PUTTICK..... APPELLANT;
PLAINTIFF,

AND

TENON LIMITED..... RESPONDENT.
DEFENDANT,

[2008] HCA 54

ON APPEAL FROM THE SUPREME COURT OF VICTORIA

HC of A
2008
Sept 4;
Nov 12
2008

French CJ,
Gummow,
Hayne,
Heydon,
Crennan and
Kiefel JJ

Practice — Action — Stay — Forum non conveniens — Tort — Negligence — Asbestos-related injury — Whether place of tort was where employer was based or where employee inhaled asbestos fibres — Whether material available on interlocutory application sufficient to enable court to determine governing law — Discretion to grant stay if governing law cannot be determined on interlocutory application.

A manager brought proceedings in the Supreme Court of Victoria alleging that he contracted malignant mesothelioma and other asbestos-related injuries as a result of being exposed to asbestos during visits to factories in Belgium and Malaysia in the course of his employment with a New Zealand company. He later died of those injuries. His widow was substituted as plaintiff. It was subsequently discovered that the deceased had been employed by a subsidiary of the defendant and not by the defendant. An amended statement of claim alleged that the defendant controlled its subsidiary and hence had owed a duty of care to the deceased. Though alleging that the exposure to asbestos occurred in Belgium and Malaysia, the amended statement of claim made no allegation that the claim was governed by any foreign law and contained no particulars of where, when or how the deceased had been directed or required by the defendant to inspect the factories. The defendant applied for a permanent stay or summary dismissal of the proceedings. It contended that the alleged negligence had occurred in New Zealand, that the law to be applied was the law of New Zealand and that the no-fault compensation scheme operating there which barred a claim for negligence at common law. The judge ordered that the proceedings be permanently stayed on the ground that Victoria was a clearly inappropriate forum since most witnesses and documents were in New Zealand and the governing law was that of New Zealand. The Court of Appeal found no error of law in that decision and dismissed an appeal.

Held, (1) that it was not possible to make a finding about where the tort occurred. Accordingly, it was not possible, on the material available, to decide what was the lex causae or what it was likely to be. All that could be decided on the defendant's application was that it was arguable that the lex causae was that of New Zealand.

Regie Nationale des Usines Renault SA v Zhang (2002) 210 CLR 491, applied.

(2) That showing that the alleged tort was, or might be, governed by a law other than the law of the forum did not demonstrate that the chosen forum was clearly inappropriate to try the action.

Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538, applied.

(3) That the Supreme Court had erred in attributing determinative weight to a finding, not open on the material then available, that the lex causae was the law of New Zealand.

Decision of the Supreme Court of Victoria (Court of Appeal): *Puttick v Fletcher Challenge Forests Pty Ltd* (2007) 18 VR 70, reversed.

APPEAL from the Supreme Court of Victoria.

Russell Simon Puttick was employed by Tasman Pulp and Paper Co Ltd, a subsidiary of Tenon Ltd (formerly Fletcher Challenge Forests Ltd). In the course of his employment, he was required to work in or inspect asbestos factories in Belgium on three occasions between 1981 and 1987 and in Malaysia on eight occasions between 1987 and 1989. He was not exposed to asbestos in New Zealand or anywhere other than Belgium and Malaysia. In common law proceedings in negligence against Fletcher Challenge commenced in Victoria on 14 February 2005, Puttick alleged that, when working in or inspecting the factories, he inhaled asbestos resulting in a diagnosis in 2003 of malignant mesothelioma. He died on 25 February 2005. The claim was continued by his widow, Janina Puttick, on behalf of the estate of her husband, their two children and herself. After it was discovered that Puttick had in fact been employed by Tasman Pulp and Paper, not Fletcher Challenge, an amended statement of claim was filed alleging that, since Fletcher Challenge directed, managed and controlled Tasman Pulp and Paper, it had owed a duty of care to the deceased. Fletcher Challenge applied to the Supreme Court of Victoria to have the proceedings permanently stayed and the claim summarily dismissed. Mrs Puttick adduced evidence of her husband's history and circumstances and argued that even if the applicable law was that of New Zealand, neither that fact nor the relative convenience of the parties rendered Victoria a clearly inappropriate forum. The judge (Harper J) found that most of the evidence was located in New Zealand but that, while New Zealand would be a more appropriate forum, Victoria was not shown to be a clearly inappropriate forum on that basis alone. However, he ordered that the proceeding be permanently stayed because the respondent's negligent conduct first assumed significance in New Zealand; New Zealand law thus applied to the claim; and it would be undesirable for an Australian court to pronounce on the effect of the applicable New Zealand law. Harper J refused to summarily dismiss the claim. Mrs Puttick appealed to the Court of Appeal and Tenon cross-appealed against the judge's refusal to dismiss the claim. The Court of Appeal (Warren CJ and Chernov JA, Maxwell P dissenting) dismissed Mrs Puttick's appeal, agreeing with the judge's holding that the lex causae was the law of New Zealand and concluding that he had not erred in

his exercise of discretion. It was held that it was unnecessary to decide Tenon's cross-appeal (1). Special leave to appeal to the High Court was granted to Mrs Puttick by Gleeson CJ, Heydon and Kiefel JJ.

B W Walker SC (with him *J R C Gordon*), for the appellant. The place where the cause for complaint arose, and where the omissions of the duty-bound respondent assumed any factual or legal significance, was the place where the unmitigated exposure and inhalation of asbestos occurred. [CRENNAN J. Isn't it medically impossible to tell whether the damage arose out of the Belgian exposure or the Malaysian exposure?] Yes. But we disavow damage as the legal concept whose location locates the wrong. In *Regie Nationale des Usines Renault SA v Zhang* (2), a New South Wales resident was injured in New Caledonia while driving a French car alleged to have design and manufacturing defects. The court held that the lex loci delicti would govern the choice of law in torts with an international element but, applying *Voth v Manildra Flour Mills Pty Ltd* (3), upheld the decision to set aside a stay. The joint judgment stated (4) that the applicant carried the onus of demonstrating that a trial in New South Wales would be oppressive, in the sense of seriously and unfairly burdensome, prejudicial or damaging; or vexatious, in the sense of productive of serious and unjustified trouble and harassment to the party objecting. The Court observed that the judge had not stated his conclusion in anything resembling those terms and that the forum could be a clearly inappropriate forum merely by virtue of the circumstance that the choice of law rules which apply in the forum require its courts to apply foreign law as its lex causae. In this case, the majority of the Court of Appeal incorrectly read the appellants' pleaded allegations, as did the primary judge, leading Warren CJ to draw the erroneous conclusion (5) that the plaintiff had not asserted that the defendant's negligent act or omission had occurred at any of the factories overseas where the plaintiff was sent and (6) that there was no allegation that could reasonably be made that the defendant failed to do something in Belgium or Malaysia. The pleadings and particulars identified numerous allegations that can only be asserting negligent omissions in Belgium and Malaysia. The courts below erred in concluding that the lex causae was New Zealand either at all or with such a degree of confidence as to treat it as the factor that made sufficient that which would otherwise be insufficient for a stay. The notion that the "conduct first assumed significance in New Zealand" was not explained. The conduct did not have any significance until the plaintiff went to the premises where he inhaled fibres. We adopt the

(1) *Puttick v Fletcher Challenge Forests Pty Ltd* (2007) 18 VR 70.
(2) (2002) 210 CLR 491.
(3) (1990) 171 CLR 538.
(4) (2002) 210 CLR 491 at 521.
(5) (2007) 18 VR 70 at 75 [14].
(6) (2007) 18 VR 70 at 77 [20].

reasoning of Maxwell P. The Court should set aside the stay on a proper appreciation of the issues to be determined. [He also referred to *James Hardie & Co Pty Ltd v Hall* (7); *James Hardie Industries Pty Ltd v Grigor* (8); *John Pfeiffer Pty Ltd v Rogerson* (9); *Dow Jones & Co Inc v Gutnick* (10); and *Amaca Pty Ltd v Frost* (11).]

A S Bell SC (with him *L G De Ferrari* and *R L Garnett*), for the respondent. The appellant was required to amend her pleading to accommodate the fact that the respondent was not the late Mr Puttick's employer, as had initially been supposed. The significance of the forensic choice made not to sue the actual employer, Tasman Pulp and Paper, but to recast the pleading and allege Tasman Pulp and Paper was subject to the direction, management, and control of Fletcher Challenge cannot be over-emphasised. The amendment informs the search for the location of the tort. This is substantially ignored in the appellant's submissions. The respondent was being sued because of its alleged complete control over the employer at the relevant times, and as the respondent and the employer were New Zealand companies with corporate control in New Zealand, on any view and in particular as a matter of substance, the place of the act or acts of the respondent which could give the deceased a cause of complaint must have been New Zealand. The "focus of attention" must be on "some act of the defendant" (12). The deceased was instructed in New Zealand to go to Belgium and Malaysia to inspect the factories and that was the obvious time for any warning or instruction to be given to him in relation to those visits. In this respect the case is similar to *Voth*. It is the necessary conclusion of the appellant's argument on the facts and the attempt to enunciate a single inflexible rule in asbestos cases that the place of exposure is the significant factor that there was not one place of the tort but two – Belgium and Malaysia – and that, if the deceased had been sent to inspect factories in twenty different countries and been exposed to asbestos dust in those places, the tort would have taken place in twenty countries and there would be twenty applicable laws. The only sensible place to locate the lex causae is New Zealand. There is no occasion for disturbing or re-exercising the discretion as originally exercised by the judge on the stay application if the finding as to the place of the tort is upheld. The exercise of that discretion should be respected in accordance with well-established principles. Moreover, the discretion was correctly exercised.

By its notice of contention, the respondent contends that if the occasion arises for the re-exercise of the discretion on the stay application, the Court should clarify or modify the test in *Voth* at least

(7) (1998) 43 NSWLR 554.
(8) (1998) 45 NSWLR 20.
(9) (2000) 203 CLR 503.
(10) (2002) 210 CLR 575.
(11) (2006) 67 NSWLR 635.
(12) *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 567.

to abandon the language of vexation in the sense of "seriously and unfairly burdensome, prejudicial or damaging" and oppression in the sense of "productive of serious and unjustified trouble and harassment". The continuing use of these formulae undermines the liberalising and more internationalised approach to the resolution of stay applications that *Voth* intended to introduce. The Court should restate the test for a stay of proceedings by holding that a stay should be granted when the local forum is an "inappropriate forum" or, alternatively, that a stay should be granted where there is a more appropriate forum for the resolution of the dispute – the *Spiliada Maritime Corporation v Cansulex Ltd* (13) formulation – which is most widely applied in the common law world, including Canada, New Zealand, Hong Kong, Singapore, Brunei, Gibraltar and India. [He also referred to *Jackson v Spittall* (14); *St Pierre v South American Stores (Gath & Chaves) Ltd* (15); *Distillers Co (Biochemicals) Ltd v Thompson* (16); *James Hardie & Co Pty Ltd v Hall* (17); *James Hardie Industries Pty Ltd v Grigor* (18); *Agar v Hyde* (19); *John Pfeiffer Pty Ltd v Rogerson* (20); *Regie Nationale des Usines Renault SA v Zhang* (21); *Dow Jones & Co Inc v Gutnick* (22); and *Amaca Pty Ltd v Frost* (23).]

B W Walker SC, in reply. [GUMMOW J. Why do you say the Supreme Court of Victoria is not a clearly inappropriate forum?] Its jurisdiction having been regularly invoked, as is not disputed, the law to govern the dispute between the parties can be proved in Victoria. No one suggests that it is clearly inappropriate because Belgium or Malaysia would be better. We rely on the formula the Court has repeated since *Voth*. No injustice is done to the respondent by requiring the Supreme Court of Victoria to exercise its jurisdiction. [GUMMOW J. If you are wrong about the lex causae being Belgium or Malaysia and assume that the lex causae is New Zealand, does it follow that Victoria is a clearly inappropriate forum?] No.

Cur adv vult

12 November 2008

(13) [1987] AC 460.
(14) (1870) LR 5 CP 542.
(15) [1936] 1 KB 382.
(16) [1971] AC 458.
(17) (1998) 43 NSWLR 554.
(18) (1998) 45 NSWLR 20.
(19) (2000) 201 CLR 552.
(20) (2000) 203 CLR 503.
(21) (2002) 210 CLR 491.
(22) (2002) 210 CLR 575.
(23) (2006) 67 NSWLR 635.

The following written judgments were delivered: —

1 FRENCH CJ, GUMMOW, HAYNE AND KIEFEL JJ. The appellant (Mrs Puttick) appeals against orders (24) of the Court of Appeal of the Supreme Court of Victoria dismissing her appeal against orders (25) of a single judge of the Supreme Court permanently staying her action as brought in a clearly inappropriate forum. Much of the argument of the appeal in this Court proceeded on the footing that an important, even a determinative, issue in deciding whether Victoria was a clearly inappropriate forum is what law governs the appellant's claim for damages. Is it, as the respondent alleged, the law of New Zealand, or is it, as the appellant alleged, some other law or laws?

2 These reasons will show that the Court of Appeal (and the primary judge) erred in deciding that the material available in this matter was sufficient to decide what law (or laws) govern the rights and duties of the parties. Rather, each should have held only that it was arguable that the law of New Zealand was the law that governed the determination of those rights and duties. Each should have further held, that assuming, without deciding, that the respondent was right to say that the parties' rights and duties are governed by the law of New Zealand, the respondent did not establish that Victoria is a clearly inappropriate forum.

3 Mrs Puttick's late husband, of whose estate she is executor, was employed by Tasman Pulp and Paper Co Ltd (Tasman) as a marketing assistant, export assistant, and export manager, between about 1981 and 1989. She alleges that her husband contracted malignant mesothelioma and other asbestos-related injuries as a result of his being exposed to asbestos during that time. This exposure is said to have occurred during visits Mr Puttick made to factories in Belgium and Malaysia in the course of his employment by Tasman.

4 Mrs Puttick is now the plaintiff (in substitution for her late husband) in proceedings instituted in the Supreme Court of Victoria claiming damages for the personal injuries suffered by Mr Puttick. The defendant to those proceedings is the present respondent – Tenon Ltd (Tenon) referred to in the courts below by its former name of Fletcher Challenge Forests Ltd or "Fletcher Challenge".

5 Initially the proceedings alleged that Mr Puttick had been employed by Tenon, but it soon emerged that this seemed not to have been the case. As the proceedings are now framed, it is accepted that between about 1981 and 1989 Mr Puttick was employed by Tasman, not Tenon. It is alleged, however, that Tenon owed Mr Puttick a duty of care and that it breached that duty. It is pleaded that the duty was owed "[b]y reason of the direction, management and control exercised by [Tenon], its servants and agents, over Tasman and over the work of its employees" including Mr Puttick. And it is alleged that:

(24) *Puttick v Fletcher Challenge Forests Pty Ltd* (2007) 18 VR 70.
(25) *Puttick v Fletcher Challenge Forests Ltd* [2006] VSC 370.

"Throughout the Tasman employment, Tasman was:

(a) a subsidiary of [Tenon];

(b) subject to the direction, management and control of [Tenon], its servants or agents;

(c) directed, managed and controlled by [Tenon], its servants or agents;

(d) a corporation with no effective independent direction, management and control other than that exercised by [Tenon], its servants or agents."

6 Mrs Puttick brings the action against Tenon pursuant to s 29 of the *Administration and Probate Act 1958* (Vic) as administrator of her late husband's estate for the benefit of the estate, and pursuant to Pt III of the *Wrongs Act 1958* (Vic) on her own behalf and on behalf of their children as dependants of the deceased.

7 Tenon is registered as a foreign company in Australia. It was served with the proceedings at its Australian registered office. Tenon entered a conditional appearance and sought either an order permanently staying the proceedings, or an order dismissing the proceedings summarily. Tenon contended that the tort of negligence alleged in the proceedings had occurred in New Zealand, that the law to be applied in determining the claim was the law of New Zealand, and that the statute law of New Zealand providing for a no-fault compensation scheme barred the common law claim made in the proceedings. In support of its application, Tenon filed affidavit evidence deposing to matters alleged to bear upon those issues.

8 The primary judge (Harper J) held (26) that the proceedings should be permanently stayed "on forum non conveniens grounds". It was therefore not necessary to decide Tenon's application for summary judgment. Accordingly, the primary judge declined (27) to express an opinion about the effect of the New Zealand no-fault compensation scheme on Mrs Puttick's claim.

9 The reasoning adopted at first instance proceeded in two steps. First, the primary judge accepted (28) that "many – if not the great majority – of the witnesses and the relevant documents will be based or located in New Zealand". On that footing he considered (29) that although New Zealand would be a more appropriate forum, Victoria was not shown to be a clearly inappropriate forum. He accepted (30) that if those were the only considerations, the Supreme Court of Victoria should not decline to exercise the jurisdiction which the plaintiff (the present appellant) had regularly invoked.

(26) [2006] VSC 370 at [36].
(27) [2006] VSC 370 at [36].
(28) [2006] VSC 370 at [20].
(29) [2006] VSC 370 at [21].
(30) *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

10 The second step taken to the conclusion that the action should be permanently stayed depended upon identifying the law that governed the tort of negligence alleged in the proceedings. At first instance, the plaintiff argued (31) that her claim was governed by Victorian law, as the law of the forum. The primary judge rejected the plaintiff's argument and concluded (32) that the law governing questions of substance in the proceedings was the law of New Zealand. The primary judge correctly held (33) that questions of substance were to be determined according to the law of the place where the tort occurred: the lex loci delicti. The primary judge further concluded (34) that in this case the tort occurred in New Zealand and in this respect referred to a number of cases considering where the tort of negligence occurs, including, in particular, *Distillers Co (Biochemicals) Ltd v Thompson* (35). The conclusion that the proceedings should be permanently stayed must therefore be seen as proceeding from the two steps identified earlier: first, where is the evidence found, and secondly, what is the governing law.

11 The choice of law question loomed large in the argument in the Court of Appeal. In part that was because Mrs Puttick alleged that the discretionary judgment of the primary judge to order a permanent stay should be set aside on appeal on the basis that the primary judge had made an identified error of law in this respect (36). But the prominence given to questions of choice of law can also be traced to the fact that the respondent (Tenon) cross-appealed to the Court of Appeal, alleging that, because the law of New Zealand is the governing law and New Zealand law regulating the no-fault compensation scheme (37) should be held to preclude a claim for negligence of the kind made in this case, the plaintiff's action should be dismissed as bound to fail.

12 Mrs Puttick's appeal to the Court of Appeal was dismissed. By majority (Warren CJ and Chernov JA, Maxwell P dissenting) the Court of Appeal held that the primary judge was not shown to have erred in making the order for a permanent stay. The majority agreed (38) with the primary judge's conclusion that the lex loci delicti, and thus the lex causae in the matter, was the law of New Zealand. This, coupled with what was identified (39) by Warren CJ as "the general undesirability of a Victorian court making a pronouncement upon a foreign legislative

(31) [2006] VSC 370 at [22].
(32) [2006] VSC 370 at [28].
(33) [2006] VSC 370 at [22], citing *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.
(34) [2006] VSC 370 at [25].
(35) [1971] AC 458.
(36) cf *House v The King* (1936) 55 CLR 499 at 505.
(37) Identified by the respondent as either or both of the *Accident Compensation Act 1982* (NZ) and the *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ).
(38) (2007) 18 VR 70 at 84 [42] per Warren CJ; at 95-96 [97]-[99] per Chernov JA.
(39) (2007) 18 VR 70 at 84 [42].

regime" (the New Zealand statutes regulating the no-fault compensation scheme), was held sufficient not to disturb the primary judge's order that the action be stayed permanently. It was not necessary, therefore, for the majority to decide the issues raised by Tenon's cross-appeal.

13 The third member of the Court, Maxwell P, concluded (40) that, consistent with a number of decisions of the Court of Appeal of New South Wales (41), it should be held that in substance the cause of action alleged by Mrs Puttick had arisen in the "unsafe overseas factories, in Malaysia and Belgium, where the employer by its travel instruction required Mr Puttick to work". In the opinion (42) of Maxwell P, Tenon "failed to discharge the onus of showing that [the Supreme Court of Victoria] would be a clearly inappropriate forum". And because Maxwell P concluded that the tort of which the appellant complained was not committed in New Zealand, it followed that the premise for Tenon's cross-appeal (that the law of New Zealand was the lex causae) was not made good, and he expressed no view on the issues raised by that cross-appeal.

14 By special leave, Mrs Puttick appeals to this Court. Only one ground of appeal was stated in her notice of appeal, namely:

> "The majority in the Court of Appeal erred in finding that the omissions of the Respondent in New Zealand determined the place where, in substance, the tort occurred and gave rise to the Applicant's 'complaint in law', as such omissions to act (and the further omissions in Belgium and Malaysia) were devoid of fault (and thus legal consequence) until the deceased was, in the course of his employment foreseeably exposed to asbestos in Malaysia and Belgium."

15 Tenon did not seek leave to cross-appeal to argue that the proceedings should be summarily dismissed. That is, Tenon did not seek to argue, as it had argued in the courts below, that the lex causae should now be held to be New Zealand and that, according to the law of New Zealand, the appellant's claim was bound to fail (43).

16 As the appellant's sole ground of appeal alleged that the Court of Appeal erred in locating where the alleged tort occurred, it is not surprising that oral argument in this Court proceeded on the footing that it was necessary to decide where the tort alleged by the appellant

(40) (2007) 18 VR 70 at 92 [81].

(41) *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554; *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20; *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635.

(42) (2007) 18 VR 70 at 93 [89].

(43) *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128-130 per Barwick CJ; *Agar v Hyde* (2000) 201 CLR 552 at 575-576 [57] per Gaudron, McHugh, Gummow and Hayne JJ; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 274-275 [44]-[46] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

should be located (44) (and thus what was the lex loci delicti). But to proceed on that basis requires making several assumptions which should be exposed and tested. That is why, after the conclusion of oral argument, the parties were invited to make written submissions directed to a number of questions, including whether the courts below could decide which was the country or countries whose law would govern whether Tenon is liable to Mrs Puttick, and what consequences were said to follow if the Court of Appeal should be held to have erred in deciding that question or deciding it as it did.

17 The joint reasons in *Regie Nationale des Usines Renault SA v Zhang* (45) emphasise the need for a party relying upon a foreign lex causae to do so clearly and with appropriate particulars; in *Zhang* it was said not to be enough that merely on one reading of the statement of claim the plaintiff alleged that the lex causae was that of New Caledonia. In the present litigation failure to heed what was said in *Zhang* has given rise to difficulties which became manifest in the course of argument in this Court.

18 The amended statement of claim filed in the proceedings makes no express allegation that the plaintiff's claim was governed by any foreign law. No defence has been filed. The plaintiff's pleading contains only a few allegations which locate the occurrence of any fact or circumstance. First, it alleges Tenon's incorporation in New Zealand (and its registration in Australia as a registered foreign corporation with a registered office in Sydney). Secondly, it alleges Mr Puttick's death in Victoria. Thirdly, it alleges that he was exposed to asbestos in Belgium and Malaysia. The pleading says nothing about where Mr Puttick was employed, or where Tenon or Tasman operated at the material times, whether generally or in whatever were the operations in which Mr Puttick was engaged.

19 The plaintiff's pleading might be understood as alleging that although Tasman employed staff, including Mr Puttick, Tasman had no management at all, and that all relevant management of Mr Puttick's activities was done by employees of Tenon. It may well be thought that such an arrangement would be (at the least) highly unusual. And against that understanding of the relevant arrangements, it may be noted that Mr Puttick's job or jobs with Tasman were described in the plaintiff's pleading as "marketing assistant, export assistant and export *manager*" (emphasis added). But although there was some evidence tendered about the employment of Mr Puttick by Tasman and some evidence of the corporate structures of both Tenon and Tasman at various times, that material provided no sufficient basis for any positive finding that relationships of the kind alleged in the plaintiff's pleading

(44) *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 606 [43].

(45) (2002) 210 CLR 491 at 517-518 [68] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

could *not* be established. And the respondent did not submit in this Court, or in the courts below, that any finding to that effect could be made.

20 No less importantly, there was no material that amplified the allegations, made in the plaintiff's pleading, that Mr Puttick had been "required" to do certain things. No particulars were given in the pleading, or in the evidence adduced at first instance, of how, when, or where it was that Mr Puttick had been "required to travel to Belgium and Malaysia", repeatedly "required to work in or inspect" one plant where asbestos products were being manufactured, or repeatedly "required to work in, inspect or walk through" another such plant.

21 These uncertainties and ambiguities about the relevant relationships between Mr Puttick, Tenon and Tasman could not be, and were not, resolved in determining the respondent's application for a permanent stay. Those were treated as issues that if they were to be resolved would be decided at trial. But because the relevant relationships between the parties could not be identified and described in any relevant detail, and because it was not possible to say where (or for that matter how) the various requirements referred to in the plaintiff's pleading were made of Mr Puttick, not even a provisional finding could be made about what was the place of commission of the tort alleged. Rather, all that the material advanced in support of the application for a permanent stay demonstrated about questions of choice of law was that there would likely be a lively dispute about those questions, and that one possible outcome of the dispute is that New Zealand law would be found to govern the rights and duties of the parties.

22 Because the material bearing upon where the alleged tort occurred took the exiguous form it did, the present matter differed from the New South Wales decisions upon which Maxwell P relied. In *James Hardie & Co Pty Ltd v Hall* (46), it was found on appeal, after trial of the action, that the lex causae was New Zealand. In *James Hardie Industries Pty Ltd v Grigor* (47) most of the negligent acts alleged by the plaintiff occurred in New Zealand and the Court of Appeal of New South Wales considered (48) the question of forum non conveniens on the footing that because the negligent conduct occurred there, the place of the tort was New Zealand. But unlike the present case, the material available to the Court in *Grigor* showed where critical events occurred. Likewise, in *Amaca Pty Ltd v Frost* (49), the third decision relied on by Maxwell P, the case proceeded on agreed facts which were understood as showing (50) that the tort occurred in New Zealand.

23 None of these three cases provided a sufficient footing for any conclusion about what law should be held to govern the rights and

(46) (1998) 43 NSWLR 554.
(47) (1998) 45 NSWLR 20.
(48) (1998) 45 NSWLR 20 at 37.
(49) (2006) 67 NSWLR 635.
(50) (2006) 67 NSWLR 635 at 642-646 [25]-[58].

duties of the parties in the present matter. Rather, as Spigelman CJ rightly said in *Frost* (51), each case in which it is necessary to decide where a tort occurred "turns on its facts and it will rarely be appropriate to try to reason on the basis of factual analogies".

24 The Court of Appeal (and the primary judge) therefore erred in concluding that it was possible in this case to make a finding (even a provisional finding) about where the alleged tort occurred. And it follows that it was not possible, on the material available, to decide what the lex causae is, or is likely to be. Rather, all that the courts below could decide was that it was arguable that the lex causae is the law of New Zealand.

25 As noted earlier, the respondent's claim to summary judgment was not pursued in this Court. But it is to be noticed that it follows from the conclusion that the courts below could decide only that it was arguable that the lex causae is the law of New Zealand that the respondent did not demonstrate that the proceedings should be dismissed as bound to fail. Showing that the lex causae is the law of New Zealand was a necessary step in the respondent's argument, in the courts below, that the proceedings should be summarily dismissed. The questions about construction and application of New Zealand statutes regulating the no-fault compensation scheme should therefore not have been reached, not because of any supposed principle of judicial diffidence or deference, but because the premise for their consideration was not established. It is, therefore, not necessary to consider whether a principle of the kind mentioned by Warren CJ (52) and the primary judge (53) (that Australian courts should hesitate before expressing views about the construction or application of foreign statutes) should be identified or rather rejected as inconsistent with the existence and application of choice of law rules.

26 The conclusion that the majority in the Court of Appeal erred in deciding that the lex causae is the law of New Zealand is a conclusion that it was not open to find, in the words of the notice of appeal in this Court, "that the omissions of the Respondent in New Zealand determined the place where, in substance, the tort occurred and gave rise to the [appellant's] 'complaint in law'". It follows, then, that the appellant made out her ground of appeal, although for reasons other than those she assigned in her ground of appeal. What consequential orders should this Court make?

27 In *Voth v Manildra Flour Mills Pty Ltd* (54), the Court held that a defendant will ordinarily be entitled to a permanent stay of proceedings instituted against it and regularly served upon it within the jurisdiction, if the defendant persuades the local court that, having regard to the circumstances of the particular case, and the availability of an

(51) (2006) 67 NSWLR 635 at 641 [20].
(52) (2007) 18 VR 70 at 84 [42].
(53) [2006] VSC 370 at [36].
(54) (1990) 171 CLR 538.

alternative foreign forum to whose jurisdiction the defendant is amenable, the local court is a clearly inappropriate forum for determination of the dispute. The reasons of the plurality in *Voth* pointed out (55) that the focus must be "upon the inappropriateness of the local court and not the appropriateness or comparative appropriateness of the suggested foreign forum".

28 Tenon contended that, if the occasion arose for the re-exercise of discretion on the stay application, this Court "should restate the test for a stay of proceedings either by holding that a stay should be granted when the local forum is an 'inappropriate forum' … or, alternatively, by holding that a stay should be granted where there is a more appropriate forum for the resolution of the dispute". It was submitted that this would eliminate "the scope for tension and confusion" said to be produced by the explanation, given in *Voth* (56), of the different content that had been given in earlier cases to the adjectives "oppressive" and "vexatious". These submissions of Tenon should not be accepted.

29 It may readily be accepted that, as pointed out in *Voth* (57), the power to stay proceedings, regularly commenced, on inappropriate forum grounds, is exercised "in accordance with the general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious or an abuse of process" and that "the rationale for the exercise of the power to stay is the avoidance of injustice between parties in the particular case". It may also be observed, as it was in *Voth* (58), that "oppressive" and "vexatious" are terms that have been understood in different senses (59). But in *Voth*, these differences were examined in the course of considering what test should be adopted for deciding whether proceedings should be stayed on inappropriate forum grounds. What was said in *Voth* about those differences casts no doubt on the content of the test ultimately stated in *Voth*. In particular, contrary to Tenon's submissions, it provides no "scope for tension and confusion" about the content or application of the clearly inappropriate forum test.

30 Tenon's invitation to the Court to restate the test in *Voth* should not be accepted.

31 If the tort which Mrs Puttick alleges Tenon committed against her late husband was shown not to be a foreign tort, Tenon's claim to a stay of proceedings would have been greatly weakened. But it by no means follows that showing that the tort which is alleged is, or may be, governed by a law other than the law of the forum demonstrates that

(55) (1990) 171 CLR 538 at 565 per Mason CJ, Deane, Dawson and Gaudron JJ.
(56) (1990) 171 CLR 538 at 555-556.
(57) (1990) 171 CLR 538 at 554.
(58) (1990) 171 CLR 538 at 555-556.
(59) See, eg, *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 233-234 per Brennan J; at 246-247 per Deane J; *The Atlantic Star* [1974] AC 436 at 464 per Lord Wilberforce; at 477 per Lord Kilbrandon.

the chosen forum is clearly inappropriate to try the action. The very existence of choice of law rules denies that the identification of foreign law as the lex causae is reason enough for an Australian court to decline to exercise jurisdiction. Moreover, considerations of geographical proximity and essential similarities between legal systems, as well as the legislative provisions now made for the determination of some trans-Tasman litigation (60), all point against treating the identification of New Zealand law as the lex causae as a sufficient basis on which to conclude that an Australian court is a clearly inappropriate forum to try a dispute.

32 The Court of Appeal should have held that the primary judge erred in ordering a permanent stay. The primary judge's error lay in attributing determinative weight to a finding (not open on the material then available) that the lex causae was the law of New Zealand. For the reasons given earlier, the majority in the Court of Appeal also erred in deciding that the lex causae was shown to be the law of New Zealand. Rather, the Court of Appeal should have held that it was not possible to decide what would be the lex causae. And the Court of Appeal should then have held that even if the lex causae was later shown to be the law of New Zealand, that circumstance, coupled with the fact that most evidence relating to the issues in the case would be found in New Zealand, did not demonstrate that the Supreme Court of Victoria was a clearly inappropriate forum.

33 The appeal to this Court should be allowed with costs. The order of the Court of Appeal granting leave to appeal to that Court should not be disturbed. Paragraphs 2 and 3 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 27 November 2007 should be set aside and in their place there should be orders:

(a) appeal allowed with costs;

(b) set aside the orders of Harper J made on 13 October 2006 and in their place order that the defendant's summons filed on 6 March 2006 be dismissed with costs.

34 HEYDON AND CRENNAN JJ. The circumstances of this appeal are set out in the judgment of French CJ, Gummow, Hayne and Kiefel JJ. The appeal should be allowed and the notice of motion before the primary judge should be dismissed for the following reasons.

Four questions for consideration

35 There are four questions for consideration. The first is whether the courts below erred in concluding that the lex causae was New Zealand law. If that first question is answered affirmatively, it follows that the primary judge's exercise of discretion miscarried. A second question then arises, namely whether this Court should remit the matter to the Supreme Court of Victoria for the discretion to be re-exercised or

(60) See, eg, *Evidence and Procedure (New Zealand) Act 1994* (Cth); *Federal Court of Australia Act 1976* (Cth), Pt IIIA.

whether this Court should re-exercise the discretion itself. If the answer to the second question is that this Court is to re-exercise the discretion, a third question must be considered. That question is whether the discretion should be exercised in accordance with the principles stated in *Voth v Manildra Flour Mills Pty Ltd* (61), or in accordance with some other test. However the third question is answered, a fourth question is whether the Court's discretion should be exercised in favour of or against the respondent's application for a stay.

First question: was the lex causae New Zealand law?

36 For the reasons given in the plurality judgment, it is not at present possible to decide whether the lex causae is New Zealand law (62). A conclusion reached on a stay application about what the proper law of a tort is will normally only be a provisional conclusion: it will be a conclusion open to alteration in the light of further evidence called at the trial. A judge considering a stay application may be able to determine the location of the alleged tort despite somewhat unreal or artificial contentions in the pleadings (63). However, in the present proceedings it is not possible, on the state of the pleadings and the evidence called before the primary judge, to reach even a provisional view on that subject.

Second question: should the matter be remitted to the Supreme Court of Victoria?

37 It follows from the answer to the first question that the primary judge's exercise of his discretion to order a stay, upheld by a majority of the Court of Appeal, miscarried. It miscarried because it depended in part on the proposition that the lex causae was New Zealand law, and the answer to the first question is inconsistent with that proposition. Hence the discretion must be exercised afresh. Should the Supreme Court of Victoria exercise the discretion, or this Court? It would be unduly onerous on the parties, by remitting the matter to the Supreme Court of Victoria, in effect to compel them to conduct further interlocutory litigation, particularly since the loser of that further litigation may seek special leave to appeal to this Court. Consideration of the evidentiary materials does not appear to turn on any issue in relation to which the Supreme Court of Victoria was in a position of advantage compared to this Court. Neither party advocated remitter. Accordingly the answer to the second question is that the matter should not be remitted and that this Court should re-exercise the discretion.

(61) (1990) 171 CLR 538.
(62) At [16]-[24].
(63) See, eg, *Buttigeig v Universal Terminal and Stevedoring Corporation* [1972] VR 626 at 629 per Crockett J.

Third question: should Voth v Manildra Flour Mills Pty Ltd be applied?

38 The invitation extended by the respondent to overrule *Voth v Manildra Flour Mills Pty Ltd* (64) completely, or to substitute for the test it states a "modified" test, should be rejected. *Voth's* case should not be overruled in this appeal. Nor is it appropriate even to contemplate that course in this appeal. *Voth's* case should simply be followed until the time comes, if it ever comes, for full argument to be developed about its correctness, and for an argument that it is wrong to be accepted. That is so for the following reasons.

39 First, the contention that the *Voth* test should be modified was the third of three contentions which only arise if, contrary to the arguments of the respondent, New Zealand law is not the lex causae, but the law of Malaysia or Belgium is. The precondition for that particular forensic approach on the respondent's part has not been met. The Court's view is not that New Zealand law is not the lex causae and that some other law is. Instead the Court's view is simply that it is premature to decide that question. That does not create a satisfactory forensic background against which to explore the correctness of *Voth's* case.

40 Secondly, although it was submitted that the considerations relevant to overruling prior authorities analysed in *John v Federal Commissioner of Taxation* (65) were satisfied, the submissions did not explain in detail how they were satisfied.

41 Thirdly, the question is whether a well-known decision of the Court, which was arrived at in a determined endeavour to settle controversies of legal principle, should be overruled. Because the parties concentrated on the lex causae question the written submissions advanced by the respondent in relation to the correctness of *Voth's* case were not developed in the detail which is desirable when a question of that very important kind is presented. The same is true a fortiori of the respondent's oral submissions, which were necessarily advanced only in compressed fashion in the short time left available at a late stage of the hearing. Thus a primary reason advanced by the respondent for overruling *Voth's* case was that it had been undercut in certain respects by later decisions of the Court – *John Pfeiffer Pty Ltd v Rogerson* (66); *Regie Nationale des Usines Renault SA v Zhang* (67); *Neilson v Overseas Projects Corporation* (68). A contention of this kind makes it necessary that there be much more than passing references to the authorities. It calls for close analysis of the language used in the authorities in the light of their particular facts and the issues thrown up by that language.

(64) (1990) 171 CLR 538.
(65) (1989) 166 CLR 417 at 438-439.
(66) (2000) 203 CLR 503.
(67) (2002) 210 CLR 491.
(68) (2005) 223 CLR 331.

42 Fourthly, it was not demonstrated that even if the *Voth* test were overruled or modified, there would be any difference in the result of this appeal. In the absence of that demonstration, any observations making a change to the *Voth* test would in one sense be dicta only. This is not in general a satisfactory method of developing the law.

Fourth question: how should this Court's discretion be exercised?

43 The test stated in *Voth v Manildra Flour Mills Pty Ltd* turns on the following matters (69):

> "First, a plaintiff who has regularly invoked the jurisdiction of a court has a prima facie right to insist upon its exercise. Secondly, the traditional power to stay proceedings which have been regularly commenced, on inappropriate forum grounds, is to be exercised in accordance with the general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious or an abuse of process and the rationale for the exercise of the power to stay is the avoidance of injustice between parties in the particular case. Thirdly, 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 the dismissal of the action or the grant of a stay. Finally, the jurisdiction to grant a stay or dismiss the action is to be exercised 'with great care' or 'extreme caution'."

The Court also said (70) that in applying those principles the discussion by Lord Goff of Chieveley in *Spiliada Maritime Corporation v Cansulex Ltd* (71) of relevant "connecting factors" and "a legitimate personal or juridical advantage" provides valuable assistance.

44 In her written submissions filed before oral argument, the appellant submitted:

> "If the lex loci delicti is not the law of New Zealand, then the Courts below have exercised their discretion to stay the proceedings largely or solely on the basis of an error of law and so the exercise of discretion should be set aside and re-exercised – against the grant of a stay."

No reasons were advanced as to why this submission should be accepted.

45 In its written submissions filed before oral argument, the respondent, on the assumption that the test in *Voth v Manildra Flour Mills Pty Ltd* was to be applied, submitted:

> "the preponderance of relevant connections is with New Zealand, and this will remain the case even if the court were to hold, contrary

(69) (1990) 171 CLR 538 at 554 per Mason CJ, Deane, Dawson and Gaudron JJ. At 564 they said that the principles to be applied were stated by Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247-248.

(70) (1990) 171 CLR 538 at 564-565.

(71) [1987] AC 460 at 477-478, 482-484.

> to the respondent's principal submission, that the place of the tort was Belgium and or Malaysia. One of the key issues both of fact and law relates to the allegation of direction, management and control by the respondent of Tasman. That issue has every connection, both factually and legally, with New Zealand and it is singularly appropriate that that be resolved by a New Zealand Court."

The respondent repeated this argument in written submissions filed after oral argument closed. By the expression "the preponderance of relevant connections" the respondent meant the following facts referred to earlier in its submissions. The respondent was incorporated in New Zealand. Its board meetings were always held in New Zealand. Its corporate records were and remained located in New Zealand. Tasman, Mr Puttick's employer, was also a New Zealand company, and a subsidiary of the respondent. The board meetings of Tasman were held in Auckland and it retained its board records there. Mr Puttick was a New Zealand citizen and a resident of New Zealand whilst employed by Tasman. It could be inferred that New Zealand law governed his contract of employment. The instruction to Mr Puttick to visit overseas factories was issued by Tasman in New Zealand and received by Mr Puttick in New Zealand. Neither the respondent nor Tasman owned or controlled the factories which Mr Puttick visited in Malaysia or Belgium. Mr Puttick applied to the New Zealand Accidents Compensation Commission (ACC) for compensation in relation to his injuries. The ACC accepted his application, and some moneys have been paid to the appellant. Under New Zealand law, any common law claim for exemplary damages that may have been available outside the accident compensation regime was extinguished on Mr Puttick's death.

46 In oral argument counsel for the respondent also handed up a list of "Factors relied upon by the Respondent on the forum non conveniens question". Among the additional factors which were in existence when the notice of motion was heard and to which the respondent thus referred were the following. At the time of the action the respondent had a very limited presence in Australia. Mr Puttick never obtained Australian citizenship. Tasman had an independent board, and the respondent did not involve itself in the day-to-day management of Tasman. The directors of Tasman resided in New Zealand. The documents of Tasman were in New Zealand. The documents of Tasman were not in the possession of the respondent and would therefore have to be obtained from Tasman through some legal process in New Zealand. The head office of the respondent was in New Zealand. All senior personnel of the respondent were employed in New Zealand. The documents of the respondent were in New Zealand, and most had been placed in archives. All the witnesses for the respondent were in New Zealand. Witnesses who were managers or employees of Tasman at the relevant time, were in New Zealand. There was no allegation that either the respondent or Tasman were owners of or occupiers of or otherwise able to exert control or conduct supervision at the overseas

factories to which Mr Puttick travelled. The respondent referred in addition to the following matters. If the current proceedings are not stayed, the respondent intends to cross-claim against Norske Skog Tasman Ltd, the successor of Tasman. The appellant is able to conduct litigation in New Zealand. The appellant has in fact conducted litigation in New Zealand against the ACC, and with her present lawyers. There would be no reason for the respondent or Norske Skog Tasman Ltd to dispute the evidence to be called by the appellant that Mr Puttick died of mesothelioma. The issues at the trial would be limited to whether Tenon or Norske Skog Tasman Ltd were liable, not whether damage occurred, nor, to any substantial extent, the extent of the damage. There was no great need for the appellant to be present in New Zealand for the trial. The evidence to be called from Mr Puttick's treating doctors will be limited, given that his death from mesothelioma will not be in issue. Mr Puttick's records relevant to the issues of the case will be limited.

47 In written submissions filed after oral argument concluded, the appellant submitted – and a similar submission had been made briefly in oral argument – that her appeal had "proceeded on the basis that, if the respondent's premise that [the] lex loci delicti was the law of New Zealand could be successfully attacked, the other findings and conclusions of the judge at first instance … should be a good reason for the motion to be dismissed". By the expression "the … findings and conclusions of the judge at first instance" the appellant meant a passage appearing immediately after the primary judge had set out the difficulties which a trial in New Zealand would cause the appellant in view of the youth of her children, the fact that she is the sole proprietor of a business and the fact that she is a part-time student; described the links between the controversy and New Zealand; stated that Mr Puttick's health and cause of death were unlikely to be contentious, so that the appellant's need to call medical evidence would be limited; and had concluded that since the central dispute would be the degree of control exercised by the respondent over Tasman, "many – if not the great majority – of the witnesses and the relevant documents will be based or located in New Zealand" (72). The passage referred to by the appellant was (73):

> "If matters were to rest at this point, New Zealand would be the more appropriate forum; but, at the same time, Victoria would not be clearly inappropriate. Thus, were no further considerations to be taken into account, then this Court – following the principles expounded in *Oceanic Sun Line Special Shipping Co Inc v Fay* (74) and *Voth v Manildra Flour Mills Pty Ltd* (75) – should not decline to exercise the jurisdiction which, as the [respondent] in effect

(72) *Puttick v Fletcher Challenge Forests Ltd* [2006] VSC 370 at [18]-[20].
(73) *Puttick v Fletcher Challenge Forests Ltd* [2006] VSC 370 at [21].
(74) (1988) 165 CLR 197.
(75) (1990) 171 CLR 538.

> concedes, has been regularly invoked. The issue would of course be even clearer were Victorian law to be the lex causae. But if, according to Australian choice of law rules, New Zealand law were to be the governing law, the matter would have to be revisited."

The primary judge thus made it plain that if it could not be concluded that New Zealand law were the lex causae, he would not have granted a stay. Those observations were of course dicta. After referring to the primary judge's analysis and quoting parts of it, including the passage just set out, Warren CJ said that the primary judge's analysis "does not disclose any error" (76). Since Warren CJ agreed with the primary judge that the lex causae was New Zealand law, that observation too was a dictum. Maxwell P agreed with the conclusion now stated by this Court that the lex causae could not be said to be New Zealand law, though he went further in concluding that the cause of action arose in the unsafe overseas factories in Malaysia and Belgium. Maxwell P noted the conclusion stated by the primary judge in the passage just quoted. He proceeded to analyse the relevant evidence for himself, and concluded that the respondent had failed to discharge the onus of showing that the Supreme Court of Victoria was a clearly inappropriate forum (77). Chernov JA did not examine the present point.

48 In its written submissions filed in this Court after oral argument in answer to those of the appellant, the respondent set out and evidently adopted the submission which it said it had put to the primary judge:

> "If the Court formed the view that it was not possible … to make even a 'predictive' finding … that the place of the tort was New Zealand, at the very least New Zealand would be a very strong candidate, and in the absence of any suggestion that Victorian or Australian law was to apply, it remained legitimate to exercise the discretion taking that consideration into account."

Later the submission was reformulated thus:

> "[I]f there was an issue of one or more foreign laws being applicable and one of them might be New Zealand, then, [if] all other relevant factors [were] also taken into account and given such weight as they warranted, this was a proper case for a stay to be granted."

49 This argument of the respondent should be rejected. The question of the lex causae can be relevant to the question whether Victoria is a clearly inappropriate forum. If the lex causae were New Zealand law, that would make a stay more likely, though not inevitable. But the question of what the lex causae is ceases to be relevant if it is impossible to say what it is. And the question remains irrelevant even if New Zealand law "might be" a candidate, or is "a very strong candidate", for ex hypothesi it is impossible to say whether New Zealand law is in truth the lex causae.

(76) *Puttick v Fletcher Challenge Forests Pty Ltd* (2007) 18 VR 70 at 83 [41].
(77) *Puttick v Fletcher Challenge Forests Pty Ltd* (2007) 18 VR 70 at 92-93 [84]-[89].

50 The balance of the respondent's arguments boil down to a submission that this Court should reach a different conclusion from that of the primary judge in the passage quoted above (78) simply because he gave incorrect weight to factors other than the lex causae. The respondent did not point to any error of law or fact on the primary judge's part, nor to any relevant matter which was wrongly not considered, nor to any irrelevant matter which was wrongly considered – and it did not contend that the conclusion in question of the primary judge was so unreasonable as to point to the existence of any otherwise undiscoverable error of those kinds. It is true that the Court is re-exercising a discretion which miscarried, rather than considering an appeal against an order flowing from the primary judge's conclusion, so that the factors summarised in the previous sentence, which are those relevant to appellate intervention in discretionary decisions (79), are not conclusive. But the fact that the respondent's contention was only that if this Court examined for itself the relevant materials de novo it would come to a different conclusion from that to which the primary judge came is not one attracting particular sympathy. This is particularly so given the fact that Warren CJ found no error in the conclusion in question, and the fact that Maxwell P arrived at the same conclusion independently. It is true that the primary judge's conclusion was a dictum, and so was Warren CJ's approval of it. But Maxwell P's conclusion was not a dictum.

51 When the relevant materials are examined, that examination does not suggest that once the lex causae issue is put on one side any conclusion should be reached which is different from that reached by the primary judge. The matters relied on by the respondent certainly reveal that New Zealand is an appropriate forum, but other factors indicate that Victoria is not clearly inappropriate. The respondent conceded that the jurisdiction of the Supreme Court of Victoria had been validly invoked. The proceedings are not oppressive, vexatious or an abuse of process, particularly when factors affecting the appellant personally are remembered.

52 Orders should be made as proposed in the judgment of French CJ, Gummow, Hayne and Kiefel JJ.

1. Appeal allowed with costs.

2. Set aside paras 2 and 3 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 27 November 2007, and in their place order:

(a) appeal allowed with costs; and

(b) set aside the orders of Harper J made on 13 October 2006 and in

(78) At [47].

(79) *House v The King* (1936) 55 CLR 499 at 504-505.

their place order that the defendant's summons filed on 6 March 2006 be dismissed with costs.

Solicitors for the appellant, *Slater & Gordon*.

Solicitors for the respondent, *Freehills*.

PTV