CASE NOTE

VOTH v MANILDRA FLOUR MILLS PTY LTD

(1990) 65 ALJR 83 (HC)

Tort - Service of writ out of the jurisdiction - New South Wales Supreme Court Rules, Pt 10, r I(I)(e): 'Where the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of damage suffered in the State caused by a tortious act or omission wherever occurring.' - Professional negligence - Failing to advise on liability to account to the IRS (USA) for withholding tax.

The respondents sued the appellant, an accountant practising in Missouri (USA), in New South Wales for damages for professional negligence in failing to advise on their liability to account to the Inland Revenue Service (USA) for withholding tax, whereby penalties and interest became payable by the respondents. Some of the damage occurred in New South Wales. The appellant sought to stay the proceedings on the ground that the New South Wales court lacked jurisdiction. This plea was rejected at first instance and by the Court of Appeal.

The High Court prefaced[1] its joint judgment thus: 'This appeal is a sequel to the decision in *Oceanic Sun Line Special Shipping Co Inc v Fay*[2] where this Court by a majority (Brennan, Deane and Gaudron JJ; Wilson and Toohey JJ dissenting) declined to apply to Australia the principle governing the doctrine of forum non conveniens as stated by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460'. In the *Oceanic Sun Line* case, Wilson J and Toohey J clearly approved of the general principle stated[3] by Lord Goff in *Spiliada*; '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 trial of the action i e in which the case may be tried more suitably for the interests of all the parties and the ends of justice'. However, the High Court observed[4] that 'it has been urged that the *Spiliada* approach has been adopted not only in the United Kingdom but elsewhere and that for this reason we should embrace it. ... However, we are not persuaded that there exists any real international consensus favouring a particular solution to the question. Nor are we persuaded that any consensus exists among countries of the common law world.' For this reason the High Court preferred to adopt

---

1 (1990) 65 *ALJR* 83 at 84.

2 (1988) 165 *CLR* 197.

3 [1987] *AC* 460 at 477.

the approach used by Deane J in the *Oceanic Sun Line* case. They said[5]: 'Dean J concluded (at 248) that a defendant would discharge the onus of proof which rested on him if he established that, having regard to the circumstances of the particular case and the availability of a foreign tribunal, the local court is a clearly inappropriate forum for the determination of the dispute. The continuation of the proceedings in that forum would then be oppressive or vexatious.'

It is interesting to observe the following passage from the dissenting judgment[6] of Toohey J in *Voth's* case: '... I am impenitent in adhering to the view which Wilson J and I expressed in *Oceanic Sun*; thus the doctrine of forum non conveniens should determine whether, in the present case, there should be a stay of proceedings. It is necessary then to determine the application of that doctrine to the facts. I would begin the search for the appropriate forum by asking, as Wilson and I did in *Oceanic Sun* at 217, with which forum has the action the most real and substantial connection ... New South Wales is clearly an inappropriate forum in which to permit the action to proceed, the reasons which lead to that conclusion point also to Missouri as the more appropriate forum.'

Summing up the evidence, the majority judgment in *Voth's* case stated[7] that 'In this situation, we have little doubt that Missouri is the more appropriate forum but it does not necessarily follow that New South Wales is a clearly inappropriate forum ... In favour of a stay are the considerations that the action has a substantial connection with the law of Missouri; the relevant acts and omissions took place predominantly in Missouri and the professional standards will therefore be relevant to his liability, if any; in large part the damage which the appellant was alleged to have caused was referable to United States taxation law; and the greater part of the evidence in any trial of the action would be found in Missouri. On the other hand, the plaintiffs in the action are residents of New South Wales and may therefore reasonably point to the advantages to them in practical terms of bringing actions in the local courts.' However, the High Court decided that: 'They are not sufficient to resist the conclusion to which the other considerations irresistibly point, that New South Wales is clearly an inappropriate forum in which to permit the action to proceed'. Thus the majority allowed the appeal, set aside the order made by the Court of Appeal and ordered that the action be stayed.

In *Oceanic Sun Line Special Co Ltd v Fay,* Wilson and Toohey JJ ended[8] their joint judgment with these words: 'Since preparing these reasons for judgment we have had the opportunity of reading the reasons prepared by the other members of the Court. It is apparent that the decision of the Court, while resolving the immediate dispute between the

---

4 At 91.

5 At 89.

6 At 103.

7 At 95.

parties, does not yield a precise and authoritative statement of the principles that should be applied in dealing with an application to stay proceedings. That statement awaits another day.'

Has that day now arrived?

MICHAEL HOWARD
Faculty of Law
University of Tasmania

8 (1988) 165 *CLR* 197 at 398.