Before the High Court: Michael Wilson & Partners Ltd v Nicholls

An interesting case is to be heard by the High Court on 31 May. It is an appeal from the decision of the New South Wales Court of Appeal in *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177; [2010] NSWCA 222.

The case arose out of the employment of two Australian citizens by a law firm operating in Kazakhstan. The firm commenced proceedings against the employees in the Supreme Court of New South Wales alleging that they and a partner of the firm had stolen clients of the firm when they left the firm and set up a rival business. The firm alleged that the employees were liable for breach of contract, inducing breach of contract, conspiracy to injure, breach of fiduciary duty and knowing assistance. The partner was not a party. The firm separately commenced arbitration proceedings in London against him, to which proceedings the employees were not party. The Supreme Court of New South Wales held the employees liable to the firm and awarded compensation. Subsequently the London arbitrators held that the partner had breached his duties but that this did not cause the firm any compensable loss.

Out of these circumstances, the matters before the High Court are:

1. whether, in light of the arbitral award, it was an abuse of process for the firm to seek to recover against the employees in the Supreme Court of New South Wales;
2. whether the judge ought to have recused himself on the ground of apprehended bias in light of findings he made at interlocutory stages of the proceeding; and
3. whether the employees waived their right to appeal the judge's judgment after trial on the ground that he wrongly dismissed their application, prior to trial, for him to recuse himself, where the judge invited the employees to appeal that decision and they did not do so.

The parties' written submissions may be found on the High Court's website. (It may be of interest to know that the High Court has, from this year, begun publishing parties' submissions on its website.)

One of the matters raised at trial, and before the Court of Appeal, but not the subject of the appeal to the High Court was the governing law of the firm's claims against the employees. The Court of Appeal upheld the judge's decision to apply the law of New South Wales to all of the claims. The Court of Appeal held that:

1. the trial judge did not err in holding that the onus was on the employees to prove the content of Kazakh law and that absent such proof the presumption of identity applied (at [320]-[335]);
2. equitable claims were ordinarily governed by the law of the forum and, in light of the judge's conclusion that the employment contracts were governed by the law of New South Wales, no occasion arose to depart from that ordinary position on the ground that the source of the equitable obligations was a contract governed by foreign law (at [339]-[346]); and
3. though the firm was incorporated in the British Virgin Islands, it was not necessary to consider whether under the law of that place the partner breached his obligations to the firm arising from company law (as required by the *Foreign Corporations (Application of Laws) Act 1989* (Cth)) because the obligations asserted arose in equity not from company law (at [347]-[363]).

While the Court of Appeal's conclusion on the first point is a helpful authority concerning the presumption of identity, the point in fact appears to have been a false one in light of the trial judge's reasoning ([2009] NSWSC 1033). The employees pleaded that all the claims were governed by Kazakh law as the law governing their employment contracts and the conduct of business in Kazakhstan (at [324]). Based on the expert evidence, the trial judge concluded that, under Kazakh choice of law rules, the employment contracts were governed by New South Wales law (at [314]-[342]). He concluded that the same result followed under Australian choice of law rules (at [343]-[363]). It is not apparent why it was felt necessary to consider the position under Kazakh choice of law rules, given that the question of the governing law of the contract would be expected to be addressed by Australian choice of law rules and they directed attention only to New South Wales law. In those circumstances, no renvoi question could arise. The judge then concluded (at [364]):

> *The defendants have failed to prove as a matter of fact that Kazakhstan law applies to the contracts of employment. The plaintiff has overwhelmingly proved it does not. The presumption that Kazakhstan law is the same as local*

> *New South Wales law applies in that event.*

The third sentence does not follow from the previous two. This was not a case involving the presumption of identity at all, ie one in which the court concludes that foreign law applies but there is no evidence as to its content. Rather, the employees' position was that Kazakh substantive law applied, the firm's position was that New South Wales substantive law applied and the judge accepted the latter view.

Finally, it is worth noting one — of a very large number — interesting earlier interlocutory disputes in this proceeding. In *Wilson & Partners Ltd v Nicholls* (2008) 74 NSWLR 218; [2008] NSWSC 1230, the Supreme Court made an order for production for inspection of client files, located in Kazakhstan, of Kazakh companies associated with the employees and the partner. The companies were defendants to the proceeding. The files had been discovered but were not made available for inspection on the ground that this would breach Kazakh law. The Court held that even if this were so, it would not be an absolute bar to an order for production for inspection, as that is a question of procedure governed by the law of the forum (at [5]-[11]) and, in any event, the competing expert evidence did not prove that it would be a breach of Kazakh criminal or administrative law (at [12]-[27]). In resolving this application, the Court was not greatly assisted by the experts (at [12]):

> *Neither of the experts was cross-examined, and no application for leave to cross-examine was made. Neither descended to much detail in setting out the statutory or other authoritative basis for the opinions that they tendered. In many cases, I am left with competing ipse dixits of the two experts.*

Not high praise!