Forum Non Conveniens and Foreign Law in Australia

A recent judgment of the New South Wales Court of Appeal contains a number of points of interest, even if the ultimate conclusion is routine and unsurprising: an Australian court refused an application for stay of proceedings on forum non conveniens grounds in a case concerning an Australian-resident plaintiff.

The facts in Fleming v Marshall [2011] NSWCA 86 were complex and multi-jurisdictional. An Australian man was killed in a plane crash in the State of South Australia. His dependent survivors, apparently based in the State of New South Wales, brought tort proceedings against the manufacturers of the aircraft and its engines who were located in the State of Pennsylvania, USA. To do so, the survivors engaged a New York firm of attorneys (who in turn engaged Pennsylvania agents) whose services were partly paid for by a litigation funder and partly by a contingency fee arrangement. The manufacturers ultimately reached a settlement with the claimants, out of which the New York attorneys claimed a success fee, and to which the attorneys attached conditions before they would pay the claimants in Australia.

The present litigation before the NSW courts was brought by the dependent survivors against the New York attorneys, as they were dissatisfied with the deductions and conditions attached to the settlement. They claimed that this amounted to breach of the contract of retainer, breach of duty of care in tort (a claim abandoned on appeal) and breach of fiduciary duty, as well as allegedly the tort of conspiracy. Significantly, the plaintiffs conceded that if New York law applied, their claim was time-barred by a now-expired 3 year limitation period, whether the claim was heard in New York or NSW.

The primary judge rejected the defendant's application for a stay on forum non conveniens grounds [[2010] NSWSC 86]. His Honour observed that 'there is no one cause and no one applicable law', and that each of the laws of South Australia, NSW and New York might be implicated. He also placed some importance on the lex loci contractus of the contract of retainer, which he considered to be most likely to be that of NSW.

On appeal, the defendants submitted that the case 'principally concerns the professional standards of lawyers practising in New York' and that the trial judge was wrong to emphasise the importance of the place of contracting at the expense of the jurisdiction with which the contract had 'the closest and most real connection' [Bonython v Commonwealth of Australia (1950) 81 CLR 486; [1951] AC 201]. The plaintiffs resisted those contentions, and also emphasised the fact that (on their account of the facts) the New York attorneys had acted through Australian agents—therefore performing at least some of the retainer in Australia.

Macfarlan JA (with whom Spigelman CJ and Sackville AJA agreed) criticised the primary judge's treatment of the lex loci contractus:

> *"The primary judge correctly treated the identification of the proper law of the contract of retainer as relevant to the question of whether New South Wales is a clearly inappropriate forum for determination of the disputes between the parties. However in determining what was the proper law of the contract (that is, that with which the transaction had "the closest and most real connection": Bonython) his Honour in my view placed undue emphasis upon the place where it was concluded. If read on its own, paragraph [38] of the primary judgment (see [43] above) would suggest that his Honour regarded the place of contracting as determining, rather than simply being relevant to, the identity of the proper law." [at [61]]*

That being the case, the Court of Appeal proceeded to decide for itself the question of whether NSW was a clearly inappropriate forum, but ultimately reached the same view as the primary judge. Along the way, they emphasised:

- the unavailability of New York as an alternative forum because of the statute bar;
- the fact that it was 'not appropriate that at this stage of the proceedings a final determination be made as to the identity of the proper law of the contract of retainer', despite their Honours' 'provisional view' that it was New York law;
- the fact that, even if foreign law applied, this was 'not of itself a reason for granting a stay';
- the irrelevance of the lawyers' professional indemnity insurance cover being limited to proceedings brought in the US or Canada.

These conclusions are entirely within the mainstream of Australian private international law. As repeated decisions demonstrate, the practical reality is that Australian courts will never under any circumstances relinquish jurisdiction in a case concerning an Australian-resident natural plaintiff.

One topic referred to in the judgment which was not of direct importance to the case at hand is nonetheless likely to be of wider interest to non-Australian readers, namely the reference of questions of foreign law by the forum court to a court of that foreign jurisdiction. This was of potential future relevance to the case since the NSW forum was likely to end up applying New York law. The Supreme Court of NSW and the Supreme Court of New York have recently entered into a bilateral arrangement to facilitate such references, and Chief Justice Spigelman has recently published an article on the topic: J J Spigelman "Proof of Foreign Law by Reference to the Foreign Court" (2011) 127 Law Quarterly Review 208. More details of the NSW-New York bilateral arrangements can be found here on the NSW Supreme Court's website.

In the context of the case at hand, the Chief Justice remarked that:

> *"It is by no means clear whether the present case is one in which this mechanism for deciding such an issue would be more cost effective than the customary means of determining a question of foreign law by expert evidence. However, the determination of an issue of professional practice is one of the kinds of legal issues for which there is unlikely to be a single correct answer. Advice from three serving appellate judges of the foreign jurisdiction is much more likely to be accurate than an Australian judge choosing between contesting expert reports." [at [10]]*