PRIVY COUNCIL. 1908. BLAKE v. BAYNE.

Their Lordships are of opinion that the conclusion at which Mr. Justice *Holroyd* arrived was right. They will, therefore, humbly advise His Majesty that the appeal ought to be allowed, the judgment of the High Court discharged with costs, and the judgment of *Holroyd* J. restored.

The respondents will pay the costs of the appeal.

Foll *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 62 ALJR 389 | Foll *Oceanic Sun Line Special Shipping Co Inc v Fay* 79 ALR 9 | Foll *Voth v Manildra Flour Mills Pty Ltd* 97 ALR 124 | Dist *Ranger Uranium Mines Pty Ltd v BTR Trading (Qld) Pty Ltd* 75 FLR 422 | Cons *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538

Appr *Oceanic Sun Line Special Shipping Co Inc v Fay* 165 CLR 197 | Foll *Kimberley NZI Finance Ltd v Ferguson* [1988] WAR 288 | Cons *Voth v Manildra Flour Mills Pty Ltd* 65 ALJR 83 | Discd/Foll *Green v Aust Industrial Investment Ltd* 25 FCR 532 | Appl *Ranger Uranium Mines Pty Ltd v B T R Trading (Qld) Pty Ltd* (1985) 34 NTR 1

[HIGH COURT OF AUSTRALIA.]

MARITIME INSURANCE CO. LTD. . . APPELLANTS;
DEFENDANTS,

AND

GEELONG HARBOR TRUST COMMISSIONERS . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1908.

MELBOURNE, *June* 19.

Griffith C.J., Barton, O'Connor and Higgins JJ.

Practice—Staying action—Cause of action arising out of jurisdiction.

Where an action was brought within the jurisdiction of the Supreme Court of Victoria in respect of a cause of action arising out of the jurisdiction,

Held, that a stay was properly refused, the injustice which would be occasioned to the plaintiffs by a stay being as great as the injustice which would be occasioned to the defendants by allowing the action to proceed.

Logan v. *Bank of Scotland* (*No.* 2), (1906) 1 K.B., 141 ; and *Egbert* v. *Short*, (1907) 2 Ch., 205, considered and applied.

Judgment of Supreme Court: *Geelong Harbor Trust Commissioners* v. *Maritime Insurance Co.*, (1908) V.L.R., 257 ; 29 A.L.T., 243, affirmed.

APPEAL from the Supreme Court of Victoria.

The Geelong Harbor Trust Commissioners brought an action

in the Supreme Court of Victoria against the Maritime Insurance Co. Ltd. to recover £12,000 in respect of a policy of insurance upon the steam hopper dredger "Walrus," during a voyage from Durban in Natal, South Africa, to Geelong, in the course of which she was lost.

An application was made by the defendants on motion to the Supreme Court that the action should be stayed on the grounds that the action was vexatious and oppressive and an abuse of the process of the Court, and that the proper and most convenient Court to try the action was the Court of Natal, South Africa.

The following facts were stated in the affidavits filed in support of and in opposition to the application:—The plaintiffs were incorporated in Victoria where alone they carried out their duties, and had no agent or representative in the Colony of Natal. The defendants were a corporation formed and registered in England having their head office at Liverpool, and having branches in various parts of the world including Cape Town and Melbourne, but they had no office or agents, and no assets in the Colony of Natal, and did not carry on business there. In Victoria the defendants were registered under the provisions of the Companies Acts relating to foreign companies, and had carried on business there for many years by their attorney under power.

The policy of insurance was effected in Cape Town where the policy moneys were payable in the event of a loss.

On behalf of the defendants it was alleged that one of the defences would be that the vessel was unseaworthy at all times material to the action; that in support of that defence there would be likely to be called from 30 to 50 witnesses who were in Natal; that one of their witnesses resided in England; that the action would probably involve a consideration of South African law; and that, if the action were tried in Victoria, great and unnecessary expense would be occasioned to the defendants.

On behalf of the plaintiffs it was alleged that, if the action were tried in Natal, it would be necessary for commissions to issue to take the evidence of witnesses in Cape Colony, England and Victoria; that their chief engineer, who had been sent to Natal to negotiate the purchase of the vessel, would not be able to leave Victoria without serious inconvenience and loss to the

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plaintiffs; that no question of South African law was involved, except as to the interest payable in the event of the plaintiffs' action being successful; that even if the action could be brought in Natal (of which there was said to be grave doubt) any judgment probably could not be enforced there or elsewhere; that, whether the action were tried in Natal or Victoria, it would be necessary in regard to the defence of unseaworthiness for a commission to issue to examine witnesses in England; and that the proceedings were instituted in Victoria *bonâ fide* under the advice of counsel as the proper Court to decide the matters in issue, and not with the view of prejudicing or harassing the defendants.

The motion was heard by *à Beckett* J. who refused the application, with costs (*Geelong Harbor Trust Commissioners* v. *Maritime Insurance Co.*) (1).

The defendants now by leave appealed to the High Court on the grounds:—

(*a*) That the action is vexatious and oppressive and an abuse of the process of the Court.

(*b*) That the proper and more convenient Court to try the plaintiffs' alleged cause of action is the Court of Natal, South Africa, where such alleged cause of action arose.

(*c*) That, if this action be not stayed but allowed to proceed in the Supreme Court of Victoria, the defendants will be put to great and unnecessary expense, difficulty and inconvenience in defending the action, by sending out to Victoria all the witnesses on their behalf, who are very numerous and none of whom are in Victoria, and by proving and establishing the law of Natal, which governs the policy of insurance the subject matter of the action, and the defendants will thereby be greatly prejudiced in their defence.

Irvine K.C. (with him *Hayes*), for the appellants. The issue of the writ in the Victorian Court amounts to oppression and an abuse of the process of the Court. The motion was made under the inherent jurisdiction of the Court. The contract will be construed according to the law of Cape Colony where the contract

(1) (1908) V.L.R., 257; 29 A.L.T., 243.

was made and was to be performed. The parties have by the contract practically chosen the forum. That is one of the elements which the Court will consider. The cause of action arose where the policy money was to be paid, viz., in Cape Colony. The bulk of the evidence as to unseaworthiness is to be obtained in Natal, and it would be an injustice to the defendants amounting to oppression to compel them to bring that evidence to Victoria. This case is practically the same as *Logan* v. *Bank of Scotland* (*No.* 2) (1).

[HIGGINS J. referred to *Egbert* v. *Short* (2).]

If that case decides that absence of *bona fides* must be shown, it is inconsistent with *Logan* v. *Bank of Scotland* (*No.* 2) (1). It is sufficient for the appellants to show that some injustice will be done to them: *In re Norton's Settlement*; *Norton* v. *Norton* (3).

[GRIFFITH C.J.—The appellants are only technically present in Victoria.]

Mitchell K.C. (with him *Starke*), for the respondents. This appeal is to a great extent on a question of fact. There was no sinister motive on the part of the respondents in issuing the writ in Victoria. They could not sue in Natal, for the appellants have no assets there, and do not carry on business there. The fact that the appellants were carrying on business here and were registered here under the *Companies Act* 1896, and therefore might be sued here, would have materially influenced the respondents in making the contract. The cause of action did not arise in Natal. If it is suggested that the action should be brought in Cape Town, that is the worst place of all to try it. None of the witnesses are there, and practically all the evidence would have to be on commission. It has always been an element in cases where the action has been stayed on this ground that there has been some wrong-doing on the part of the plaintiff: *In re Norton's Settlement*; *Norton* v. *Norton* (4). There is no conclusive presumption that the parties intended the contract to be interpreted according to the law of the country where it was made, which was Cape Town and not Natal. The respondents

(1) (1906) 1 K.B., 141.
(2) (1907) 2 Ch., 205.
(3) (1908) 1 Ch., 471.
(4) (1908) 1 Ch., 471, at p. 482.

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are perfectly entitled to any advantage they may gain in bringing their action in Victoria: *Peruvian Guano Co.* v. *Bockwoldt* (1); *Hyman* v. *Helm* (2). Injustice would be done to the respondents by refusing to allow them to bring their action in Victoria, and that is a ground for refusing the appellants' application: *Egbert* v. *Short* (3); *Logan* v. *Bank of Scotland (No. 2)* (4).

Hayes in reply. The respondents have undoubtedly chosen the Court of Victoria in order to get an advantage. The real conduct of the action is upon the appellants as they have to prove unseaworthiness.

GRIFFITH C.J. The application in this case is founded, substantially, upon the contention that, although the defendants are a company registered in Victoria, and liable to be sued there, they ought not under the circumstances of the case to be sued in Victoria, because it would be inflicting an injustice upon them to put them to the expense of defending the action there. The general principles to be applied in such a case are laid down in the authorities cited to us. I will read one or two passages from the judgment of the President, *Sir Gorell Barnes*, in which the other members of the Court of Appeal concurred, in *Logan* v. *Bank of Scotland (No. 2)* (5). He said:—"The Court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the Court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice" (I interpolate there the words supplied by *Warrington* J. in *Egbert* v. *Short* (6),) "in defending the action that he ought not to be sued in the Court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent Court"; and again (7):—"Yet it seems to me clear that the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant

(1) 23 Ch. D., 225.
(2) 24 Ch. D., 531.
(3) (1907) 2 Ch., 205, at p. 212.
(4) (1906) 1 K.B., 141.
(5) (1906) 1 K.B., 141, at p. 150.
(6) (1907) 2 Ch., 205, at p. 213.
(7) (1906) 1 K.B., 141, at p. 151.

and be vexatious. This would probably not be so if the difference of trying in one country rather than in another were merely measured by some extra expense . . . If, for instance, as was put in argument a dispute of a complicated character had arisen between two foreigners in a foreign country, and one of them were made defendant in an action in this country by serving him with a writ while he happened to be here for a few days' visit, I apprehend that, although there would be jurisdiction in the Court to entertain the suit, it would have little hesitation in treating the action as vexatious and staying it." After giving another instance, he said (1):—"If that were not held, I see no reason why any one abroad might not sue and be allowed to proceed, against a bank which had a branch in this country, in respect of transactions all of which had taken place in another country where the head office of the bank was—*e.g.*, Australia or Brazil—and where the inconvenience of trying the case in this country would be so enormous as practically to work the most serious injustice upon the defendant. This matter is, in this respect, of general importance, because so many banks and other mercantile houses which are established in our Colonies and in the United States and other foreign countries have branches here. To a business concern to allow actions to proceed in such circumstances when there is a proper and adequate tribunal in the place where both parties really are, and dealt with each other, and all the evidence is, would be intolerable." I think that puts the argument as high as it can be put for the appellants.

We are told that the representative of the appellants in Victoria knows nothing about the matter; that the transaction took place, that the contract was made and was to be performed, in Cape Colony; and therefore that it would be an injustice to compel the appellants to defend the action in Victoria. To that they add that all their witnesses are in South Africa. *Primâ facie*, upon those facts there is a case to be answered. But, as *Warrington* J. pointed out in *Egbert* v. *Short* (2), having conceded so much—that there would, *primâ facie*, be an injustice to the appellants—it remains to be considered whether granting the application would not work at least as great an injustice to the respondents.

(1) (1906) 1 K.B., 141, at p. 152. (2) (1907) 2 Ch., 205.

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Griffith C.J.

Let us consider the case from that point of view. In the first place, the respondents are a Victorian local authority. They desired to bring a vessel from South Africa to Victoria. They insured the vessel for the voyage, and insured it with a company carrying on business in Victoria and amenable to the jurisdiction of the Courts of Victoria. I do not think it is a far-fetched idea that a person insuring a ship takes into consideration the fact that the company with which he insures has a domicil in a particular country where he will be able to sue them in the event of a dispute arising. That is one element of the case. Another element is this. The main argument of the appellants was founded upon the idea that if the action were brought in South Africa it could be tried on oral evidence. It was suggested upon the motion to *àBeckett* J. that the trial should take place in Natal, where a great number of the witnesses who can give evidence as to the seaworthiness of the vessel when she sailed are resident. But it appears now, upon the evidence before us, that an action could not be brought there. The appellants do not carry on business there, the contract was not made there or to be performed there, and the respondents are not represented there. Really, when the argument is reduced to naked bedrock, that contention is founded upon the notion that the action ought to be brought where the defendants' witnesses are. That proposition cannot be supported for a moment. It appears, on the other hand, that some of the witnesses for the respondents are in Victoria. If the action goes to trial here, the respondents will have the advantage of having those witnesses examined *vivâ voce*. If the action is not tried in Natal, then it is suggested that it ought to be tried in Cape Colony for two reasons: one, that the contract was made there and was to be performed there, the other, that the appellants have an agency there. If it were tried there, all the evidence on both sides would have to be taken by commission, since the witnesses are either in Natal or Victoria; and we have no right to assume that the witnesses will be taken to Cape Town or will go there voluntarily. It is said that a commission to England may also be necessary. So that, whether the action is tried in Victoria or in Cape Colony, there will have to be com-

missions; if it is tried in Cape Colony practically all the evidence will have to be taken on commission; and if it is tried in Victoria, some of it will have to be so taken. Under these circumstances can it be said that injustice will not be done to the respondents by staying this action and compelling them to go somewhere else, quite as great as that done to the appellants by allowing the respondents to proceed with the action? The respondents are doing no more than seeking to assert a legal right, and it seems to me impossible to say that they should be driven to some other tribunal. It might as well be said that they should be driven to England; for, if the action may not be brought where the respondents are, why should they not be compelled to bring it where the head office of the appellants is situated? For these reasons I think the judgment appealed from is right.

BARTON J. I am of the same opinion for the same reasons.

O'CONNOR J. I agree.

HIGGINS J. I concur.

Appeal dismissed with costs, including costs of motion for leave to appeal.

Solicitors, for the appellants, *Brahe & Gair.*
Solicitors, for the respondents, *Moule, Hamilton & Kiddle.*

B. L.