relied upon the representations. The defendants sought a stay, arguing that the case ought to be tried in Victoria where both defendants operated and where all records relating to the company, and the defendants' witnesses, were. Applying the approach of Deane J, Master Staples refused the application for a stay. Whether the decision would have been different if a *Spiliada* approach had been taken may be doubted, especially if regard had been had to the passage quoted above from Lord Goff's judgment,[30] requiring a defendant to show that there is another forum which is clearly or distinctly more appropriate.

In *Lee v Johnson Taylor and Co Pty Ltd*,[31] Master White followed Master Staples' approach in *Kimberley NZI* and applied Deane J's clearly inappropriate forum test.

In *Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd*[32] and in *Voth v Manildra Flour Mills Pty Ltd*[33] the Court of Appeal of the Supreme Court of New South Wales applied Deane J's clearly inappropriate forum test. In both cases,[34] Kirby P held that Deane

29. (Unreported) Supreme Court of Western Australia, 5th October 1988, no 2206 of 1987.
30. Supra n 24.
31. (Unreported) Supreme Court of Western Australia, 25th October 1988, no 1816 of 1988.
32. (Unreported) Supreme Court of New South Wales, Court of Appeal, 23 December 1988, no CA 417 of 1988. Copies of these two decisions were obtained too late to permit detailed consideration of them in this work.
33. (Unreported) Supreme Court of New South Wales, Court of Appeal, 13 February 1989, no CA 647 of 1986.
34. *Reese* supra n 32, 22; *Voth* supra n 33,5.

J's approach represented the ratio decidendi of *Oceanic Sun Line*, because it attracted more support, from the members of the majority than the other approach taken by a member of the majority. In *Voth* McHugh JA held that the result of the High Court's decision in *Oceanic Sun Line* was that the law remained the traditional approach of the *St Pierre* test and adopted Deane J's "interpretation" of what that test means. Gleeson CJ[35] did not appear to decide what the ratio decidendi of *Oceanic Sun Line* is.

Freckmann v Pengendar Timur Sdn Bhd

However, in a recent decision the Full Court of the Supreme Court of Western Australia applied a forum non conveniens approach on the basis that the High Court's decision in *Oceanic Sun Line* did not provide an authoritative determination of the applicable principles. In *Freckmann v Pengendar Timur Sdn Bhd*[36] the plaintiff sued for injuries received in a car accident in Thailand where she was working for the defendant pursuant to a contract allegedly made in Western Australia. Since the accident the plaintiff had become resident in Western Australia where she had received medical and physiotherapy treatment, having initially been treated in Thailand. The defendant was a Malaysian company — incorporated and principally doing its business there. The plaintiff obtained ex parte leave to serve the defendant out of the jurisdiction pursuant to order 10 rule 1(1)(e)(i). After entering a conditional appearance, the defendant sought an order that the writ be set aside or the action stayed.

Malcolm CJ, in a judgment with which the other members of the court agreed, began with the submission of counsel for the appellant (plaintiff) that a defendant seeking a stay in an order 10 case has the same burden as a defendant seeking a stay where jurisdiction exists as of right. His Honour first examined the English position in this regard. There, in order 11 (which broadly corresponds to order 10 of the Western Australian Rules) cases the onus was on the plaintiff to show that England is the forum conveniens, not only when applying for leave, but also when resisting an ap-

35. *Reese* supra n 32, 14; *Voth* supra n 33, 28-29.
36. (Unreported) Full Court of the Supreme Court of Western Australia Appeal, 14 November 1988, Appeal no 12 of 1988.

plication to set aside or stay the proceedings. Where the plaintiff had invoked the jurisdiction as of right, the defendant carried the onus on an application for a stay. His Honour traced the developments, from *Atlantic Star* to *Spiliada*, as to what the defendant had to establish to obtain a stay. In particular, he noted that, even after *Spiliada*, it remained for the defendant to establish the existence of a more suitable forum where jurisdiction was founded as of right.[37]

His Honour then analysed the decision of the High Court in *Oceanic Sun Line* in some detail. He accepted that a majority of the High Court had rejected the forum non conveniens approach developed by the House of Lords in the cases culminating in *Spiliada*, but stated that "they were not agreed on the test to be applied".[38] Further, his Honour pointed to the apparent confusion, especially in the judgments of Deane and Brennan JJ between cases of stay under order 10 and cases where jurisdiction had been founded as of right.[39]

On this basis his Honour concluded that *Oceanic Sun Line* did not provide an authoritative determination of the question of who bore the onus of proof in an order 10 stay case or of the question of what must be proven to succeed in or defeat a stay application in such a case. Accordingly, he considered himself free to follow a South Australian decision, *Hayel Saeed Anam & Co v Eastern Freighters Pty Ltd and Others*[40] which applied a forum non conveniens approach. His Honour formulated the onus of proof in order 10 stay cases as follows:

> The onus is on the plaintiff to bring the case within one of the grounds in Order 10 and on the ex parte application to show that the case is a proper one for service ex juris. On the application for a stay there is a threshold onus on the defendant to show that there is a more appropriate forum. If the defendant discharges that onus there will be a stay unless the plaintiff shows that there are circumstances which would cause an injustice if a stay were granted.[41]

That statement differs from the position in England. There the burden is on the plaintiff in an order 10 case (order 11 in England)

37. Ibid, 22.
38. Ibid, 30.
39. Ibid.
40. (1973) 7 SASR 200.
41. Supra n 36, 32.

to show that England is clearly the appropriate forum for the case, not only when applying for leave, but also when resisting an application to set aside or stay the proceedings,[42] as Malcolm CJ himself pointed out.[43]

A comparison of the two cases

The court in *Freckmann* can be seen as having taken a more liberal approach to the granting of stays than the majority in *Oceanic Sun Line*, having propounded and applied a forum non conveniens approach rather than the "vexatious and oppressive" test in its several forms. However, in this regard, the actual decision in *Freckmann* should be considered. The action concerned an accident in Thailand which would have given rise to causes of action in both tort and contract (at least under Western Australian law) brought by a Western Australian resident against a Malaysian defendant. The plaintiff sued only in contract, since there would clearly have been no basis for jurisdiction in Western Australia for a tort claim. The ground for bringing the case within order 10 was that there was "a good arguable case" that the contract had been made in Western Australia. The additional factors pointing to a Western Australian forum were that some of the damage had occurred in the jurisdiction and that the plaintiff resided in Western Australia. Against that, the action was in respect of a breach occurring in Thailand, and Malcolm CJ provisionally found that the proper law of the contract was Malaysian. That finding was based on the facts that a large part of the plaintiff's performance was to be in Malaysia; she was to be paid in Malaysian dollars and her travel to and from Malaysia was to be paid by the respondent.[44]

There is thus substantial similarity between the circumstances arguably justifying a stay in *Oceanic Sun Line* and in *Freckmann*; in both cases, although different tests were propounded, the decision was the same — a stay was refused. That might be seen as reinforcing my earlier suggestion that there is less difference between the approach of Deane J in *Oceanic Sun Line* and the *Spiliada* approach than what is suggested by Deane J. Alternatively, it may be thought to suggest more generally that where a decision is to be made by

42. Supra n 26.
43. Supra n 36, 16-17.
44 Ibid, 34.

a discretionary weighing of competing factors, the verbal formulation of the applicable test will not, within a range of formulations, be crucial to the decision in a particular case. If a judge decides that a case should be heard in a particular forum then it can be said that the forum has not been shown to be clearly inappropriate or that no other forum has been shown to be clearly more appropriate as necessary.

However two qualifications must be made to the suggestion that these conclusions may be drawn from the similarity of the decisions in *Oceanic Sun Line* and *Freckmann*. First, differences in the facts of the cases made the case for a stay stronger in *Oceanic Sun Line*. In *Oceanic Sun Line* the jurisdiction whose law governed the contract and the place where the accident/breach occurred were the same (Greece), whereas in *Freckmann* they were different (respectively, Malaysia and Thailand). In *Oceanic Sun Line* this made Greece more clearly the natural forum than could have been said of either Thailand or Malaysia in *Freckmann*. Further, in *Freckmann* the plaintiff resided in the jurisdiction; this was not so in *Oceanic Sun Line* where the plaintiff resided in Queensland but sued in New South Wales. There would have been no ground for a Queensland court to take jurisdiction in the case. The New South Wales courts had jurisdiction only by virtue of the (unusual within Australia) provision in their Rules permitting service out of the jurisdiction where the action was based on a tort and part of the damage had occurred within the jurisdiction. Thus Western Australia was a more appropriate forum in *Freckmann* than New South Wales was in *Oceanic Sun Line*.

Secondly, it appears that the evidence submitted on behalf of the defendant in *Freckmann* in support of its application for a stay was deficient. The two potential fora for the case other than Western Australia were the courts of Thailand and Malaysia. In applying for a stay of the Western Australian action evidence should have been given of the factors pointing to those jurisdictions and of the fact that they would be amenable to hearing the case. But apparently this was not done in *Freckmann*. Malcolm CJ concluded that "there was no evidence before the Court of the relevant Thai law or of the extent to which the Thai courts would claim or accept jurisdiction"[45] and that "there was [however] no evidence before the Court

45. Ibid, 35.

of the relevant Malaysian law or of the extent to which the Malaysian courts would claim or accept jursidiction".[46] Further, Malcolm CJ stated that "there was no evidence concerning the extent to which it would be necessary to obtain evidence from witnesses in Thailand or Malaysia".[47] With such a paucity of evidence of the facts which might have made Malaysia or Thailand a more appropriate forum, a conclusion that the stay application is to be refused could hardly have been avoided, given that Malcolm CJ's statement of the onus of proof requires the defendant to show that there is a more appropriate forum. In view of all of this, issue is not taken here with the decision in *Freckmann*.

On the other hand, the decision in *Oceanic Sun Line* raised squarely the question of the applicable principles for the grant of a stay precisely because, in my view, a decision not to grant a stay was realistically open only if the forum non conveniens principles set out in *Spiliada* were rejected. If those principles are accepted, the case for a stay on the facts of *Oceanic Sun Line* is a very strong one. The factors pointing to Greece as the forum for the action were the occurrence of the tortious act and the breach of contract in Greece, the contract being governed by Greek law and to have been performed by the Greek defendant there. All of this made Greece a clearly more appropriate forum than New South Wales where none of the parties was resident, but where the contract had been made and part of the damage had been suffered. However, the connections of the case with New South Wales were sufficient in my view to justify Deane and Gaudron JJ's conclusion that New South Wales could not be said to be a clearly inappropriate forum.[48] Thus *Oceanic Sun Line* itself illustrates the difference between the *Spiliada* approach and the clearly inappropriate forum test set out by Deane J in *Oceanic Sun Line*.

The decision of the majority in *Oceanic Sun Line* not to adopt the *Spiliada* forum non conveniens approach has already been trenchantly criticised by Pryles[49] who canvasses the arguments in detail. There is considerable force in his criticisms of most of the reasons

46. Ibid.
47. Ibid.
48. Supra n 1, 414 (Deane J) and 419 (Gaudron J).
49. Supra n 5.

given by members of the Court rejecting the *Spiliada* approach: namely that arguments that the traditional approach accords with principle and authority are largely "bootstraps" arguments; and that it is plainly wrong to attribute the English adoption of forum non conveniens arguments to England's entry into the European Economic Community. Cases involving countries within the Community are dealt with under the Civil Jurisdiction and Judgments Act 1982 which incorporates the Brussels Convention and excludes common law discretion to stay. We will now consider another potential justification for the retention of a traditional, stricter approach to stays, in preference to the adoption of a forum non conveniens approach.

The difference between the forum non conveniens approach and the traditional approach (in its various forms) may be based upon or motivated by differences in view as to the weight to be given to the fact of the defendant's presence within the jurisdiction. The traditional approach requires a stronger justification than does the *Spiliada* approach for departure from the prima facie position that a court will exercise jurisdiction if the defendant was served within the jurisdiction. This may indicate that those who adhere to the traditional approach give a greater weight to the defendant's presence as itself justifying the *exercise* of jurisdiction. The question was not, however, discussed in these terms by any member of the court in *Oceanic Sun Line* including Deane J who expressly addressed the "question of principle" raised by the choice between the two approaches.[50] In any event, such an analysis could support the traditional approach where the court's jurisdiction was founded on the defendant's presence, but not where, as in *Oceanic Sun Line* itself, service had been effected outside the jurisdiction.

In addressing the question of the choice between the two approaches from the points of view of principle and policy, Deane J did not deal with a possible argument that justice to defendants warrants or demands a forum non conveniens approach.[51] In his Honour's discussion of the policy arguments, the only reference

50. Supra n 1, 409-413.
51. This argument has been put, in varying forms, in some of the academic discussion in this area: supra n 6.

to considerations as between the individual parties involved was the statement that "the considerations of overall balance of private convenience to the actual parties prima facie favours a rule that the plaintiff should be required to litigate in the most appropriate forum".[52] In my view, however, the premise of, and most powerful justification for, the forum non conveniens approach is that the question of where an action is to be tried is not merely one of the parties' convenience, but rather raises fundamental issues of justice and will often affect significantly the substantive outcome of a case.

The view to the contrary seems to rely on choice of law rules as minimising the effect of forum A hearing a case rather than forum B. There are well-accepted qualifications to the proposition that choice of law rules will minimise the effect of the choice of forum on the outcome of a case: it is for the person relying on foreign law to prove that it is different from forum law; and matters of procedure are governed by the law of the forum. The practical importance of these two qualifications appears often to be underestimated. Many matters of procedure, for instance, quantification of damage,[53] are often of considerable significance.

Furthermore, different fora may have different choice of law rules, or may determine the connecting factor in the particular case differently. This might be thought to be the case only in a very small proportion of cases. But cases raising difficult questions of the suitable forum generally involve fact situations substantially connected to two or more jurisdictions. Where this is so, the selection of different domestic substantive laws after application of each jurisdiction's choice of law rule is not merely a remote possibility.

Finally, the treatment of statutes in the conflict of laws, and in particular the difference in treatment of forum and foreign statutes, makes significant inroads into the extent to which choice of law rules will minimise the effect of the choice of forum on the outcome of a case. Some statutes, expressly or impliedly, by their terms are applicable to a case regardless of whether the common law general

52. Supra n 1, 413.

53. Characterisation of questions of damages in the cases may not always be consistent. For present purposes it is sufficient to note that many aspects of quantification of damage, such as whether social security benefits received are to be deducted from the recoverable damages, are treated as procedural and thus governed by the law of the forum.

choice of law rules would select the jurisdiction's rules as the law governing the case. For example, a statute affecting contracts may provide that it applies to any contract made within the jurisdiction. Such a statute may be termed a mandatory or overriding statute. For obvious constitutional reasons an overriding forum statute must be applied by a court whenever by its terms it is applicable, whereas in Australian and other common law countries' courts an overriding foreign statute will not be applied unless it is applicable by application of the forum's general choice of law rules.[54] With the ever-increasing volume of statute law this difference is of increasing significance. The ramifications of this consideration warrant fuller discussion than is possible here. For present purposes, the important point is simply the significance of the choice of the forum for an action, given the difference in treatment of forum and foreign statutes.

For these reasons, the question of where a case is to be tried may often significantly affect the substantive outcome of a case. This being the case, it is difficult to see why the plaintiff should be favoured by being permitted the choice of any forum that cannot be shown to be clearly inappropriate in which the defendant is present, to whatever extent. The *Spiliada* approach, on the other hand, treats the parties on an equal footing in the question of where a case is to be heard, involving as it does an objective search for the natural or appropriate forum. The proposition in the first sentence of this paragraph provides a strong argument for the *Spiliada* approach — that it should be sufficient for a defendant to establish that another forum is clearly more appropriate to demonstrate a prima facie case for a stay. It also provides, in my view, justification for adopting the *Spiliada* approach notwithstanding that it is accepted that such an approach results in greater uncertainty as to whether a stay is to be granted than the traditional approach. The importance of having principles which lead to the just result as to the forum for an action justifiés the cost of the increased uncertainty of the *Spiliada* approach.

54. E.I. Sykes and M.C. Pryles *Australian Private International Law* Second Edition (Sydney: Law Book Co, 1987) 222-230.

Transfers of proceedings under the cross-vesting legislation

The importance of the common law principles for the grant of stays in cases involving the courts of the various State, Territory and Commonwealth jurisdictions has been substantially reduced, perhaps almost eliminated, by the cross-vesting legislation, as interpreted in the recent decision of the New South Wales Court of Appeal, *Bankinvest A G v Seabrook and Others*.[55] Section 4 of the Commonwealth and various State Acts[56] cross-vests the jurisdiction of the superior federal and state courts. Section 5 attempts to guard against forum shopping by giving courts the power, and at times, the duty, to transfer proceedings to another court. The grounds for transfer include that "there are related proceedings pending in the other court and it is more appropriate that the relevant proceeding be determined by that other ... Court";[57] "that ... having regard to (A) ...; (B) ...; and (C) the interests of justice — it is more appropriate that the relevant proceeding be determined by that other ... Court;"[58] and that "... it is otherwise in the interests of justice that the relevant proceeding be determined by that other ... Court".[59]

In *Bankinvest* in a lengthy reserved judgment in which he traced the history and purpose of the cross-vesting legislation, Rogers A-JA first rejected the submission of counsel that one should start with a prima facie presumption that a court should exercise its jurisdiction and that there would be an onus on the applicant to show why its exercise should be displaced. There should be no predisposition, he said, to hearing the case in the court where the action was first commenced. His Honour's reasoning and conclusions can be summarised as follows. The grounds in the legislation broadly imported the principles of *Spiliada*. In particular, in deter-

55. (Unreported) Supreme Court of New South Wales, Court of Appeal, 30 September 1988, no CA348 of 1988.
56. There is a Commonwealth Act: (Cth) Jurisdiction of Courts (Cross-Vesting) Act 1987; and uniform State Acts: for example, (WA) Jurisdiction of Courts (Cross-Vesting) Act 1987.
57. (WA) Jurisdiction of Courts (Cross-Vesting) Act, 1987, s 5(2)(b)(i).
58. Ibid, s 5(2)(b)(ii).
59. Ibid, s 5(2)(b)(iii).

mining whether it is "more appropriate" that the proceedings be determined by the other court, the search is for the natural or appropriate forum — the forum with which the action has the most real and substantial connection and in which the case may be most suitably tried in the interests of all parties and the ends of justice. Further, in determining what is "in the interests of justice" the relevant matters and considerations are essentially the same as were specified in *Spiliada*. The High Court's refusal in *Oceanic Sun Line* to follow *Spiliada* was not in point — that decision related to the common law. That has been displaced by legislation which provides for its own criteria for determining the place of hearing within Australia. Those criteria correspond to the criteria in *Spiliada*. In *Freckmann* Malcolm CJ made a similar observation, stating that "there seems to be some reflection of the concepts developed in the recent English cases in the cross-vesting legislation."[60]

The other members of the court in *Bankinvest* — Kirby P and Street CJ — agreed with Rogers A-JA subject to certain reservations.[61] It is open to argument whether the reservations of each judge extend to the importing of the *Spiliada* principles, but in my view neither Kirby P nor Street CJ dissented from the proposition that the principles in *Spiliada* will be of great assistance in determining whether a particular court is "more appropriate", and what "the interests of justice" dictate in a particular case.

The judgments of the Court of Appeal in *Bankinvest* should be especially authoritative because judicial consideration and interpretation of section 5 at an appellate level will be rare. Section 13(a) provides that there is no appeal from a decision to transfer or not to transfer.[62]

If the approach of Rogers A-JA is accepted and applied (and, in my view, it should be) then, however *Oceanic Sun Line* is interpreted, it will not be necessary to satisfy the clearly inappropriate forum test for disputes involving two potential fora within Australia. The transfer powers in the cross-vesting legislation are not limited

60. Supra n 36, 22.
61. Supra n 55, Street CJ 1-5, Kirby P 1-5.
62. *Bankinvest* itself got to the Court of Appeal through a special reference from the individual judge — Rogers J — who heard the transfer application. That reference was expressly based, in part, on the need for appellate consideration of this new legislation.

to cases where the transferring court has jurisdiction only by virtue of the legislation. Thus in cases such as *Kimberley NZI* and *Lee v Johnson Taylor* where the defendant failed to get a stay of the Western Australian proceedings because it failed to establish that Western Australia was a clearly inappropriate forum, it could have been argued that the case should be transferred to the other court because "taking into account . . . the interests of justice . . . it is more appropriate"[63] that the matter be determined by that other court, or that it was "otherwise in the interests of justice."[64] Arguably that would have demanded a less stringent test than the clearly inappropriate forum test. The possible application of the cross-vesting legislation appears not to have been raised at all by counsel or by the Master in *Kimberley NZI*. In *Lee v Johnson Taylor* the application for a transfer was abandoned during argument, for reasons which are not apparent from the judgment.

The judgment of Rogers A-JA in *Bankinvest* dealt comprehensively with the interpretation of the first ground for a transfer under the legislation, which deals with cases where a related action is pending in the other court. However, his Honour's judgment did not (because it was unnecessary for the decision) attempt to deal comprehensively with the interpretation of the second ground for a transfer — that "having regard to (A) ...; (B) ...; and (C) the interests of justice — it is more appropriate that the relevant proceeding be determined by that other ... Court".[65] (A) and (B) will be relevant where the transferor court would not have had jurisdiction over the claim or a part of it without the cross-vesting legislation. They will thus most often be relevant in cases where the choice is between a federal and a state forum. In most cases where the choice is between two state courts, (A) and (B) will not be relevant. An important question of the interpretation of this ground then arises. Is it sufficient to establish that the other court is, on a *Spiliada* approach, the natural or appropriate forum to justify a transfer? This question is not clearly dealt with in *Bankinvest*. However, arguably implicit in the reasoning of Roger A-JA is an affirmative answer to this question.

63. Supra n 57, s 5(2)(b)(ii)(c).
64. Ibid, s 5(2)(b)(iii).
65. Ibid, s 5(2)(b)(ii).

Perhaps the strongest argument that the answer should be an affirmative one is that the consequence of a negative answer, in the light of the interpretation of the first ground, will be to create a strong incentive for defendants to commence related proceedings in the court in which they wish the action to be heard. Once a related proceeding in another court exists, it is sufficient to justify a transfer that that other court is the natural or appropriate forum. It would appear that this will be so regardless of whether the related proceedings were commenced before or after the proceedings sought to be transferred. In that case, for it not to be sufficient to show that another court is the natural or appropriate forum to obtain a stay would mean that would-be transferors will have a strong incentive to start an action in the court of their preference before bringing a transfer application. Such an incentive is surely undesirable.

If it is held not to be sufficient to establish that the other court is the natural or appropriate forum, it is difficult to guess what further threshold will be required before it can be said that taking into account "the interests of justice — it is more appropriate that the proceedings be determined by that other ... Court".[66]

The effect of an exclusive choice of forum clause on the exercise of a court's transfer powers is also an open question. At common law, very strong grounds were required before a court would permit a party to depart from a contractually agreed exclusive forum.[67] In practice, I would suggest that this will remain the case, although the question must now be put in terms of what is appropriate and what the interests of justice demand.

In summary, it is suggested that the transfer powers of a court under the cross-vesting legislation have superseded the common law power to stay an action on grounds of inappropriateness of the forum. Although the power to grant common law stays has not been abolished by the cross-vesting legislation, for cases within Australia the transfer power should be the starting point. On the current interpretations of the principles applicable to transfer and stay applications this is likely to occur naturally, because it will be easier for a defendant to obtain a transfer than a stay. It is only if it were

66. Ibid.

67. *Owners of Cargo Lately Laden on Board The Ship or Vessel Eleftheria v The Eleftheria (Owners)* [1970] P 94; *The "El Amria" and "El Minia"* [1981] 2 LI LR 539

easier to obtain a stay that the common law stay power would remain important in practice. It is difficult to see that this could occur, on any reasonable interpretation of the applicable principles. It may be noted, however, that neither stay applications, nor appeals from refusals of a stay, have been abolished by the cross-vesting legislation. That leaves the potential for an appeal from a decision refusing a stay, whereas there is no appeal from a refusal of an application for a transfer. That seems anomalous. It is difficult to see why the common law stay power needs to be retained at all in cases to which the cross-vesting legislation applies.

The importing, in the cross-vesting legislation, into the determination of forum for cases within Australia of principles broadly corresponding to the *Spiliada* forum non conveniens approach adds further weight, in my view, to the case for adoption of the *Spiliada* principles in international cases. What justifications are there for any difference in the principles applicable to interstate and international questions of forum? It would, perhaps, be a tenable position to hold that while a forum non conveniens approach applies in international cases, a "vexatious and oppressive" test is applied in interstate cases. The justification for that might be that a defendant within Australia should expect to be sued anywhere in Australia and would be less likely to be substantially prejudiced by such suit than would a defendant where the alternative forum was a foreign one. However, the majority decision in *Oceanic Sun Line*, combined with the cross-vesting legislation would appear to produce the converse position — that forum non conveniens principles apply in interstate cases whereas in an international case a defendant must satisfy a "vexatious and oppressive" test. That means that an Australian court is more ready to refuse to hear a case on the basis that the plaintiff should proceed in some other Australian forum than on the basis that the case should be dealt with by a foreign forum. That position is difficult to justify and could even be interpreted as reflecting an assumption that another Australian court can more readily be trusted to deal satisfactorily with a case than can a foreign court.

Conclusion

The academic criticisms of the majority decision in *Oceanic Sun Line*, in particular those of Pryles, have already been noted. It should

also be noted that Rogers A-JA's discussion of the *Oceanic Sun Line* decision suggests a preference on his part for the minority approach. He points to the lack of a clear ratio in the majority approach;[68] he describes the minority judgment as powerful;[69] and implicit in the following statement is his considerable doubt that the majority approach in *Oceanic Sun Line* will survive:

> "Even if, ultimately, the accepted test for forum non conveniens, in relation to non-Australian venues, should remain the "traditional approach" described by Deane J the Australian Parliaments have prescribed different criteria for determining a place for hearing within Australia."[70]

Finally, he criticised Brennan J's principal reason for rejecting the *Spiliada* approach — that it was too uncertain to be workable — given that the same criteria had been made applicable by the cross-vesting legislation.[71] The preference of the court in *Freckmann* for a forum non conveniens approach has already been seen.

It is open to doubt whether the decision not to adopt the *Spiliada* approach will survive reconsideration by a Full Court of the High Court. In the meantime, the approach of Malcolm CJ in *Freckmann* may show the way — limiting the decision in *Oceanic Sun Line* effectively to its facts, and so leaving a court free to pursue a forum non conveniens approach. Further, the cross-vesting legislation appears to have limited the significance of common law principles regarding discretion in jurisdiction to cases involving a potential forum outside Australia. For cases involving fora within Australia, the legislation provides its own criteria.

68. Supra n 55, 24.
69. Ibid, 23.
70. Ibid, 24.
71. Ibid, 31.