

Substance and Procedure: The Statute of Frauds in Australia

A recent decision of the Western Australian Court of Appeal is apparently the first Australian decision to address the correctness of the decision in *Leroux v Brown* (1852) 12 CB 801; 138 ER 1119 after the High Court of Australia's decision in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, which adopted a wider definition of 'substance' for the purposes of characterisation than had previously been the case. *Leroux v Brown* had determined that s 4 of the *Statute of Frauds* (UK) was procedural, and that an oral agreement made in France was not enforceable in England despite being enforceable under its proper law.

The recent case concerned an oral contract of guarantee whose proper law was in dispute: if the law of Western Australia applied, an equivalent to s 4 of the Statute of Frauds would bar the plaintiff's claim; whereas no such bar existed under the law of New South Wales. Characterisation and choice of law were therefore of equal practical importance: if the proper law were that of NSW and *Leroux and Brown* were not good law, the plaintiffs would succeed.

As it turned out, McLure JA (with whom Wheeler and Newnes JJA agreed) decided that the proper law of the contract was the law of WA, and that *Leroux v Brown* was no longer good law in Australia after the decision in *John Pfeiffer*. Thus, the Statute of Frauds applied as substantive law, and plaintiff's claim was barred.

Tipperary Developments Pty Ltd v The State of Western Australia [2009] WASCA 126 (22 July 2009)