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After The *Spiliada - Forum Non Conveniens* in New Zealand and Australia

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Under the doctrine of *forum non conveniens,* a court which has jurisdiction over a defendant under municipal law declines to exercise it on the grounds that it is not the appropriate venue for the action and that considerations of justice require that the plaintiff litigate in another jurisdiction. As Michael Pryles observed, it is concerned only with the "*exercise* rather than with the *existence* of jurisdiction".[1]

Historically, two rules were prescribed in English law for situations encompassing a stay or non-exercise of jurisdiction, which a court possessed over a defendant. Where the defendant *was served* with process within the forum, the circumstances where the court would grant a stay (refuse to exercise its jurisdiction) were severely limited. The classic statement of the common law on staying an action was that of Scott LJ in *St Pierre v South American Stores (Gath & Chaves) Ltd:*

> The true rule about a stay... so far as is relevant to this case may I think be stated thus: (1) A *mere balance of convenience* is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.[2]

However, in cases where the defendant has been served out of the jurisdiction, under rules of court which authorised such a procedure, the court has a broader discretion. The onus is on the plaintiff who sought leave to serve a defendant out of the jurisdiction, to show that the case fell within the rules and was a

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1 M. Pryles, "Judicial Darkness on the Oceanic Sun", (1988) 62 A.L.J. 774 (emphasis in original).

2 [1936] 1 KB 382 at 398

proper one for service out of the jurisdiction. That is because jurisdiction obtained by service *ex juris* and exercised against persons outside the forum is considered an extreme jurisdiction which should be exercised with caution.[3]

Such a distinction has, however, been refined over the last two decades in England. The rule applicable to stay cases has been shed of its requirements of 'oppression or vexation" and, as the House of Lords established in *Spiliada Maritime Corp. v Cansulex Ltd*,[4] the defendant now need only show there to be another forum clearly or distinctly more appropriate than England for the trial of the action. If they can do so, proceedings are likely to be stayed.[5] The same analysis is also applied in applications for leave to serve outside the jurisdictions.[6]

The principles enunciated in *Spiliada* have been received quite differently by the courts of New Zealand and Australia. It was unequivocally adopted by the New Zealand Court of Appeal in *Club Mediterranee NZ v Wendell*,[7] but in Australia the reception of the more recent English developments has not been as forthcoming.[8] This paper analyses the development of *forum non conveniens* in New Zealand and Australia and considers the potential effects of the disparate developments.

England & the *Spiliada*

The present English law was established in 1986 in *Spiliada*. In an Order 11, rule 1 action[9] a Liberian shipowner asked the House of Lords to uphold the trial judge's decision that leave had been properly granted to serve a writ in Canada on a British Colombian exporter whose shipment of wet sulphur had caused severe corrosion to the hold of their ship. Although the case turned primarily on the exercise of the court's discretion to grant leave to serve proceedings abroad, the House of Lords took the opportunity to clarify the court's discretion to stay proceedings in cases where jurisdiction existed as of right. Lord Goff, in the leading judgment, stated the fundamental principle as:

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3 *Societe Generale de Paris v Dreyfus Bros.* (1885) 29 Ch.D. 239 at 242-43; *The Hagen* [1908] P 189 at 201; and *Mackender v Feldia A-G* [1967] 2 QB 590 at 599-600.

4 [1986] 3 All ER 843.

5 This development started in *The Atlantic Star* [1974] AC 436 which established that the requirement of "oppressive or vexatious" should be liberally interpreted, was continued in *MacShannon v Rockware Glass Ltd* [1978] AC 795 and *The Abidin Daver* [1984] AC 398 and was finalised in *Spiliada*, which essentially adopted the Scottish principle of *forum non conveniens*.

6 *Spiliada, supra* note 4 at 846-47 per Lord Templeman. In England servie *ex juris* requires the leave of the Court under R.S.C., Ord.11.

7 [1989] 1 NZLR 216.

8 *Oceanic Sun Line Special Shipping Co. v Fay* (1988) 79 ALR 9; and *Voth v Manildra Flour Mills Pty Ltd* (1990) 65 ALJR 83. A.G. Slater offers a thoughtful and critical review of the rationale of the modern English doctrine in "Forum Non Conveniens: A View From the Shop Floor" (1988) 104 L.Q.Rev. 554.

9 The provision relied upon by the plaintiff was Rule l(l)(f)(iii) which allowed service *ex juris* with leave if the action was brought on a contract governed by English law.

> [A] stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the action, *i.e.* in which the case may be tried more suitably for the interests of the parties and the ends of justice.[10]

The House of Lords established that the appropriate forum is the forum with which the action has the most real and substantial connection. The factors which the court may consider in determining whether another forum is more appropriate are "legion"[11] and will include the availability of witnesses, the law governing the relevant transaction, the places where the parties reside or carry on business and general matters of convenience and expense.[12] No guidance was given as to the weight of the various factors. Such determination is to be left to the trial judge and should rarely be disturbed on appeal.[13] This lack of guidance has been criticised by some commentators as conferring too broad a discretion on trial judges.[14]

In stay cases, the burden rests on the defendant to demonstrate that there is another available forum which is "clearly or distinctly more appropriate than the English forum".[15] If the court concludes that the defendant has met this burden, it will ordinarily grant a stay, unless the plaintiff (the respondent in the stay proceedings) can establish that it will not obtain justice in the foreign jurisdictional.[16]

Lord Goff also observed that the same principles should govern *ex juris* cases, although the allocation of the burden is different: the burden is on the plaintiff to show that England is clearly the more appropriate forum.[17]

On the facts of the case, the House of Lords sustained the service *ex juris*. The factors relied on most heavily by Lord Goff were the existence of a parallel action in England involving the same solicitors and the same issue, the fact that the applicable law was English and the fact that the insurers were managed in England.[18]

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10 *Spiliada, supra* note 4 at 855.

11 *Ibid* at 846 per Lord Templeman.

12 *Ibid* at 856-57.

13 *Ibid* at 857.

14 A.C. Slater, *supra* note 8 at 567-73; and R.J. Paterson, "Forum Non Conveniens in New Zealand" (1989) 13 N.Z.U.L.Rev. 337 at 355-56. The Australian High Court found this uncertainty to be one of the reasons for not following *Spiliada*. Brennan J *in Oceanic Sun* (*supra* note 8 at 38) observed that the "English law can be seen to have moved from a discretion confined by a tolerably precise principle to a broad discretion to be exercised according to the judge's view of what is suitable for the interests of all the parties and the ends of justice". He noted that once the court assumes such a wide discretion, "there is no turning back short of the point where the court, guided by no more specific touchstone than the ends of justice, assumes the power to affect the parties' substantive rights"(at 39).

15 *Spiliada, supra* note 4 at 856.

16 *Ibid* at 857.

17 *Ibid* at 856-58.

18 *Ibid* at 846-47; and 861-63.

New Zealand & *Forum Non Conveniens*

New Zealand's historical position in stay cases mirrored the English rule, classically expounded by Scott L J in *St Pierre.* Once a court was properly seized of jurisdiction to hear a case with a foreign element, there was no residual discretion to stay the proceedings on the basis that there was another, more suitable foreign forum.[19]

This has now been modified and liberalised with the advance of the modern doctrine of *forum non conveniens. The Spiliada* principles first received approval by the New Zealand Court of Appeal in *Club Mediterranee.* In that case, the defendant, Club Med, had been served in New Zealand, where it carried on business, with proceedings brought by the plaintiff, a New Zealander, who contracted food poisoning during a visit to Club Med New Caledonia.

The Court of Appeal upheld the trial judge's refusal to grant a stay. However, whereas Hillyer J had applied the abuse of process test, the Court of Appeal followed *Spiliada.* Cooke P agreed with Lord Goff that the essential task "is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice".[20] In determining the matter, the Court found that the defendant had failed to discharge the onus of showing that New Caledonia was a more appropriate forum. Although the relevant events had occurred there, the overall balance of convenience pointed to New Zealand, where the contract was made and by whose laws it was governed.

New Zealand courts since *Club Mediterranee* have expanded on the factors relevant to *forum non conveniens* applications, as espoused by *Spiliada,*[21] and have looked to such factors as the similarity of the law in the various jurisdictions, procedural advantages including costs and speed, whether one trial will determine all the issues between the parties and the internal political situation of the relevant fora.[22]

The doctrine of *forum non conveniens,* in line with English authority, has also been applied to service *ex juris.* There are two different procedures for service out of New Zealand: (1) without leave, pursuant to Rule 219 of the High Court Rules; and (2) with leave, pursuant to Rule 220.

The leading authority on the availability of a stay in a Rule 219 case is the Privy Council's decision in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd.* [23] In this case a statement of claim was served on a foreign defendant pursuant to Rule 219. The defendant protested the New Zealand jurisdiction and applied

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19 *Bank of New Zealand v Proudfoot* (1885) 3 NZLR 372 at 375-76.

20 *Club Mediterranee, supra* note 7 at 219. The Court, however, did not pass comment on the fact that this case represented a change in direction for New Zealand law and this has been the focus of some comment: R.J. Paterson, *supra* note 14 at 350; and "Conflict of Laws" [1989] N.Z. Recent L.Rev. 350 at 351.

21 See accompanying notes 11-13.

22 *McCotinell Dowell v Lloyd's Syndicate 396* [1988] 2 NZLR 257 at 274-77; and 282; *Crane Accessories Ltd v Lim Swee Hee* [1989] 1 NZLR 221 at 231-32; *Oilseed Products (NZ) Ltd v H.E. Burton Ltd* (1987) 1 PRNZ 313 at 316-18; *Bank of New Zealand v Kemp* (1991) 4 PRNZ 444 at 449-50; and *Marine Helicopters Ltd v McAlpine Helicopter Services Ltd* (1991) 5 PRNZ 625.

23 [1990] 3 WLR 297.

for a dismissal of the proceedings against it, pursuant to Rule 131 which, by its wording, limited the court to deciding simply whether jurisdiction existed. The Privy Council held that the scope of an application under Rule 131 extends beyond ruling whether jurisdiction simply exists, to a discretion whether jurisdiction ought to be declined. Notwithstanding the right conferred by Rule 219 to serve proceedings out of New Zealand without leave, and the ostensibly narrow ground of objection embodied in Rule 131, this case established that the court retains a discretion to set aside service *forum non conveniens* grounds.[24]

The scope of Rule 220 was considered by Hardie Boys J in *Cockburn v Kinzie Industries* Inc.[25] The case arose out of the crash in North Canterbury of a helicopter manufactured in Oklahoma. The plaintiff alleged that the crash was the result of certain detective parts which had not been replaced. His Honour established that in exercising the court's discretion under Rule 220, the court should consider whether an alternative court is a more appropriate forum for the proceedings. Hardie Boys J declined to exercise New Zealand jurisdiction in the case because there was another forum which had jurisdiction and which was more convenient for the parties. The act or default central to the causes of action had occurred in Oklahoma, whereas the New Zealand connection was merely incidental. Further, Oklahoma was the *forum conveniens* when considerations of expense and convenience with regard to the witnesses were weighed.[26]

Forum Non Conveniens in Australia

Like New Zealand, jurisdiction in Australia is based either on the presence of the defendant in the forum or on service *ex juris* if the case falls within the rules of the court. Moreover, New South Wales, Victoria, Queensland, Tasmania and the Northern Territory mirror New Zealand in no longer requiring leave as a preliminary to the service of most proceedings overseas.[27]

However, unlike New Zealand, the Australian High Court in *Oceanic* Sun and its sequel *Voth v Manildra Flour Mills* has declined to follow the House of Lords decision in *Spiliada* and has developed a uniquely Australian approach to the doctrine of forum non *conveniens.*

In *Oceanic Sun,* the plaintiff, a resident of Queensland, booked a cruise on a Greek ship through a Sydney travel agent. He obtained an "exchange order" in Sydney which was surrendered in Athens for a ticket. The ticket contained certain conditions with which the plaintiff was unaware - one being that any action be brought in Athens. The plaintiff was subsequently injured during the cruise and commenced proceedings for damages in New South Wales. He obtained

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[24] *Ibid* at 310. This point was recently affirmed by the Court of Appeal in *Longbeach Holdings Ltd v Bhanabhai & Co Ltd* [1994] 2 NZLR 28 in which Hardie Boys J observed that even where "jurisdiction could be invoked under R 219 the Court has an inherent discretion to decline jurisdiction... The Court must be satisfied that there is another available forum for the trial of the case that is the more appropriate forum, in that the case may be tried there more suitably for the interests of the parties and the ends of justice" (at 34).

[25] (1988) 1 PRNZ 243.

[26] *Ibid* at 249-50.

[27] *Voth v Manildra Flour Mills, supra* note 8 at 92.

leave from the court to serve the defendant outside the jurisdiction on the basis that he had suffered injury in New South Wales caused by the tort of the shipping company.

The defendant sought a stay of proceedings based on two grounds: (1) the plaintiff, by reason of the conditions on the ticket had submitted to the exclusive jurisdiction of the courts in Athens; and (2) having regard to all the circumstances, Greece was the more appropriate forum for the litigation.

The High Court in a three to two decision refused to stay the proceedings.[28] The minority were in favour of adopting the more recent English rule as encapsulated by *Spiliada*, whereas the majority preferred the traditional rule as enunciated in *St Pierre*.

Deane J wrote what is now regarded as the leading judgment in the *Oceanic Sun*. He observed that the traditional approach was the correct one. The defendant must satisfy the court that the continuance of the proceedings would be oppressive or vexatious by reason of the inappropriateness of the local court. The words "oppressive and vexatious", however, should be liberally construed, much as the House of Lords had suggested in *The Atlantic Star*.[29] He held that the test will be satisfied and a stay ordered if the defendant establishes that there is an available and appropriate tribunal in some other country and that the local court is a clearly inappropriate forum, unless the plaintiff establishes the existence of exceptional circumstances.[30]

His Honour described the test as a "clearly inappropriate forum" test as opposed to the "more appropriate forum" test articulated by Lord Goff.[31] The difference, according to Deane J, is that the mere fact that a tribunal in some other country would be a more appropriate forum for the particular proceedings does not necessarily mean that the local court is a clearly inappropriate one. On the facts, he found that while there was much to be said for the view that the more appropriate forum was Greece, New South Wales was not clearly inappropriate.[32]

The case has been the subject of much criticism. Commentators have criticised *Oceanic Sun* for a variety of reasons. Firstly, they have said that the High Court approached the facts on an entirely erroneous basis. The case should have been treated as one involving service out of the jurisdiction, in which in both England and Australia *forum conveniens* factors had always been relevant, instead of a

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28 The majority consisted of Brnannan, Deane and Gaudron JJ, whilst the minority was Wilson and Tochney JJ.

29 *Oceanie Sun v Fay, supra* note 8 at 44-46.

30 *Ibid* at 47. Justice Brennan, on the other hand, advanced the orthodox interpretation and was of the view that the words "oppresive and vexatious" should be understood according to their ordinary meaning (at 34-35). justice Gaudron drew a distinction between cases where foreign law governed the substantive rights of the parties and cases where local law applied. In the latter situation, she was in favour of a more liberal test along the lines of that advanced by Deane J. However, in cases where the *lex fori* applied, she adhered to the orthodox interpretation (at 57-59).

31 *Ibid.*

32 *Ibid* at 51.

stay case which involves consideration of the *St Pierre* formulation.[33] Secondly, critics have said that there was no unanimity within the majority on the construction and application of the proper formulation in *St Pierre*.[34] Finally, it has been noted that the High Court formulated a unique doctrine at a time when recent developments in England were pushing for greater harmonisation with other legal systems.[35]

Whilst no clear ratio, apart from a rejection of *Spiliada*, emerged from *Oceanic Sun*, a more unified voice was presented in *Voth*. In this case, the plaintiffs, who were members of a corporate group, commenced proceedings in New South Wales for negligence against an accountant practising in Nhssouti, the United States. They alleged that the defendant failed to advise members of the group of their liability to the I.R.S. for withholding tax. The plaintiffs obtained leave to serve proceedings in Nhssouti on the ground that they had suffered some or all of the relevant damage in New South Wales.[36]

The majority[37] confirmed that the power to stay proceedings on *forum non conveniens* grounds is to be exercised with "great care" or "extreme caution" in accordance with the court's general power to dismiss or stay proceedings which are oppressive, vexatious or an abuse of process.[38]

The majority went on to establish that the same test is to be applied in applications to set aside service *ex juris* and in applications for a stay, and is the test as articulated by Deane J in *Oceanic Sun*. Thus, the mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction would provide a more appropriate forum does *not* justify a dismissal or stay of the action. The High Court ruled that it has to be established by the defendant that the local court is clearly an inappropriate forum for the determination of the dispute before the court would stay proceedings.[39]

Although it did not adopt the *Spiliada* test, the Court did adopt Lord Goff's discussion of the various "connecting factors" and "legitimate personal or judicial advantages" that would be relevant in the determination of whether the local court is a clearly inappropriate forum. Thus, there is some accommodation of the *Spiliada*, albeit in the context of a somewhat differently phrased rule.

A Comparison

The New Zealand Court of Appeal and the Australian High Court have enunciated different tests that are to apply equally to cases where the defendant, seeking a stay or non-exercise of the court's jurisdiction, has been served within the forum or has been served *ex juris*. In New Zealand, the essential test, unequivocally adopted from *Spiliada*, is that for a stay or non-exercise of the

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33 L. Collins, "The High Court of Australia & Forum Conveniens: A Further Comment" (1989) 105 L.Q. Rev 364 at 364-366.

34 A Briggs, "Wider and wider still: the bounds of Austrlian exorbiant jurisdiction" (1989).

35 M. Pryles, *supra* note 12 at 781-791.

36 *Voth v Manildira Flour Mills, supra* note 8 at 87.

37 Mason Ci, Deane, Dawson and Gaudron) J.

38 *Voth v Manildira Flour Mills, supra* note 8 at 88.

39 *Ibid* at 92.

court's jurisdiction, another forum must be clearly and distinctly demonstrated to be a "more appropriate forum". Whereas in Australia, the requirement is that the Australian court be shown to be "clearly inappropriate".

The Australian High Court in Voth acknowledged that the two tests will probably yield the same result in the majority of cases.[40] However, on a technical reading of the language of the two tests, the result could be different if either: (1) there were an available forum which were the natural or more appropriate forum, but it could not be inferred that the local forum were clearly an inappropriate one;[41] or (2) there is no other available forum, but it could nevertheless be said that the local forum was clearly inappropriate. The latter exception follows from the fact that for a forum to be considered a "clearly inappropriate forum", the Australian court need not find the existence of a more appropriate forum elsewhere. By contrast, under the *Spiliada* test, in order to find that the forum is *forum non conveniens*, a more appropriate forum must be found elsewhere.[42]

It was also asserted in *Voth* that another distinction between the two tests is that the "clearly inappropriate forum" test focuses on the advantages and disadvantages arising from a continuation of the proceedings in Australia, rather than making a comparative judgment between the two fora.[43] Such an assertion, however, seems misplaced because making a comparison of the procedural advantages and disadvantages would be necessary whenever a plaintiff argues that exceptional circumstances exist which require a stay to be refused. Indeed the High Court explicitly adopted Lord Goff's discussion of the relevance of "legitimate personal and juridical advantages".[44]

The differences between New Zealand and Australia with regard to the doctrine of *forum non conveniens* were broached by Thorp J in *Primesite Outdoor Advertising Ltd v City Clock (Australia)* Ltd.[45] In that case, he lamented the difference in approach, especially at a time of closer economic relations and harmonisation of Australian and New Zealand commercial law. His Honour observed that the essential nature of the difference is that the Australian test sets a "considerably higher" burden of proof on the party attempting to stay Australian proceedings.[46] He concluded that:

> Until the conflict is somehow resolved, the determination of forum non conveniens issues as between litigants on different sides of the Tasmania may well be affected by the entirely fortuitous circumstance of the availability of time in one country or the other to hear and determine applications for stay.[47]

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40 *Ibid* at 90.

41 Deane J thought that the *Oceanic Sun* case was an example of this type of exception, *ibid* at 90-91.

42 Ellen Hayes highlights these points in her article: 'Forum Non Conveniens in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation" (1992) 26 University of British Columbia L.Rev. 41 at 52-53.

43 *Voth v Manildra Flour Mills, supra* note 8 to 90.

44 *Ibid* at 92.

45 (1991) 4 PRNZ 472.

46 *Ibid* at 476.

47 *Ibid* at 478.

Consequently, the burden of proof for those contesting the right of an Australian court to exercise its jurisdiction is higher in Australia than in New Zealand because the test in Australia continues to remain tied to the traditional formula. It may be that very tenuous connections with Australia will be sufficient to justify a finding that the Australian court is not "clearly inappropriate". In some circumstances, then, prospective plaintiffs may find it advantageous to initiate their proceedings in Australia rather than elsewhere.

However, as the *Voth* decision demonstrated, such reservations should not be exaggerated.[48] This point is buttressed by the realisation that the New Zealand cases have generally demonstrated a reluctance by the courts to stay proceedings despite their unequivocal acceptance of *Spiliada*. In *McConnell Dowell*, in spite of the fact that trial judges in both England and New Zealand concluded that England was clearly the more appropriate forum for the action, the New Zealand Court of Appeal saw New Zealand as providing the natural forum.[49] In *Van Dyck v Van Dyck*,[50] even though the action concerned the conversion of funds in bank accounts in San Diego and the fact that similar proceedings were about to commence in Holland, the High Court found that the onus had not been discharged that there was a more appropriate forum than New Zealand.

The High Court decision, *Curnow Shipping Ltd v National Bank of New Zealand Ltd* [51]further highlights this reluctance by the courts to grant stays. There the plaintiff had entered into a contract to sell a ship to a New Zealand company which subsequently turned out to be insolvent. The plaintiff sought to recover its losses from the first defendant, the National Bank, which acted as guarantor. It successfully applied to join the second defendant, Lloyd's Bank, the plaintiff's bank, claiming that it was liable in negligence. The first defendant appealed the joinder, and that was still pending at the time. The second defendant applied to stay the proceedings against it on the grounds that England was the appropriate forum for the dispute. A stay was initially granted by a Master of the Court on the grounds that the matter had no connection with New Zealand. It was considered that the fact that most of the witnesses resided in England, that the contract was to be governed by English law and, most importantly, that the negligent advice, on which the plaintiff's case was based, was given in England meant that England was the "more appropriate" forum. Gallen J, however, believed that it could not be said that no part of the proceedings had any connection with New Zealand. The whole background to the relationship between the parties arose out of a contract by a New Zealand company to purchase a ship which was to operate with New Zealand registration. More significantly, if a stay were allowed, Gallen J believed that the decisions of the High Court and Court of Appeal with regard to the application for joinder would

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48 In *Voth*, the plaintiff was from New South Wales, some of the injury was suffered in New South Wales and New South Wales would be relevant for the calculation of damages. These appear to be not insignificant ties to the jurisdicfion.

49 *McConnell Dowell, supra* note 22. The decisive factors for the Court were the comprehensiveness of the New Zealand proceedings, the speed and lesser cost of proceedings here and the fact that the claims, and the evidence, were centred in the Pacific basin (at 274-77).

50 [1990] 3 NZLR 624.

51 (1990) 2 PRNZ 67.

be rendered nugatory. The plaintiff would therefore be faced with two sets of proceedings in different countries and the possibility of having to produce witnesses in different countries. His Honour, therefore, did not consider that the "English Courts constitute[d] a more appropriate forum for the parties and the ends of justice".[52]

These decisions highlight the fact that the *Spiliada* test requires the defendant to show that there is another available forum which is *clearly* or *distinctly* more appropriate than the local forum. They make it clear that if there is any doubt as to which forum is the more appropriate, then the court will exercise its discretion against the party who has the burden of proof.

Conclusion

Although the tests applied by the New Zealand courts (the "more appropriate forum" test) and the Australian courts (the "clearly inappropriate forum" test) each articulate a different standard, the two of them appear to apply the same fundamental principles. Each test recognises the fact that on certain occasions jurisdiction will have to be declined. The burden of proof for such a decision in both New Zealand and Australia, however, is not easily discharged. And, in determining whether the forum is *non conveniens* the two jurisdictions look to essentially the same factors. It has to be questioned, however, whether at a time when the two nations are increasingly becoming closer economically and commercially, the fact that they each profess different tests for the doctrine of *forum non conveniens* will be of any assistance for continued harmonisation. This is particularly pertinent when one of two situations is encountered. Firstly, where there is an available forum which is the natural or more appropriate forum, but it cannot be inferred that the local forum is clearly an inappropriate one. And secondly, where there is no other available forum, but it can be said that the local forum is clearly inappropriate.

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[52] *Ibid* at 71. The recent Court of Appeal decision in *Longbeach Holdings, supra* note 24 is another example of the Court's reluctance to grant stays. in that case, there was a dispute over the quality of garments manufactured by the respondent Fijian company. The Court of Appeal held there was jursidiction to serve the respondent out of New Zealand as of right under Rule 219 and overruled the High Court decision which had held that New Zealand was *forum non conveniens*. It held that New Zealand was the appropriate forum for trial. Whilst the breaches of the contract, if there were any, had occurred in Fiji, their "consequences were felt entirely in New Zealand" (at 36). It was in New Zealand that the defects were discovered and where the damages had resulted. As Hardie Boys J observed: "It is really a New Zealand centred case" (at 36). However, in *Society of Lloyd's & Oxford Members' Agency Ltd v Hyslop* [1993] 3 NZLR 135 the Court of Appeal did grant a stay in proceedings. In that case, the respondent sought to avoid liability for underwriting losses incurred by her as a name of Lloyd's. The Court found that it was not appropiate that the appellants be subjected to New Zealand jurisdiction. Cooke P commented that he could find nothing in the facts of the case to dissuade him from the view that "prime facie a claim relating to liability as a name is most appropriately tried in London" (at 137-138).