Forum Non Conveniens and Foreign Law in Australia

The High Court of Australia has handed down judgment in Puttick v Tenon Limited (formerly called Fletcher Challenge Forests Limited) [2008] HCA 54 (12 November 2008), the most recent High Court case to consider stay of proceedings and choice of law in an international tort case. The High Court unanimously reversed the Victorian Court of Appeal and held in two joint judgments (French CJ, Gummow, Hayne and Kiefel JJ; and Heydon and Crennan JJ) that the Supreme Court of Victoria was not a clearly inappropriate forum, the test in Australia for forum non conveniens.

The suit was brought by a man who was exposed to asbestos while visiting factories in Belgium and Malaysia in the course of his employment by a New Zealand-based company. At the time, the man was resident in New Zealand. The man subsequently moved to Victoria, and he sued in the Supreme Court of Victoria after contracting mesothelioma. After his death, his wife was substituted as plaintiff. The Supreme Court and the Court of Appeal (by majority) concluded that Victoria was a clearly inappropriate forum and stayed the proceedings (see Perry Herzfeld's earlier post here). The Court of Appeal majority had concluded that the applicable law was that of New Zealand and that this, combined with other factors such as the location of witnesses and defendants, rendered Victoria a clearly inappropriate forum. This conclusion was then reversed by the High Court on the plaintiff's appeal.

French CJ, Gummow, Hayne and Kiefel JJ held that, in light of the state of the pleadings and the evidence,

> *"the Court of Appeal (and the primary judge) erred in deciding that the material available in this matter was sufficient to decide what law (or laws) govern the rights and duties of the parties. Rather, each should have held only that it was arguable that the law of New Zealand was the law that governed the determination of those rights and duties. Each should have further held, that assuming, without deciding, that the respondent was right to say that the parties' rights and duties are governed by the law of New Zealand, the*

> *respondent did not establish that Victoria is a clearly inappropriate forum." At [2]*

Their Honours added that:

> *"The very existence of choice of law rules denies that the identification of foreign law as the lex causae is reason enough for an Australian court to decline to exercise jurisdiction. Moreover, considerations of geographical proximity and essential similarities between legal systems, as well as the legislative provisions now made for the determination of some trans-Tasman litigation, all point against treating the identification of New Zealand law as the lex causae as a sufficient basis on which to conclude that an Australian court is a clearly inappropriate forum to try a dispute." At [31]*

By contrast, Heydon and Crennan JJ appear to have taken a less absolute approach to the relevance of a foreign lex causae:

> *"The question of the lex causae can be relevant to the question whether Victoria is a clearly inappropriate forum. If the lex causae were New Zealand law, that would make a stay more likely, though not inevitable. But the question of what the lex causae is ceases to be relevant if it is impossible to say what it is. And the question remains irrelevant even if New Zealand law "might be" a candidate, or is "a very strong candidate", for ex hypothesi it is impossible to say whether New Zealand law is in truth the lex causae." At [49]*

Their Honours concluded that, even though "New Zealand is an appropriate forum, … other factors indicate that Victoria is not clearly inappropriate." At [51]

Although the course of argument in Puttick may not have been quite what the parties and some commentators were expecting — the decisive issues were not raised by the Court until after the conclusion of oral argument — on one level the result is unsurprising considering the High Court's previous decisions in the area of tort and private international law: as cases like Oceanic Sun, Zhang, Neilson and Puttick demonstrate, it is almost impossible for a defendant to succeed in a forum non conveniens application against an Australian-resident plaintiff in a torts case, regardless of how slight the case's connection to Australia, and regardless of how compelling the apparent factual connection to an overseas

jurisdiction may be. After all, the plurality in Puttick concluded that "even if the lex causae was later shown to be the law of New Zealand, that circumstance, coupled with the fact that most evidence relating to the issues in the case would be found in New Zealand, did not demonstrate that the Supreme Court of Victoria was a clearly inappropriate forum." At [32].

The more troubling aspect of the decision in Puttick is the practical interrelationship between the test for forum non conveniens and the rules about pleading and proving foreign law. Because plaintiffs in Australia have no obligations to allege, plead or prove foreign law — and because Australian choice of law rules are not mandatory — they have no incentive to draft a pleading that clearly discloses a foreign lex causae (whether expressly or by factual implication). To the contrary, they have every incentive to draft bland and incomplete pleadings that avoid clear references to a foreign lex causae.

Defendants are thereby placed in an invidious position: if they do nothing in response to such an unclear pleading, a successful forum non conveniens application will be precluded because of the plaintiff's lack of clarity; but if they elucidate the foreign lex causae by putting on a defence, they will have submitted to the jurisdiction, thereby rendering any jurisdictional challenge nugatory.

Heydon and Crennan JJ seem to have been alive to this difficulty and, citing *Buttigeig v Universal Terminal & Stevedoring Corporation* [1972] VR 626, observed that it will sometimes be possible to look through an artificial pleading to see the underlying substance:

> *"A conclusion reached on a stay application about what the proper law of a tort is will normally only be a provisional conclusion: it will be a conclusion open to alteration in the light of further evidence called at the trial. A judge considering a stay application may be able to determine the location of the alleged tort despite somewhat unreal or artificial contentions in the pleadings." At [36].*

By contrast, no such statement appears in the plurality judgment, which appears very much to focus on the literal words of a plaintiff's pleading.

Puttick therefore represents one more step in the slow death of forum non conveniens in Australia. The references in both judgments to vexation and oppression suggest the likely direction of future cases: under the general law of

civil procedure, a vexatious or oppressive pleading can be struck out independently of any jurisdictional complaint; but unless a pleading is so manifestly defective as to fall foul of the general tests of vexation and oppression it is now unlikely that a court will ever issue a stay on jurisdictional grounds.

Whether this state of affairs is desirable — and whether it is consistent with the decision in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 — is a topic on which minds may disagree. French CJ, Gummow, Hayne and Kiefel JJ flatly rejected the respondent's invitation to restate the test in Voth, but Heydon and Crennan JJ appeared to be more receptive to an invitation to reconsider Voth were it to arise in an appropriate case.

Likewise, unlike the plurality, Heydon and Crennan JJ seem to have recognised the apparent inconsistency between the Voth test and its subsequent treatment in *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, particularly the difference between a balancing exercise and a bright-line rule about vexation. Their Honours implicitly favoured the test as expressed in Voth (and not its reinterpretation in Zhang) by engaging in the very sort of contextual balancing exercise that had been disapproved of so strongly by the majority in Zhang.

If the High Court is presented with a case that squarely raises the issue of the correctness or desirability of the Voth test, it may be that these apparent differences of opinion will be highlighted more clearly.