FEDERAL COURT OF AUSTRALIA

Baxendale's Vineyard Pty Ltd and Others v Geographical Indications Committee and Another

[2007] FCA 22

Mansfield J

14 December 2006, 25 January 2007

Practice and Procedure — Transfer of proceedings — Appeal from decision of the Administrative Appeals Tribunal — Whether appeal filed in an appropriate Registry — Whether the Court should exercise its discretion and determine a nominated Registry is the appropriate Registry — Meaning of "hearing" as it refers to a hearing by the Administrative Appeals Tribunal — Federal Court Rules 1979 (Cth), O 53, rr 1, 2(2), (3).

Order 53, r 2(2) of the *Federal Court Rules 1979* (Cth) relevantly provided for a notice of appeal from the Administrative Appeals Tribunal (the AAT) to be filed in an appropriate Registry. Order 53, r 1 defined "appropriate Registry" as "a District Registry in the State or Territory in which the AAT heard the matter". Order 53, r 2(3) permitted the Court to later order that a nominated Registry be the appropriate Registry.

Held: Where the hearing of the matter by the AAT, including directions hearings, extends across different States or Territories, the District Registry in any of those States or Territories will be an appropriate Registry to file a notice of appeal pursuant to O 53, r 2(2). [18]-[20]

Consideration of the factors relating to the appropriate Registry for the purpose of O 53, r 2(3). [28]-[29]

Cases Cited

Australian Telecommunications Corporation v Lambroglou (1990) 12 AAR 515.

E v Australian Red Cross Society (1991) 27 FCR 310.

Hadid v Lenfest Communications Inc (1996) 70 FCR 403.

Martin v Abbott Australasia Pty Ltd [1981] 2 NSWLR 430.

Melbourne & Metropolitan Board of Works v Bevelon Investments Pty Ltd [1977] VR 473.

National Mutual Holdings Pty Ltd v The Sentry Corporation (1988) 19 FCR 155.

Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd (1981) 148 CLR 457.

South Australia v Victoria (1911) 12 CLR 667.

Motion

D Agresta, for the applicant.

The first respondent did not appear.

T Ginnane SC and *L De Ferrari*, for the second respondent.

Cur adv vult

25 January 2007

Mansfield J.

1 Motion of the second respondent to transfer the proceeding to the Victoria District Registry.

2 The proceeding is an application by way of appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth). The applicants applied to the Administrative Appeals Tribunal (the AAT) to review a decision of the first respondent determining under the *Australian Wine and Brandy Corporation Act 1980* (Cth) the extent of what the AAT called the King Valley wine region in Victoria. The decision appealed is a decision of the President of the AAT of 18 October 2006. The appeal must be heard by the Full Court: s 44 of the AAT Act.

3 Both the applicants' application to the AAT and this application were instituted in the South Australia District Registries of the AAT and of this Court respectively. The second respondent is described in the application as a "joined party", but its status is a little more complicated than that.

4 Both the applicants and the second respondent are, or represent, groups of grape growers in the area of the King Valley wine region, as now named by the AAT. The second respondent also separately applied to the AAT to review the same decision of the first respondent. That application was instituted in the Victoria Registry of the AAT.

5 The AAT heard both applications together. The President of the AAT did not formally order that the matters should be consolidated or that they should be heard together, although they proceeded to be heard together by general consent. On 30 March 2005, the President directed that the applicants should file their documents in the South Australia Registry of the AAT and the second respondents (as applicants in their review application) should do so in the Victoria Registry of the AAT. There is nothing to suggest that process caused any difficulty. His Honour declined to make any direction as to which registry a consolidated proceeding should be conducted from. On that occasion, his Honour also declined to make any formal order as to where the hearing should take place. He indicated that there should be flexibility, including allowing for evidence in the King Valley area and in Adelaide and Melbourne, depending upon convenience and cost.

6 His Honour also indicated that one decision would be given in relation to both applications. His Honour was true to his word. His decision of 18 October 2006 is headed with the title of both applications.

7 The interlocutory hearings of both applications to the AAT took place in various locations. The first directions hearing of the applicants' application took place in Adelaide. The hearing at which the President declined to order that the two applications to the AAT be consolidated and transferred to the Victoria Registry of the AAT, and subsequent directions hearings, apparently took place

with the applicants in Adelaide, the second respondents in Melbourne, and the President either in Melbourne or Sydney. In my view, the directions hearings in the AAT therefore took place in Adelaide, Melbourne and Sydney.

8 The hearing of evidence before the AAT lasted some 11 days. That evidence was given at Wangaratta and in Melbourne. After the evidence, there was a final directions hearing which took place with the President in Melbourne with the second respondents' representatives, and with the representatives of the applicant in Adelaide appearing by video link. It is unclear what transpired on that occasion. I assume that it was a hearing as part of the process of the AAT finally determining the orders which it should make. It was, therefore, part of the hearing. The delivery of judgment and pronouncing of orders is also a step in the hearing of the matters.

The Contention

9 The second respondents contend:

1. that the present application by way of appeal should have been instituted in the Victoria District Registry of the Court in accordance with O 53, r 1 and O 53, r 2(2) of the *Federal Court Rules 1979* (Cth) (the Rules), or alternatively
2. if the application was properly issued in the South Australia District Registry, the Court should in the exercise of its discretion determine under O 53, r 2(3) of the Rules that the appropriate Registry for the proceeding is the Victoria District Registry.

Consideration

10 Section 44(2A)(b) of the AAT Act prescribes that an appeal from the AAT shall be instituted as prescribed in the Rules. Order 53 of the Rules deals with appeals from the AAT. Order 53, r 2(2) provides for a notice of appeal to be filed "in *an* appropriate Registry", and O 53, r 2(3) permits the Court to later order that a nominated Registry "is *the* appropriate Registry" for a particular appeal (my emphasis). Order 53, r 1 defines "appropriate Registry" as a "District Registry in the State or Territory in which the Tribunal heard the matter."

11 The researches of counsel have not revealed any authorities as to what is meant by the "hearing" referred to in O 53, r 1, nor any discussion as to the term "appropriate Registry".

12 In *Australian Telecommunications Corporation v Lambroglou* (1990) 12 AAR 515 at 519 Ryan J indicated that because O 53 was not qualified in any way by reference to the other Rules, it should in the first instance determine the practice and procedure applicable to appeals from the AAT. The parties made no submission to the contrary.

13 Indeed, the second respondent stressed that the Court should apply O 53 in its terms, rather than direct that the venue of the hearing of the appeal be changed to the Victoria District Registry under s 48 of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act), or under O 30, r 6(1), or that the proceeding be transferred to that Registry under O 10, r 1(2)(f), having regard to the definition of the "proper place" in O 1, r 4 of the Rules.

14 In *Hadid v Lenfest Communications Inc* (1996) 70 FCR 403, Hill J at 407 pointed out that, for the purposes of enlivening the Court's power to control access to certain documentation under s 50 of the FCA Act, the "hearing of a proceeding" could extend to a directions hearing or an interlocutory process.

See also *E v Australian Red Cross Society* (1991) 27 FCR 310. That view is reflected in, and consistent with, the definition of "hearing" in O 1, r 4 of the Rules, namely that "hearing includes any hearing before the Court, whether final or interlocutory, and whether in open court or in chambers". Order 10, referring to the Court's powers at a directions hearing, apparently uses the term "hearing" in r 1(2)(c) in a somewhat more confined sense as a hearing in which the Court proposes to perform an adjudicative function (not necessarily a final adjudication). Order 30, r 1(2)(a) uses the term "trial" to include any interlocutory hearing. In *Martin v Abbott Australasia Pty Ltd* [1981] 2 NSWLR 430, Hunt J at 434-436 regarded an appeal "after a trial or a hearing on the merits" as including to an appeal from an interlocutory hearing. A similar conclusion was reached by Anderson J in *Melbourne & Metropolitan Board of Works v Bevelon Investments Pty Ltd* [1977] VR 473 at 475-477.

15 Whilst those cases deal with the scope of the term "hearing" in the Court, I see no reason why a different meaning should be given to that term in O 53, r 1 because it refers to a hearing by the AAT.

16 Section 20(4)(b) of the AAT Act empowers the President to give directions as to the places at which the AAT may sit. Section 20A provides for sittings from time to time at places at which there are Registries established, but that the AAT may sit at any place in Australia or in an external Territory. It is unclear whether, if in the case of a District Registry established under s 64 of the AAT Act, s 20A refers to the physical location of the Registry as established or the general area of the State itself. Section 35A provides that the AAT may, at either a directions hearing or at the hearing of a proceeding, allow a person to participate by telephone or by video.

17 Clearly the AAT sits where the member hearing the matter sits, although it is not so clear, where the AAT is comprised of more than one member and they are in different locations and conduct the hearing by video, whether the AAT sits only in the location of the presiding member or in those locations where its members are sitting. Also, it does not follow that where an AAT member sits to give directions or to hear evidence or submissions in a matter is the Registry in which the AAT hears the matter. The matter may be heard in the Registry in which it is instituted and conducted, even though the member may sit in different physical locations around Australia.

18 The starting point is to identify the matter which the AAT heard. Order 53, r 1 does not expressly refer to the District Registry of the AAT in which the matter was heard. If it did so, the first contention could be simply determined. The AAT decision now the subject of the appeal was made in a matter in the South Australia District Registry of the AAT, notwithstanding that the actual hearing of the matter took place largely in Victoria. Because the AAT may sit in various locations, it would then be sensible to treat O 53, r 1 as referring to the District Registry of the AAT in which the matter was conducted. In this instance, the AAT heard two matters together. One was conducted in its South Australia District Registry and one in its Victoria District Registry. It would then follow that the appeal may have been properly instituted in the South Australia District Registry of the Court. It might equally have been properly instituted in the Victoria District Registry.

19 However, O 53, r 1 directs attention not to the District Registry of the AAT in which it heard the matter but to the geographical place, namely the State or Territory, in which the AAT heard the matter. The hearing must be the hearing

of the issue in the matter which led to the decision the subject of the appeal. In the present appeal, that issue was the definition of, and extent of, the King Valley wine region. The President sat only in Victoria apart from giving his decision, which he gave in Sydney (so the hearing of the matter may be said to have taken place both in Victoria and New South Wales). The application does not complain of the orders made, or declined, at directions hearings. However, I do not consider it is possible to divorce the location of the directions hearings from "the matter" referred to in O 53, r 1. The hearing to which O 53, r 1 refers is that of the matter itself, and not a particular issue or issues, or a particular step or steps in the process. The term "matter" of course conveys the whole of the controversy before the AAT: *South Australia v Victoria* (1911) 12 CLR 667 at 675; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 507-509.

20 As the first directions hearing took place in Adelaide, in my view, the hearing of the matter by the AAT extended across South Australia and Victoria, as well as New South Wales, where at least one directions hearing was held and judgment was given. I note that the President directed also that documents in the two proceedings were to be filed in either the South Australia or the Victoria Registries of the AAT.

21 I conclude therefore that the present appeal was properly instituted in the South Australia District Registry. It is then necessary to address the second contention referred to in [9] above.

22 There is no indication in the Rules, or so far as I can determine, including from the researches of counsel, as to the considerations relevant to making an order under O 53, r 2(3) that a Registry other than an appropriate Registry in which an appeal has properly been instituted is the appropriate Registry.

23 Order 53, r 2(3) provides, at least, for circumstances such as the present where (for the reasons I have given) there are three appropriate Registries in which the appeal might have been instituted. The discretion to make such an order no doubt exists because, amongst other things, the identification of appropriate Registries may be the consequence of costs considerations or the convenience of the AAT for a particular sitting. For example, although the decision of the AAT was given in Sydney in this matter, there was no other connection of the matter with Sydney.

24 The parties did not seek to rely on the jurisprudence concerning the transfer of proceedings or the determination of the "proper place" of proceedings under s 48 of the FCA Act, or O 10, r 1(2)(f) of the Rules. However, their submissions focussed upon the connection of the subject of the AAT proceedings and this appeal to Victoria and the respective convenience of the parties. Their submissions therefore in fact centred upon the sort of considerations discussed in *National Mutual Holdings Pty Ltd v The Sentry Corporation* (1988) 19 FCR 155 and subsequent decisions concerning s 48 of the FCA Act and O 10, r 1(2)(f).

25 In this matter, there is no circumstance relevant to the efficient administration of the Court to be weighed. The appeal will be heard following the next Full Court callover with equal facility in Adelaide or Melbourne.

26 Clearly, the subject matter of the appeal is in Victoria. Nothing more need to be said on that point. The application to the AAT in its South Australia District

Registry appears to have been made because the applicants were South Australian based, and had relevant interests in or in the vicinity of the King Valley area.

27 The further conduct of this appeal, whether in the South Australia District Registry or in the Victoria Registry, will cause some but, in my view, not great inconvenience to one or other of the applicants or the second respondent. The appeal book must be settled. That can be done by a Registrar in either Registry with the parties attending in person or by telephone. It is not likely to be seriously contentious. There should then be a callover which can again be attended by one or other of the parties' representatives by telephone and without inconvenience. Finally, there will be a hearing. Either the applicants (or some of them) or the second respondent (or some of its representatives), and their legal teams, will need to attend interstate for the hearing. In the case of the second respondent, its solicitor in any event will have to travel to Melbourne or Adelaide from Wangaratta (and I accept it is more convenient and faster for him to attend in Melbourne) and their counsel is based in Melbourne. Despite the concerns of the parties, I do not consider that the further conduct of the application — wherever it is to take place — will require the appointment of fresh solicitors interstate.

28 In my judgment, I should determine that the Victoria District Registry is the appropriate Registry for the appeal. I do so because, in essence, the appeal concerns the identification of a vineyard region in Victoria. The nature of the issue, and its connection with Victoria, is confirmed by the fact that ultimately all the evidence was heard in Victoria. As I have noted, there is no particular consideration relevant to the efficient administration of the Court, and I do not regard the convenience of the parties or their proper interests as pointing firmly in any particular direction.

29 In my view, generally speaking, little weight should be given to the fact that counsel or the solicitors for a party are in a particular location. Principally, that is because the selection of counsel and solicitors is a matter for the parties. Their choice should not be of significance to the identification of the proper place of a matter. The Court is a national Court, with Registries in each State and Territory and can sit anywhere in Australia. However, to an extent, there is a tendency for parties to institute proceedings in a Registry of the Court convenient to counsel or the solicitors for the parties rather than in a Registry which has a real connection with the subject matter of the dispute, or indeed with the parties themselves or the witnesses. I do not think that the Registry where proceedings are instituted should be dictated by that consideration. Further, where that is the case, it may well be appropriate to transfer the proceeding to a proper place, having regard to the considerations discussed in *Sentry* 19 FCR 155 and other cases.

30 For those reasons, I order that the Victoria District Registry is the appropriate Registry for this appeal and that the proceeding be transferred to the Victoria District Registry of the Court.

31 In my view, as the second respondent has succeeded on its motion, but only on one of the two matters it argued, the appropriate order is that the costs of the second respondent on the motion should be its costs on the appeal. The intention of that order is that, if the appeal is successful, there will in effect be

no costs of the motion, but if the appeal is dismissed and the second respondent gets its costs of the appeal, those costs will include its costs of and incidental to the motion.

Orders accordingly

Solicitors for the applicant: *Iles Selley Lawyers*.

Solicitor for the second respondent: *J Francis*.

JIM McKENNA