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SUPREME COURT OF VICTORIA — APPEAL DIVISION

EQUUS FINANCIAL SERVICES LTD v LAH

Brooking, Ormiston and Vincent JJ

8 September 1994 — [1994] BC 94

CIVIL PROCEEDINGS – APPLICATION TO STAY ACTION – INTERSTATE COURT SAID TO BE MORE APPROPRIATE – STATUTORY CRITERIA TO TAKE INTO ACCOUNT – WHETHER CRITERIA EXHAUSTIVE – ONE PARTY INTERSTATE – PROVISION IN AGREEMENT THAT INTERSTATE LAWS WOULD APPLY – WHETHER ACTION SHOULD BE STAYED: *SERVICE AND EXECUTION OF PROCESS ACT* 1992, S20(4).

1. Section 20(4) of the *Service and Execution of Process Act* 1992 (Cth.) specifies matters which a court is to take into account in determining whether the court of another State is the appropriate court for the proceeding. The list of matters is not exhaustive. The question whether a court of another State is appropriate court is a discretionary determination.

2. Where a party to an agreement worked in Canberra during the week and the agreement provided that the parties submitted to the jurisdiction of the ACT Courts, a judge was not in error in staying an action commenced in Victoria and deciding that a court in the ACT was the appropriate court to determine the matters in issue.

BROOKING J: [1] The respondent, an anaesthetist practising in Canberra, and evidently living there except at weekends, has a home in a Sydney suburb which he gives as his place of residence. He signed an agreement dated 30 June 1989 with Rural Finance Pty Ltd ("Rural Finance") for it to lend him $52,083 to finance what has provided to be an unfortunate investment, units in a limited partnership in Queensland, which partnership was concerned in the farming of fresh water crayfish in that State under a scheme called the "Red Claw" project. The agreement was signed by the Respondent in Sydney, and was later signed on behalf of Rural Finance in Queensland. The loan was made as agreed.

The agreement begins with the name of Rural Finance boldly printed, followed on the left by a statement that it is incorporated in the Australian Capital Territory, and the situation there of its registered office, and on the right a direction that all correspondence be addressed to a certain post office box number in Southport, Queensland. The agreement is expressed to be made with Rural Finance, its place of incorporation and the location of its registered office again being mentioned. The definition clause of the agreement defines "Act" as the *Companies Act* 1981 of the Australian Capital Territory, a surprising definition in view of the failure of the agreement ever again to use the expression, "Act".

The clause defines "business day" as any day on which trading banks are open for business in Sydney. This definition is relevant for the purposes of Clause 6, which allows an extra day where performance falls due on a date **[2]** which is not a business day, and for the purpose of Clause 21(c), whereby communications sent by post are to be deemed to have been effected two business days after posting. I need not summarise the agreement generally. Especially to be noted are two clauses. Clause 25 says this:

> "This agreement shall be governed by and construed in accordance with the laws of the Australian Capital Territory, and the parties submit to the jurisdiction of the Courts for that Territory."

Clause 24 may, perhaps, be described as unusual:

> "The lender retains the right to assign its rights and obligations pursuant to this agreement to another party, in which case, that party assumes the rights and obligations of this agreement as though it is a signatory."

The only obligation imposed on the lender by the agreement that I have noticed is that

of making the loan, which is to be made by a single advance. It appears to have been assumed that Clause 24 enables the lender to make an assignment either before or after it has made the advance. Because a person cannot be saddled with contractual obligations without his or her consent, Clause 24 could enable Rural Finance to assign its "rights and obligations" only with the consent of the assignee if the assignee was to come under a contractual obligation to the borrower.

In the County Court (I shall mention the proceedings in a moment) the parties seem to have conducted the case on the basis that what in fact took place here amounted to an assignment pursuant to Clause 24, as opposed to the assignment of a chose in action, independently of the clause. What happened was that on 8 January 1991 the **[3]** Appellant, a company incorporated in Victoria and having its place of business in this State, and having no office in either the Australian Capital Territory or New South Wales, sent by post to the Respondent in New South Wales a letter enclosing a notice of assignment executed by Rural Finance, which letter gave notice of the assignment by the latter company of "its interest" under the loan agreement, including its right to moneys.

The letter of 8 January referred to "Clause 23" of the agreement, a manifest slip as regards clause number, as entitling Rural Finance to assign its rights and obligations under the loan agreement to the Appellant, and so may presumably be said to have manifested a willingness to assume any obligations which the loan agreement still cast upon the lender by the time of the assignment.

In August 1993 the Appellant filed a County Court writ naming the Respondent as defendant, and claiming as assignee the principal and interest under the loan agreement. That writ was served on the Respondent in Sydney under the Commonwealth *Service and Execution of Process Act* 1992. The Respondent applied to His Honour Judge Walsh under s20 of that Act for an order staying the action, and on 21 October 1993 that order was made. Against it the Plaintiff has brought the present appeal. Section 74 of the *County Court Act* 1958 unfortunately allows appeals to be brought without leave from all manner of interlocutory orders. This is one of the respects in which it stands in need of amendment.

Section 20 of the *Service and Execution of Process Act* 1992, which does not apply to proceedings issued out of a Supreme Court, enables the person served to apply to **[4]** the court of issue for an order staying the proceedings. But sub-s.(3) -

> "The court may order that the proceedings be stayed if it is satisfied that a court of another State that has jurisdiction to determine all the matters in issue between the parties is the appropriate court to determine those matters."

The result of the definition of "State" in s3 sub-s(1) is that a Territory is to be regarded as a State. Sub-s(4) of s20 specifies matters which the court is to take into account in determining whether the court of another State is the appropriate court for the proceeding. This is done in a way which makes it clear that the list of matters is not exhaustive. Six matters are referred to in the sub-section, and in addition one matter is expressly excluded from the matters to be taken into account. Whether or not the word "may" in s20 sub-s(3) should be regarded as conferring a discretion, having regard to the matters of which the court is required to be satisfied before it may make the order, it is clear that the determination whether a court of another State is the appropriate court to determine the matters in issue between the parties is a discretionary determination.

The present appeal is against the exercise of a discretion, and so the well known principles concerning appeals against discretionary judgments are applicable; but not only is the judgement a discretionary one, in addition, the decision below plainly concerned a matter of practice and procedure, so that added restraint must be exercised by an appellate court (*Adam P. Brown Male Fashions Pty Ltd v Phillip Morris Inc* [1981] HCA 39; (1981) 148 CLR 170; 35 ALR 625; 55 ALJR 548).

[5] The Judge determined that a court of the Australian Capital Territory was the appropriate court to determine the matters in issue between the parties. His Honour apparently was of the view that the Respondent was not obliged to make payment to the Appellant in Victoria, and added

this observation, which is said to show error;

> "Under the old *Service and Execution of Process Act* I would not have given leave to proceed to the Plaintiff."

I think His Honour said this merely as a means of saying shortly that the cause of action had neither of the theoretically possible connections with Victoria which a lawyer might raise for consideration in an action for money lent, those theoretically possible connections being that the contract of loan had been made in Victoria and that the Respondent's obligation to pay the Appellant was an obligation to pay in Victoria. His Honour was probably really concerned with the second matter, that of place of payment, for the contract was plainly not made here. I certainly do not think the judge is to be taken as saying that an application for a stay could not be successfully resisted unless the case would have fallen within s11 of the old Commonwealth Act. It is conceded by Mr Vassie, who appears for the Appellant before us, that the relevant considerations on a stay application, additional to those listed in s20 sub-s(4) of the new Act, include whether the cause of action has a connection with the State in which proceedings have been commenced, and that in this sense it is relevant to consider, for example, in a case of contract, where the contract was made and where the breach took place. Mr Vassie then contended that there was an **[6]** implied term of the contract which had the effect that payment to the actual assignee in this case should be made in the State where it had its place of business. The Court did not hear any extensive argument on this question.

I am prepared to assume, without expressing any opinion on the point, that His Honour was wrong in concluding that the obligation of the Respondent was not one to make payment in Victoria. Assuming that there was error here, I am not persuaded that this assumed error should be viewed as sufficient to vitiate the judge's exercise of discretion, but even if this Court had itself to re-exercise the discretion committed to the judge, and to do so on the basis that under the agreement payment had to be made by the Respondent in Victoria, I am not persuaded that the discretion should be exercised as Mr Vassie suggests it should be. Indeed, I think the right exercise of discretion is to determine that a court in the Australian Capital Territory is the appropriate court to determine the matters in issue, and to order that the action be stayed.

I shall not mention all the arguments put by Mr Vassie, either by way of seeking to attribute error to the judge, or on the question how the discretion should be exercised by this Court, if it is to be exercised by it. The matter principally relied on by Mr Vassie as to how the discretion should be exercised, that witnesses to prove formal facts on behalf of the Plaintiff reside in Victoria, is not of great weight. One cannot even say that these formal facts will be in issue.

[7] As regards evidence that might be called by the Respondent, he himself lives in Canberra from Monday to Friday. Other witnesses who might, perhaps, be sought to be called by him, will not come from Victoria. Clause 25 of the agreement may be assumed in favour of the Appellant to be a "non-exclusive" jurisdiction clause. Its terms are, nevertheless, a relevant and important consideration as regards the discretionary determination what court is the appropriate court to determine the matters in issue.

Two of the relevant matters mentioned in s20 sub-s(4) are:

> (d) "any agreement between the parties about the court or place in which the proceeding should be instituted."
>
> (e) "the law that would be most appropriate to apply in the proceeding."

I am prepared to assume, again expressing no opinion on the point, that Clause 25 is not an agreement about the court or place in which the proceeding "should" be instituted. It is, nevertheless, as Mr Vassie concedes, a relevant consideration, and in my view it is an important one. I think that, having regard to all relevant considerations, His Honour's conclusion was correct. I would only add that the order under appeal should not be regarded as working a substantial injustice to the Appellant, and I refer again to what was said in *Adam P Brown Male Fashions Pty Ltd v Phillip Morris Inc* [1981] HCA 39; (1981) 148 CLR 170; 35 ALR 625; 55 ALJR 548, this time particularly at CLR page 177. I would dismiss the appeal.

ORMISTON J: The Appellant, having conceded that the **[8]** expression "the appropriate Court" in sub-s(3) of s20 of the *Service and Execution of Process Act* 1992 should be taken as meaning "the more appropriate Court", I agree, in substance for the reasons stated by Brooking J that it clearly appears that this was a proceeding which ought to have been stayed, and it is therefore unnecessary to consider further any difficulties arising from the language of s20 might otherwise have to be resolved. I therefore agree that the appeal should be dismissed.

VINCENT J: I agree this appeal must fail, and I do so for the reasons given by Brooking J.

BROOKING J: The order of the Court is that the appeal be dismissed with costs.

APPEARANCES: For the appellant Equus Financial Services: Mr A Vassie, counsel. Alan Herskope, solicitor. For the respondent/defendant Lah: Mr GR Ritter QC with Mr SGR Wilmoth, counsel. Barton & Partners, solicitors.
