HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 13 Apr 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S147/2022
File Title:	Zurich Insurance PLC & Anor v. Koper & Anor
Registry:	Sydney
Document filed:	Form 27F - Outline of oral argument
Filing party:	Appellants
Date filed:	13 Apr 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN:

ZURICH INSURANCE PLC
First Appellant

ASPEN INSURANCE UK LIMITED
Second Appellant

And

DARIUSZ KOPER
First Respondent

ATTORNEY GENERAL OF THE COMMONWEALTH
Second Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part 1: Certification

1. This outline of oral argument is in a form suitable for publication on the Internet.

Part 2: Argument

2. Given that judicial power is "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects",[1] it is an essential attribute of such power that a decision made in its exercise is binding upon the parties to a controversy. And at least in the context of actions *in personam*, service of process is a prerequisite to the binding effect of judicial decisions (Appellant's Submissions ("**AS**") [18]).

3. By defining the class of persons who may be served, and thus bound, and the circumstances in which they may be served, rules of service define the reach of the judicial power exercisable by a court, and therefore the range of cases in which that power may properly be exercised. Especially is this so for courts of unlimited jurisdiction. It follows then that to alter a court's rules of service is to alter the reach, and quite possibly the scope, of the judicial power that it may exercise (AS [19]).

4. That being so, the scope and reach of the judicial power of the States may be altered otherwise than by the investiture of State courts with "a new substantive jurisdiction". It is, for that reason, no answer to the appellants' case simply to deny, by reference to *Flaherty v Girgis*,[2] that ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth) ("**the TTPA**") amount to a conferral of jurisdiction. So much may be accepted, but it does not detract from the proposition that in their purported application to State courts, ss 9 and 10 of the TTPA alter, at the very least, the territorial reach of the judicial power of the States beyond the borders of the Commonwealth (AS [24]-[26], [33]; Appellant's Reply ("**AR**") [5], [11]).

5. The determinative question in this appeal, to which *Flaherty v Girgis* does not supply an answer, is whether the Commonwealth is empowered to effect such an alteration.

6. Generally speaking, it would be inconsistent with the nature of judicial power as "an attribute of sovereignty"[3] if the scope and reach of the judicial power of one polity, including as defined by the rules of service of its courts, were capable of being altered by an exercise of legislative power by another polity (AS [28]).

---

[1] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.
[2] (1987) 162 CLR 574.
[3] *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603.

7. In the context of the federal system of government established by the *Constitution*, this last proposition is qualified in three respects:

   (a) by s 51(xxiv), which empowers the Commonwealth Parliament to make laws for the service throughout the Commonwealth of the process of State courts;

   (b) by s 77(ii), under which the Commonwealth Parliament make laws defining the extent to which the jurisdiction of any federal court shall be exclusive of that which is invested in State courts; and

   (c) by s 77(iii), which contemplates the investiture of State courts with federal jurisdiction, and which thus also contemplates, as Latham CJ recognised in *Peacock v Newtown Marrickville and General Co-operative Building Society (No 4)*,[4] the making by the Commonwealth of laws with respect to the service of the process of State courts in matters that would engage federal jurisdiction (AS [29]-[31]).[5]

8. On the appellants' case, these provisions qualify, but do not wholly displace, the proposition at [6] above, whereas on the respondents' case, that proposition has no relevance or application to Commonwealth legislative power, as the heads of Commonwealth legislative power comprehend, to the extent of their limits, the making of laws that alter the scope and reach of State judicial power. If this were correct, there would have been no need for s 77(ii) of the *Constitution*. The combination of Ch III and s 51(xxxix) would suffice to support any law purporting to define the extent to which the jurisdiction of any federal court is exclusive of that of State courts. Implicit in s 77(ii), then, is an assumption that the Commonwealth Parliament otherwise lacks the power to alter, or at least to reduce, the range of matters in which the judicial power of the States may properly be exercised (AR [8]).

9. Nor should the Commonwealth be understood as having the power, by extending the territorial jurisdiction of their courts, to expand the range of matters in which the judicial power of the States may be exercised. If that were so, the Commonwealth could, in reliance on the "external affairs" power in s 51(xxix) of the *Constitution*, relax, or dispense altogether with, the requirements for service of the process of State courts upon foreign defendants. The case advanced by the respondents does not

---

[4] (1943) 67 CLR 25 at 39.

[5] The operation of State courts, in the exercise of federal jurisdiction, may in turn be affected by Commonwealth legislation in the ways contemplated in ss 79 and 80 of the *Constitution*.

accommodate any limit on Commonwealth legislative power that would avoid such an outcome (AS [7]).

10. The consequence of accepting the proposition at [6] above, subject to the qualifications identified at [7], is that while, in relation to matters that would not engage federal jurisdiction, the Commonwealth Parliament may make laws with respect to the service throughout the Commonwealth of the process of State courts, it lacks power to make laws with respect to the service of such process outside the territory of the Commonwealth.

11. As for the Commonwealth Attorney-General's Notice of Contention, the following two points may be made. First, his alternative construction of ss 9 and 10 of the TTPA involves treating those provisions as a conferral of jurisdiction, when in *Flaherty v Girgis*, this Court rejected the submission that provisions drafted in similar terms should be so construed. And secondly, the language of ss 9 and 10 does not, in any event, accommodate such a construction, because, if it were correct, the result of service under those provisions – namely, a proceeding that engages federal jurisdiction – would not be "the same as if the initiating document had been served in the place of issue" – namely, a process that would not engage federal jurisdiction (AS [46]-[51]; AR [15]-[16]).

12. It follows that ss 9 and 10 of the TTPA cannot validly operate in cases, such as the posited claim by Mr Koper against Brookfield Multiplex Constructions (NZ) Limited, that would not engage federal jurisdiction, with the result that that claim could not properly have been brought in a New South Wales for the purposes of s 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW). The grant of leave to Mr Koper to bring proceedings under that statute should accordingly be set aside.

Dated: 12 April 2023

Bret Walker
Phone (02) 8257 2527
Email caroline.davoren@stjames.net.au

Gerald Ng
Phone (02) 9233 4275
Email gng@7thfloor.com.au