

Comity and Overseas Witnesses in Australia

An interesting recent decision of the Full Court of the Federal Court of Australia, *Joyce v Sunland Waterfront (BVI) Ltd* [2011] FCAFC 95, considers the role of comity and the interrelationship of public and private international law in the context of taking testimony from a witness outside the court's territorial jurisdiction.

The issue arose in civil proceedings in the Federal Court of Australia about misrepresentations said to have been made in Australia about the purchase of land in Dubai. Several witnesses (mainly Australian citizens) were located in Dubai, and although they were willing to testify, they were unable to travel to Australia to give evidence in person.

Under the Federal Court's rules, the two options were either for the judge to travel to Dubai to take evidence on commission, or for the witnesses to give evidence by video link. Approaches through diplomatic channels revealed at best an ambiguous attitude on the part of the UAE government about whether either course would be acceptable to it, but UAE lawyers gave evidence to the Australian court that there were no local statutes prohibiting either means of taking evidence.

The trial judge was concerned, in the light of diplomatic correspondence placed before him, that there was no evidence "that the UAE government would permit the taking of evidence by video link" and that to do so "without that permission, ... would be seen to be, or could be seen to be, a subversion of a refusal by a sovereign government to permit the taking of evidence on commission on its soil." *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 9)* [2011] FCA 832 at [40]

Referring to remarks in *Yamouchi v Kishimoto* (2002) 12 NTLR 32 and *Bell Group Ltd (In Liq) v Westpac Banking Corporation* (2004) 208 ALR 491, his Honour considered that to take evidence by video link was, in effect, to exercise the judicial power of the Commonwealth of Australia in the foreign country in which the witness was sitting; and that even if the witness testified voluntarily, the

exercise of the Australian court's powers could be viewed as an infringement of that foreign jurisdiction's sovereignty in the absence of clearer consent than was available in the present case. Given the diplomatic involvement of the Australian Department of Foreign Affairs and Trade, his Honour was especially wary of being perceived by a foreign sovereign as having acted unilaterally. In that context, he refused to order that evidence be taken by video link from Dubai.

The Full Court reversed that conclusion. Keane CJ, Dowsett and Greenwood JJ discussed the role of comity when taking evidence from witnesses overseas (whether on commission or by video link). Their Honours quoted a number of sceptical statements about the value of comity as a guiding principle, including the trenchant remark of Perram J in *Habib v Commonwealth* (2010) 183 FCR 62 at [27] that: "No doubt comity between the nations is a fine and proper thing but it provides no basis whatsoever for this Court declining to exercise the jurisdiction conferred on it by Parliament."

Reviewing the Australian statute on taking evidence by video link, their Honours remarked that it:

does not require that the foreign state consent to a person within its borders giving evidence by video link to an Australian court. If the Parliament perceived any problem arising out of the concept of sovereignty or that of comity, then it seems to have overridden any obligation which Australia may have had in that regard. ... We see no justification for imposing upon the exercise of the discretion conferred by [the statute] a requirement that the other state consent to the taking of evidence in that way. [at [60]]

Their Honours concluded that:

in exercising the discretion [to take evidence by video link], the Court is not hampered by any need to consider questions of sovereignty or comity between nations, at least absent any law forbidding such conduct, and subject to the question of whether an oath or affirmation should be required. To the extent that his Honour disposed of the matter upon the basis that questions of sovereignty and comity were relevant, he took into account irrelevant considerations. The exercise of the discretion miscarried. [at [62]]

Australian courts quite regularly take evidence by video link, and it is unusual for a party (in this case, the defendants) to have objected so vehemently, especially as the witnesses were themselves willing to testify. The subtext, it seems, was that one of the unavailable witnesses was the plaintiff himself: the defendants would have benefitted from a permanent stay or non-suit in the event of his inability to testify.

Perhaps of most interest to international readers is the sceptical attitude of the Full Court towards judicial comity in international litigation. This could perhaps be seen as part of a wider trend towards robust individualism on the part of the Australian courts when it comes to the exercise of their jurisdiction in cross-border cases (another example being the remarkable tenacity of Australian courts in *forum non conveniens* cases). It is also an example of the less deferential attitude taken by the Australian courts towards the executive government's conduct of foreign relations in recent times (*Habib v Commonwealth* (2010) 183 FCR 62 being the most notable example).

Joyce v Sunland Waterfront (BVI) Ltd [2011] FCAFC 95 (19 August 2011)