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SPILIADA and OCEANIC and IDEAS and WORDS

> 'What nobler occupation can there be for honouring and adorning old age than interpreting the law?': Cicero, *De Oratore*, I, 199.

My years qualify me for that epigraph, but my power of interpretation perhaps not. I struggle through what Gibbon, thankful that he had not studied law as his stepmother had urged him to do, called the 'thorns and thickets of that gloomy labyrinth'. At times in that labyrinth, words and positions wriggle like eels.

In 1988 the High Court of Australia in *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 79 ALR 9 refused by a majority of three judges to two to follow a unanimous House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460. *Spiliada* was the culminating case in the series that had begun in England with *The Atlantic Star* in 1974. The subject matter of the decisions was forum non conveniens.

A great deal has been written about the decisions, and in particular there has been disapproving criticism of the majority in *Oceanic*. The details of the decisions are well known and I shall not repeat them except so far as is necessary for comment.

There are two classes of case. One is where the defendant has been served within the forum's territory. This gives what is called 'inherent jurisdiction' and 'jurisdiction by right'. In some recent as well as older language, the phrase forum non conveniens is used only of this class of case: for example, by Lord Goff in *Spiliada*. Jurisdiction of this type is jurisdiction by common law. It empowers the court to hear a claim about anything at all (with a very few exceptions, mostly concerning foreign land), no matter how remote from and unrelated to the forum, and no matter how brief the defendant's presence in the forum when served. For easy reference I shall call these Class A cases.

In the other class of cases, the defendant is served outside the territory by authority of Rules of Court. The jurisdiction thus obtained is statutory in origin. Certain headings are fixed by these rules and the claim must come within them — or else there can be no jurisdiction. This jurisdiction, so it has been said, is to some extent an invasion of the territory and jurisdiction of foreign courts. Hence, it has been said, great reserve must be shown in its use; hence judicial leave is required before such a summons can be served. The court has a discretion to grant or refuse that leave. There has been some softening of that severe reserve in recent times: see for instance Lord Goff in *Spiliada*. The new Supreme Court Rules of Victoria no longer require leave to serve. I shall call these Class B cases. The expression forum non conveniens seems now to be commonly accepted for these cases too, and I shall use it for both.

So far as the applicable law of forum non conveniens is concerned, the House of Lords through Lord Goff in *Spiliada* (which is a Class B case) said that for Class A cases the proper forum is — to use a quick generalisation — 'the more (or most) appropriate court'. When he came then to Class B, Lord Goff said there was a 'marked resemblance' between the two classes, and he applied the same principles to his own Class B case

as he had laid down for Class A. There were, however, he said, three differences between the two classes (see p 480-481). The first is that in Class B, the burden of proof rests on the plaintiff to show that the forum he has selected is the more appropriate; whereas in Class A cases, it rests on the defendant to show a more appropriate court elsewhere. The second — and 'more fundamental' distinction, from which in fact, he said, the first flows, is that in Class B the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service beyond the territory. The third is that it is a serious matter to allow such service on a foreigner. This third point is, as said, softened by a consideration of the great variety of cases that can arise, some being those where leave to serve could well be expected: as for instance where the foreign residence may be only a tax haven, or an injunction may be sought for something to be done or not done within the forum territory.

The main thing to note for the moment from all that is the second distinction, that is, that in Class B the plaintiff seeks the court's discretion, and in Class A he does not need to. From this distinction the difference between the burdens of proof springs, as Lord Goff said. These words seem to imply that if no leave is required — as now in Victoria — the 'more fundamental' distinction disappears. Lord Goff may or may not have meant that. The first distinction would seem to disappear with it.

As one tries to go deeper into that distinction between the classes, and in particular what that 'fundamental' distinction is in itself, one has first some sorting out of words to do. Not every judicial or academic writer has used expressions with one clear meaning. And it is not only expressions that are at times obscure or ambiguous: the law appears to differ in steps on the way as well as in the now well known difference of result in *Spiliada* and *Oceanic*. All that I am trying to do here is point to some of that shadowland; I am not arguing that one line or the other — *Spiliada* or *Oceanic* — is right.

Words have to be used to describe things and notions. At times words can get adrift from the reality beneath, and then battles can be about words only, without the contestants' realising that they are not touching that which they intend to dispute. At other times words do represent reality, and then the contention goes below the words to that reality.

Take the word 'fundamental'. This means, I think, foundational, basic, the root, radical, that below which there is nothing. It is hard, or impossible, to see how a distinction, or anything, can be 'more fundamental' (as Lord Goff said at p 480 that a point of distinction was). Please do not frown at me and call me captious, pedantic, nitpicky. I am not. Arguments are built on these words. They are given a meaning. I do not know what Lord Goff means by 'fundamental': perhaps 'most important' or something like that; or perhaps the point at which Class B branched off from Class A. In *Freckmann v Pengendar Timur SDN BHD* (1989) WAR 62, Malcolm CJ said at p 68 that jurisdiction in Class B cases 'represents a fundamental departure from the traditional principles of the common law relating to jurisdiction'. I shall argue later that, whatever the difference between the principles of Class A and Class B may be, it is not 'fundamental' in the sense of being built on two different bases which do not spring from a common root.

On the other side of that argument are the words of Gleeson CJ in *Voth v Manildra Flour Mills Pty Ltd* (1989) 15 NSWLR 513 at 529:

> 'I would...find logically unacceptable any proposition which involved a *radical* [my stress] difference between the approach to be taken where a writ has been served within the jurisdiction and there is then an application for stay of proceedings on general discretionary grounds and that to be taken where a writ has been served outside the jurisdiction and there is then an application to set aside service or to stay further proceedings on the ground that the case is not one where a discretion should be exercised in favour of permitting service, or proceedings pursuant to service, out of the jurisdiction.'

It is true that Gleeson CJ indicated, in words replaced by dots in this quotation and the words preceding them, that his reason for refusing to admit a radical distinction is a practical one, namely that a Class A case can give automatic jurisdiction where person and matter concerned have no connection with the forum at all, except for a few minutes' presence of the defendant during which he is served; whereas a Class B requires leave and yet may on its facts be more strongly connected with the forum than with anywhere else. But if you are refusing a distinction for practical reasons, you must be refusing it as such. It cannot be there by law and ignored. It is true, however, that Gleeson CJ, while denying a radical distinction, admits some 'material' difference between the two (p 530). Without pursuing the matter to the end, the difference he adverts to is in the nature of the procedure and the discretion to be exercised in either case. That still leaves the whole question open of what exactly, at root, radically, the distinction is. I confess that I cannot tell what Gleeson CJ means precisely by 'radical' and 'material', any more than I can tell what Lord Goff or Malcolm CJ means by 'fundamental'.

So far then, I think, questions are emerging like: does the law of A and B cases depend on their history? Have the two classes totally different origins? Or has one class branched from the other? If so, what was there at base before branching and later development? Are there any differences apart from the nature of the discretion, if indeed there is a difference there?

Does the difference between the two come from the right to claim jurisdiction in a Class A case and the need to get leave in Class B? It has been flatly stated that it does. See *Freckmann* at pp 67 and 75, and the remarks already noted in *Spiliada* at p 480, and elsewhere. In Victoria now no leave is required. There remain there only the headings within which the case must fit, and these headings are getting wider and wider. Class B seems to be moving towards Class A, to be giving itself, within the headings, the same right to jurisdiction. In *Freckmann* (p 72) the movement of the one towards the other appears to be put the other way: Class A is assimilating the principles of B. How does this fit in with a 'fundamental' distinction? Can we say that now in Victoria, in cases within the enlarged number of headings, there is jurisdiction by right? If more places become like Victoria there will be little or no reason for distinguishing the classes of case, and therefore little or no reason for criticising adversely those who have failed to make the distinction, or are said to have. And probably more will get like Victoria, unless a swing back to former lines is imposed or grows out of a native caution at going too fast without a bridle. If Class B is already showing likenesses to A, as to a large extent in Victoria; and if, as Gleeson CJ has said, a practical distinction between them would often be unacceptable, then the much attacked majority of *Oceanic* by

passing over the gap may simply have been implicitly recognising this movement towards assimilation by applying the 'right to have my claim heard' of Class A to a case whose facts put it in Class B. Adrian Briggs in his article 'Wider Still and Wider: The Bounds of Australian Exorbitant Jurisdiction' — (2 *Lloyds Maritime & Commercial Law Quarterly* 216) had, I think, something of this in mind, though not with approval.

Another matter over which the clouds hang is the procedure for objecting to the obtaining or exercise of jurisdiction in Class B cases. In Class A, it is mostly straightforward: one applies for a stay. What of Class B? Should the procedure be to stay proceedings? Or set aside the writ? Or set aside service? Do they or don't they in this matter mean the same thing? Malcolm CJ in *Freckmann* said that if service had been 'regularly' effected in a Class B case, 'the appropriate relief, in the event of it being shown that the court did not have jurisdiction or for some reason should not exercise jurisdiction if it had jurisdiction, would be to stay the proceedings rather than set aside the writ' (p 64; see also 78). *Freckmann* was an appeal from an order setting aside leave to serve ex juris. Lawrence Collins, the current editor of Dicey/Morris, in *The Law Quarterly Review* (Vol 105, July 1989, 364) criticised both the majority and the minority in *Oceanic*. After saying that there was no doubt that forum non conveniens principles had long applied to Class B cases in both England and Australia, he went on:

> 'It is therefore very hard to follow why both the majority and the minority in the High Court of Australia treated the case as one in which only the principles applicable to staying of actions were relevant. Indeed, Deane J...expressly disclaimed any intention to decide whether forum conveniens principles were applicable to applications for leave to serve outside the jurisdiction. Yet the application had begun, quite rightly, as an application to set aside proceedings, and only in the alternative as an application to stay. The High Court seems simply to have failed to address the relevant issue, and to have failed to exercise the discretion in accordance with settled principles' (p 365-366)

Mr Collins' statement that forum non conveniens principles had long applied to Class B cases in both England and Australia is hard to square with the words of Gleeson CJ in *Voth* at p 528 that in *Oceanic* 'the majority re-asserted what had long been regarded as the law in this country', namely that, in Deane J's words, here paraphrased, a party who has regularly invoked the jurisdiction has a prima facie right to insist on its exercise, and that in Australia certain 'special categories of case have not traditionally encompassed a general judicial discretion to dismiss or stay proceedings' on the grounds of a more appropriate forum elsewhere. It is hard to square the two, given that Deane J was speaking in a Class B case. The words as such of Deane J and Lawrence Collins would seem to say that they are talking of two quite different things, though in fact they are not. Something more is said on this below.

Wilson and Toohey JJ in *Oceanic* favoured 'granting a stay' (p 23). In *Voth* at p 523 Gleeson CJ distinguished the two.

> 'Technically there are two alternative applications: first an order discharging the earlier order giving leave to serve process outside the jurisdiction; secondly, an order that the proceedings be stayed...

'He pursued the distinction on p 529 in the passage quoted above where he found not logically acceptable a radical distinction between the two.

In *Roneleigh Ltd v MII Exports Inc* (1989) 1 WLR 619 leave had been given to serve outside the jurisdiction and service had been effected. The defendants applied to have service set aside. In the judgments at first instance and on appeal the expressions 'set aside service' and 'stay proceedings' are used as if they had the same meaning.

Next point. What is needed to get leave to serve ex juris? Is it enough to show that your case fits into one of the headings? Or must there be that and something more? Lord Diplock in *Mackender v Feldia AG* (1967) 2 QB 590 appears to say the former.

> 'The application for leave to serve a writ outside the jurisdiction...is made ex parte. On that application...the only question on which [the judge] had to satisfy himself was whether the subject matter of the action prima facie falls within the ambit of [the rule]. If it does and leave is granted, the question whether the court in its discretion should allow the action to proceed falls for decision when the defendant has entered a conditional appearance and applies to have service set aside and the proceedings stayed.'

That is, discretion does not enter until this stage. (Note the conjunction in language of setting aside and staying!). In other words, the steps are: fall within heading — leave granted — no question of discretion yet. Malcolm CJ in p 69 of *Freckmann*, in the few lines following his quotation of this passage from Lord Diplock, appears to agree with what Lord Diplock appears to say. Yet elsewhere he makes it clear that that is not his view.

Case after case states that mere coming under a heading is not enough: that there must also be an exercise of discretion at that stage, that the case must be shown then to be prima facie such as to justify service ex juris. Thus Bray CJ in *Hayel Saeed Anam & Co v Eastern Sea Freighters Pty Ltd* (1973) 7 SASR 200 at 202:

> 'The general principles on which the court must approach such an application are not really in dispute. [The rule] empowers the court to allow service out of the jurisdiction in eleven cases...The order cannot be made unless a case is shown for the application of one or more of those [headings]. Even if such a case is shown, the making of the order is discretionary. Under [the rule] no leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction. I accept that it means that the plaintiff must show at least 'a good arguable case' for the application of one or more of the [headings]...before the question of discretion falls to be considered at all...'

This passage was quoted with approval by Gleeson CJ in *Voth* (pp 530-531) and with at least implicit approval by Malcolm CJ in *Freckmann* (pp 79-80).

So too Lord Goff in *Spiliada* at p 479 quoting Lord Wilberforce in *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50 at 72:

> 'RSC Ord 11, r 1 merely states that, given one of the stated conditions, such service is permissible, and it is still necessary for the plaintiff...to make it 'sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction...''

The same point is implicit in the assertions of the 'marked resemblance' between forum non conveniens principles and discretion to permit service ex juris — as, for example, per Wilson and Toohey JJ in *Oceanic* at p 19.

The exercise of discretion required on the ex parte application for leave to serve cannot be the same as that required on an application, fully argued, to stay or set aside on forum non conveniens principles. This has been sufficiently covered above, particularly in *Hayel Saeed.*

This distinction between the two discretions takes us to an examination of what is meant by 'regularly invoking' and 'properly invoking' the jurisdiction, and 'regularly instituting' proceedings — phrases that occur often in the judgments, especially *Oceanic.*

In *Freckmann*, a Class B case, Malcolm CJ at p 64 spoke of the ex juris service there as 'regularly effected'. On p 74, discussing the judgment in *Oceanic*, also Class B, he said that Deane J 'treated the respondent as one who had regularly invoked the jurisdiction' and so had a prima facie right to the exercise of competent jurisdiction. Deane J, he said, 'did not advert to any distinction' between Classes A and B so far as stay of proceedings went. However, Deane J at p 52 of *Oceanic* appears to use 'regularly invoked' for Class A cases only:

> 'In the case of an application for leave to serve or proceed, the jurisdiction invoked is statutory and not inherent and the refusal of the application involves an exercise of the relevant jurisdiction to determine the application for leave to serve or to proceed rather than a refusal to exercise jurisdiction which has been regularly invoked.'

Unless I have sadly lost my way amid the thorns and thickets, he does indeed appear throughout his judgment to speak as if *Oceanic* were Class A. Brennan J at p 40 and elsewhere in that case uses 'regularly invoked' without comment or distinction. Wilson and Toohey JJ in the same case speak of 'properly invoked' (p 21), then adding, 'The respondent, having obtained leave...to serve...in Greece, must be credited with having been entitled to invoke the jurisdiction...' What precisely does this sentence mean? Is 'being entitled' 'invoking'? Or does 'invoking' come only with service? Gaudron J at p 58 speaks of a 'doctrine which confers upon the court a discretion to decline to exercise its regularly invoked jurisdiction...' without any apparent distinction between the two classes of case.

On p 49 of *Oceanic* we have from Deane J the clear strong statement: 'It is a basic tenet of our jurisprudence that, where jurisdiction exists, access to the courts is a right.' Yes, but when does jurisdiction exist? It is mostly easy to see in a Class A case, though there is a dispute, adverted to but not settled by the High Court in *Laurie v Carroll* (1958) 98 CLR 310, whether the moment of issue of the writ or the moment of service is the telling time. In Class B we seem to be still in the labyrinth. Does 'regular invoking' apply to Class B too? Is jurisdiction in Class B regularly invoked when not only is an application heard for leave to serve, but leave is given, ex parte, with the defendant unheard? There is of course an original statutory jurisdiction by which the application is heard at all, but the mere making of an application to that jurisdiction is hardly an invoking in the sense meant, undefined though that sense is. Or is jurisdiction only regularly invoked when service is effected? When the defendant in such a case is served, and applies to set aside service (or applies for a stay?), and gets now his first chance to argue on the matter of statutory discretion — is he then already confronted with a regularly invoked jurisdiction, so that

only 'vexatious or oppressive' or some other Class A rule will relieve him of it? *Hayel Saeed* says No; but how does that fit in with later pronouncements?

The same questions arise from a passage in the judgment of Wilson and Toohey JJ (p 24):

> 'Although we have from time to time referred to the Court's discretion to stay proceedings on the ground of forum non conveniens, the expression is apt to mislead unless properly understood. The discretion is to decline to exercise the jurisdiction vested in the court.'

But when is it vested in a Class B case?

It is not easy, with respect, to form an opinion on the precise sense of some of these statements. Gleeson CJ in *Voth* (p 530) seems to speak of something of the same difficulty. 'Nor would I find it easy to accept that when...the majority in *Oceanic*...used the expression 'regularly invoked'...they were intending to draw a distinction' between Class A and Class B cases. His own statement, with respect, does not resolve the obscurity. Many, including the minority in *Oceanic*, would apparently call jurisdiction established — at least by service — in a Class B case 'regular'. Deane J apparently would not. He makes no statement on his attitude after service, but his distinction between statutory on the one hand and inherent and regularly invoked on the other is so sharp that if the former is to become regularly invoked by service, then statutory jurisdiction would seem to undergo some sort of change. In this region of uncertainty, these words and phrases do not tell us anything about the real distinction between the classes.

I mention without comment the three different views on onus which Malcolm CJ lists in *Freckmann* at pp 78-79:

> 'In the present case the appellant has shown that she has a good arguable case...There is a question whether, as Lord Diplock considered in *Mackender v Feldia*, the onus remains on the plaintiff throughout, or whether the defendant has, at the threshold, the onus of showing that there is a more appropriate forum as Wilson and Toohey JJ considered, or whether the defendant bears the entire onus as Brennan and Deane JJ held. In my opinion, *Oceanic Sun* has not resolved that question.'

It is perhaps that opinion of Wilson and Toohey JJ that brought the disapproval of Lawrence Collins down upon not only the majority but also the minority in *Oceanic*.

In summary, these are some of the areas and expressions that perplex the poor student. There is, I think, much imprecision, undefinition. The great lines are not clear. One who reads cases to learn from them has a great deal of preliminary wrestling with meaning to do. It may be charged against me that I have just misunderstood the whole thing. If so, I stand accused in great company, for this is almost what Lawrence Collins has said of the whole High Court. And as I do not believe he was right in the sweep and scope of his charge, so I hope that I too am not totally failing in understanding. There are, I believe, many true obscurities.

Finally, I offer a thought on the 'fundamental' difference between the two classes. I don't think there is one.

The two grew out of one common fundament. Jurisdiction, as we call it,

or 'competence' as some systems call it, must, whatever the present practice in a particular country is or whatever the history, rest on the essential fact, the foundation, the beginning: the power of a sovereign state over persons and property within its area. The place where a writ is served does not belong to this essence. In the fundamental question, it does not matter. Many countries use, not a writ in our sense of command, but a citation, a notification of the suit, sent wherever the defendant is.

There is no essential difference *in reason* between Class A and Class B cases. They could in history have originated together, and by common law. While historically, and in current theory, Class A cases do allow the court to hear anything, no matter how remote in content from the forum; and Class B in its growth could have allowed the same — but does not, not even in Victoria, not yet: in ultimate sense they need not differ. For courts to change the law on this present (only historical, and thus accidental) position would be a no greater, and probably in its effect a lesser change than the House of Lords worked from *The Atlantic Star* in 1974 to *Spiliada* in 1986.

I offer no opinion on whether the courts should work this change: on whether in particular they should move to a jurisdiction like that in some other systems where place of service does not matter and the courts will touch all and only cases where parties or content or place of action are in some specified way connected with the country of the court.

Class A cases as we know them are grounded in their historical beginning in the middle ages. One can ask whether territorial power in that medieval sense is a proper matrix for jurisdiction today.

The king then was concerned with the practicalities of keeping his kingdom in order and running a system of justice within it. There was not much theory or history. Full power by writ made sense then. The king could command anyone he could reach, that is, anyone within his borders. It was neither necessary nor worthwhile to worry about the niceties of subject matter barely connected with England, or defendants out of reach. Those served in England were connected with England. The position was centuries away in time and thought and life from international commerce today, from modern communication and movement.

One could well argue, I think, that the real occupation of that basic power today is, and per se always was, the appropriateness of the nature of the claim, that is, connection with the forum in person or thing.

Later in England statute allowed service abroad. This of course had no point unless there was still power back home. It does not matter in the nature of the thing whether you allow this extension by statute (as it happened in fact), or by new development of common law (as could have happened but did not). Nor does it matter essentially whether you allow it with or without leave, or with or without conditions. In all cases you have power back home.

Modern developments seem to be quietly doing away with the theory of writ as royal command and all the appurtenance of jurisdiction by right that went with that. For one particular instance where the majority of service has disappeared, and a notification has taken its place, see the Rules of the Supreme Court (SA):

18.04 Service outside the Commonwealth of Australia and its dependant Territories shall be effected by service of:

(a) notice of the summons and not the summons itself. The notice shall be in Form 7.

(b) copies of all documents in respect to any further step in the proceedings with an intimation that process in the form of the copy has been issued.

Notice of summons to be served outside of the Commonwealth

FORM 7

Notice of Summons to be served out of the Jurisdiction — Rule 18.04

'TO C.D. of

TAKE NOTE that A.B. of has commenced an action against you C.D. in the Supreme Court of South Australia by a summons issued on 19 in action No. . A copy of the statement of claim filed with the summons (or the affidavit filed with the summons) is attached hereto. You are required within clear days of the service of this Notice upon you to file an appearance in the Registry of the Supreme Court of South Australia at 1 Gouger Street, Adelaide in the State of South Australia if you wish to defend the action. If you do not file such an appearance, judgment may be given against you in your absence.

DATED the day of 19 .

....

Signed by A.B. or his solicitor
address phone no)'

(For the reminder of this example I am indebted to Mr John Doyle, Solicitor-General for South Australia).

Service of writ or notification of writ — what in reality is the difference?

Many a country says: I allow you to use my power within certain limits of person and matter that are connected with this country — ask for it; let the defendant know. England has said in Class A: I allow you all my power in unlimited scope over anyone within the realm — ask for it; seize the defendant by writ. This insistence on presence within the realm, and the indifference to the matter of the claim, have really forced England, and so us, to create Class B cases to keep up with the realities of legal life; and we are being forced these days to widen the Class B headings. Are the modern Rules of Court not saying (not openly, perhaps, but truly): service within the territory does not matter much any more? And is that message not there, curiously, in each of the two opposing grand doctrines of *Spiliada* and *Oceanic*? And that being so, what is the justification for claiming unrestricted scope if you do serve within the territory? There need never have been Class B at all, had Class A grown out of its twelfth century setting.

Again, it does not matter now in what way exercise of this royal power developed — whether and how the king left to his judges the seminal authority to work out which cases were right to hear. There is nothing in the nature of a sovereign state forbidding or dissuading from saying: we will serve or cite abroad to further the just exercise of our power back home; and there is nothing that makes it desirable to say: if we serve you at home we will hear anything however little it touches us or even if it does not touch us at all, and if we serve you abroad, but only then, we will examine the extent of the connections you have with us.

As I began with Cicero, so let me end with him. There is much these days (for instance, in Deane J in *Oceanic*) about judicial chauvinism and comity. Cicero had his own idea about international juristic relationships:

> 'You will get such joy and pleasure from knowledge of the law, because you will easily understand how much our ancestors surpassed other nations in skill if you compare our laws with Lycurgus and Dracon and Solon amongst those others. For it is incredible how all other civil law except ours is uncouth and almost ridiculous': *De Oratore*, I, 197.

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