PUTTICK (as Executor of the Estate of Russell Simon Puttick) v FLETCHER CHALLENGE FORESTS PTY LTD

COURT OF APPEAL

WARREN CJ, MAXWELL P and CHERNOV JA

1 June, 27 November 2007
[2007] VSCA 264

Conflict of laws — Applicable law — Tort — Law of place of tort — Ascertainment of place of tort — Negligence — Omissions — Personal injury — Asbestos-related disease — Employer and employee — Safe system of work — Duty to warn of workplace risks — Employer and employee situated in New Zealand — Employee exposed to asbestos dust in Belgium and Malaysia — Failure to provide protective clothing and equipment — Plaintiff resident in Victoria at commencement of proceeding — Defendant seeking permanent stay of proceeding — Forum non conveniens — Undesirability of Victorian court pronouncing on foreign legislation — Victoria clearly inappropriate forum.

Practice and procedure — Appeal — Court of Appeal — Leave — Order staying proceeding on ground of forum non conveniens — Leave to appeal required.

Between 1981 and 1989, during which period P was employed by a subsidiary of FCF Pty Ltd (both companies being registered and situated in New Zealand), he was sent to Belgium and Malaysia to inspect factories which manufactured asbestos products and, ignorant of the dangers of asbestos, P had unprotected exposure to asbestos dust. In August 2003, while living in Victoria, P developed symptoms of asbestos-caused malignant mesothelioma. In an action commenced 11 days before his death (and continued by his widow), P claimed damages against FCF Pty Ltd for negligence. The employer's alleged negligence was causing or permitting P to be exposed to asbestos in Belgium and Malaysia, failing to provide and maintain a safe system of work for him while he was working abroad and failing to warn or instruct P or the subsidiary company about the need for protective clothing and equipment while working with or while exposed to asbestos.

Harper J granted the defendant's application for a permanent stay on the ground of forum non conveniens, but did not decide its alternative application that the proceeding be struck out on the ground that under the applicable law, that of New Zealand, P's claim was not maintainable. The plaintiff appealed and the defendant cross-appealed.

Held, granting leave to appeal (Chernov JA dissenting), and dismissing the appeal (Maxwell P dissenting): (1) *Per* Maxwell P and Chernov JA, Warren CJ not deciding: Leave to appeal was required from a decision to stay a proceeding on the ground of forum non conveniens. [9], [50], [96].

> *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *Little v State of Victoria* [1998] 4 VR 596; *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 3)* (1998) 86 FCR 374; *Dodoro v Knighting* (2004) 10 VR 277 referred to.

(2) *Per* Warren CJ. The judge's discretion did not miscarry because: (a) The applicable law was the law of the place where the tort was committed. Where negligence was alleged, the place of the tort was the place where the negligent act occurred. When the alleged negligence was an omission, the place of the tort was where that which was alleged not to have been done ought to have been done. [17], [19];

> *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 applied.
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> *Jackson v Spittall* (1870) LR 5 CP 542; *Distillers Co (Biochemicals) Ltd v Thompson* [1971] 1 NSWLR 83; [1971] AC 458; *Voth v Manildra Flour Mills*

Pty Ltd (1990) 171 CLR 538; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635 referred to.

(b) In the circumstances of this case, the place of the tort was where the warning should have operated to protect the employee, and where the safe system of work should have been provided, namely, New Zealand. [26], [31];

James Hardie & Co Pty Ltd v Hall (1998) 43 NSWLR 554; *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20 discussed.

(c) The practicalities of running cases and the general undesirability of the Victorian court making a pronouncement upon a foreign legislative regime were factors which a court took into account when considering what was a clearly inappropriate forum. [40]–[42].

Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 followed.

(3) *Per* Chernov JA. The trial judge did not relevantly err in concluding that the Supreme Court of Victoria was an inappropriate forum for the trial of the proceeding, because: (a) The employee's conduct first assumed significance in New Zealand and it was where the cause of action arose. The employee inhaled the fumes which caused his injury or disease because the employer failed to give him necessary instructions, and that occurred in New Zealand. [98], [99];

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 considered.

(b) Given the statutory position in New Zealand with respect to industrial accident compensation and its interaction with common law claims for personal injuries where the accident was said to have arisen by reason of the breach of duty by the employer, Victoria was an inappropriate forum. [100].

(4) *Per* Maxwell P, dissenting. The trial judge erred because: (a) The negligent omissions which occurred in New Zealand merely created the risk of harm. The employer's continuing failure to act (to warn, train or equip the employee) meant that the risk continued to exist, but the risk did not assume significance for the employee until he was actually exposed, without warning or protection, to asbestos. [60];

(b) The course of conduct constituting the employer's failure to provide a safe system of work began in New Zealand, but did not assume significance until the employee was actually exposed, without warning or protection, to asbestos. The place of the tort was the place where the system of work should have been safe, that is, the place where the employee was exposed without warning to asbestos dust. [64];

(c) In substance, the cause of action arose in the factories in Malaysia and Belgium where the employer required the employee to work. [72], [81].

James Hardie & Co Pty Ltd v Hall (1998) 43 NSWLR 554 discussed and applied.

Amaca Pty Ltd v Frost (2006) 67 NSWLR 635 applied.

James Hardie Industries Pty Ltd v Grigor (1998) 45 NSWLR 20; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 considered.

(d) The test for deciding whether a court was a clearly inappropriate forum was whether the continuation of the proceeding in that court would be productive of injustice because

it would be oppressive in the sense of seriously and unfairly burdensome, prejudicial, damaging or vexatious in the sense of production of serious and unjustified trouble and harassment. It was not a question of striking a balance between competing jurisdictions; rather, the question was whether the local court was a clearly inappropriate forum. [83].

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

Decision of Harper J [2006] VSC 370 affirmed.

Appeal

This was an appeal by leave by the plaintiff widow against an order of Harper J permanently staying on the ground of forum non conveniens an action (commenced by the plaintiff's husband and continued by her after his death), for damages for personal injuries, and the defendant's cross-appeal against the judge's decision not to make an order on the defendant's application that the proceeding be struck out as being not maintainable. The facts are stated in the judgment of Warren CJ.

J H L Forrest QC and *J P Gordon* for the appellant.

C L Pannam QC, *L G De Ferrari* and *O Bigos* for the respondent.

Cur adv vult.

Warren CJ.

Background

1 The applicant is the widow of the late Russell Simon Puttick. Between 1981 and 1989, Mr Puttick was employed by Tasman Pulp and Paper Co Ltd ("Tasman") as a marketing assistant, export assistant and export manager. Tasman is incorporated in New Zealand. That company is a subsidiary of the respondent to this application, Fletcher Challenge Forests Ltd ("Fletcher"). Fletcher is also incorporated in New Zealand but is a registered foreign company in Australia for the purposes of the Div 2, Pt 5B.2 of the Corporations Act 2001 (Cth) with a registered office in Sydney.

2 While employed by Tasman, Mr Puttick lived in New Zealand. During the course of this employment, Mr Puttick was sent by Tasman to examine various asbestos product manufacturing plants in Belgium (on three occasions) and Malaysia (on eight occasions). For the purposes of this proceeding, it is accepted that while in those factories, Mr Puttick inhaled asbestos dust. It is also accepted for the purposes of this proceeding that Mr Puttick, ignorant of the dangers of asbestos, did not avail himself of protection from inhalation of the dust. At some point after 1989, Mr Puttick ceased employment with Tasman and moved to Victoria. In August 2003, while still living in Victoria, Mr Puttick developed symptoms of asbestos-caused malignant mesothelioma.

3 On 14 February 2005, Mr Puttick commenced a proceeding in the Supreme Court of Victoria against Fletcher claiming damages in negligence. On 25 February 2005, Mr Puttick died from mesothelioma. His widow, Ms Janina Puttick, has continued the initial action for the benefit of the estate under s 29 of the Administration and Probate Act 1958 as well as bringing an action on behalf of herself and her children, as dependents of Mr Puttick, under Pt III of the Wrongs Act 1958.

4 By summons issued 6 March 2006, Fletcher sought a permanent stay of the proceeding or, in the alternative, that the claim be struck out. With respect to the application for a stay, Fletcher argued that the proceeding be permanently stayed on the ground of forum non conveniens. To this end, Fletcher led evidence of the difficulties it would face if the matter proceeded in Victoria. Ms Puttick led evidence of the deceased's history and the appellant's circumstances. The judge below upheld this argument and granted a permanent stay of the proceeding on the basis of forum non conveniens.[1]

5 With respect to the application that the claim be struck out, Fletcher argued that the applicable law (lex causae) was the law of New Zealand and that, given the state of the law in that country, Ms Puttick has no maintainable claim. Given his Honour's conclusion with respect to forum non conveniens, it was unnecessary for his Honour to deal with this question.[2]

6 Ms Puttick wishes to appeal from this decision. It is unclear whether leave is required. If leave is required, for the reasons stated below, it should be granted. Further, by (proposed) notice of appeal, the applicant seeks to challenge the decision of the judge below on various bases. Those grounds may be distilled into two points: first, that the judge erred in determining that the applicable law was the law of New Zealand; and secondly, that the discretion of the judge in granting a stay on the basis of forum non conveniens otherwise miscarried.

7 By notice of cross-appeal, the respondent contended that, in addition to holding that the applicable law was the law of New Zealand, the judge below should have struck out the applicant's claim on the basis that it was not maintainable under New Zealand law.

Whether leave to appeal is required

8 There is uncertainty in the law as to whether leave is required to appeal from an order granting a permanent stay of proceedings on the grounds of forum non conveniens. The applicant conceded that leave to appeal was required. This concession was premised upon an analogy between an order for a stay of proceedings on the grounds of forum non conveniens and an order for a stay of proceedings on the grounds "it is frivolous or vexatious or because no reasonable cause of action is disclosed".[3] In *Little v Victoria*,[4] the latter type of order was held to be interlocutory and thus leave to appeal from such a decision was deemed necessary.[5]

9 In any event, because the practical effect of the order below was to finally determine the rights of the applicant (in Victoria at least), the risk of injustice in the event of refusing to grant leave is more easily discerned. Furthermore, this case raises a question of some difficulty; namely, the determination where the tort occurred, of the lex loci delicti commissi. Accordingly, if leave to appeal is required, it should be granted.

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1. *Puttick (as executor of the estate of Puttick) v Fletcher Challenge Forests Ltd* [2006] VSC 370 at [36].
2. Ibid.
3. *Little v Victoria* [1998] 4 VR 596 at 601.
4. Above.
5. At 601.

Forum non conveniens

10 In this case, there was no issue that the jurisdiction of the Victorian Supreme Court had been properly invoked. Rather, the judge below permanently stayed the applicant's action on the ground of forum non conveniens.[6] It is clear that the question of whether a proceeding should be stayed on the ground of forum non conveniens is discretionary. In this light, it is incumbent upon the applicant in these proceedings to show that the judge's discretion miscarried in the relevant sense before this court could re-exercise it.[7]

11 How that discretion is to be applied has previously been the subject of some controversy.[8] However, in *Voth v Manildra Flour Mills Pty Ltd* a majority of the High Court authoritatively stated that the test to be applied is that of the "clearly inappropriate forum" test. The test necessarily involves "a subjective balancing process in which the relevant factors will vary", as will their comparative weight.[9] It is for the defendant to demonstrate that the local court is a clearly inappropriate forum for the determination of the dispute. Relevant to this determination, the High Court stated that:[10]

> 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".

In addition, it may be of assistance to consider the relevant "connecting factors"[11] and legitimate personal or juridical advantage[12] and the substantive law to be applied.[13]

The applicable law — lex causae

12 The applicant submitted that the judge below erred in his determination of the applicable law, the lex causae. There was no issue that the applicant's substantive allegations fell under the rubric of the law of negligence and that, as an international tort, the applicable law or lex causae in this instance was the law of the place of the tort or the lex loci delicti commissi.[14] The judge below proceeded

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6. *Puttick (as executor of the estate of Puttick) v Fletcher Challenge Forests Ltd* [2006] VSC 370.
7. See *House v R* (1936) 55 CLR 499 at 505; see *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 570 ("*Voth*").
8. See *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460 ("*Spiliada*"); *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 ("*Oceanic*"); *Voth*; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 ("*John Pfeiffer*"); *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 ("*Zhang*").
9. *Oceanic* at 247–8.
10. *Voth* at 554.
11. *Spiliada*.
12. Ibid.
13. *Voth* at 566; see also *Zhang*.
14. *John Pfeiffer*; *Zhang* at 504, [26].

upon the same basis. To state the applicant's argument more specifically, she alleged that the judge below erred in determining the lex loci delicti commissi as the law of New Zealand.

13 This question is relevant in this court for two reasons; first, if the applicant's argument is made out, then a specific error in the reasoning of the judge below is established and the discretion is reopened; and secondly, the determination as to the lex causae in this court will be binding on a court below should the matter recommence in the Trial Division. Clearly, it was the applicant's preference — not only for the purposes of establishing a specific error — that the applicable law should be that of Belgium and/or Malaysia as opposed to that of New Zealand.

The place of the commission of the tort — lex loci delicti commissi

14 The determination of the lex loci delicti commissi is a difficult exercise. It is integral to this exercise that the plaintiff's claim against the defendant be properly characterised. The plaintiff does not assert (nor should she) that the defendant's negligent act or omission occurred at any of the factories overseas where the plaintiff was sent. The respondent breached its duty of care by:

1. causing or permitting Mr Puttick to be exposed to asbestos in Belgium and Malaysia;
2. failing to provide and maintain a safe system of work for Mr Puttick whilst he was working in Belgium or Malaysia; and
3. failing to warn or instruct Mr Puttick or Tasman about the need for protective clothing and equipment whilst working with or whilst exposed to asbestos dust.

15 An application of relevant High Court authority leads to the conclusion that the place of the tort was New Zealand.

High Court authority on lex loci delicti commissi

16 In *Voth*,[15] a New South Wales company sued a Missouri accountant in the Supreme Court of New South Wales for negligent tax advice which resulted in the New South Wales company paying penalty interest to the United States Inland Revenue Service. The High Court held, by majority, that the place of the tort was Missouri. Mason CJ, Deane, Dawson and Gaudron JJ summarised the relevant law in this area. They stated that:[16]

> The appellant argues that the cause of action alleged constitutes a foreign tort because the acts or omissions complained of, as distinct from the damage accruing therefrom, occurred outside New South Wales. The appellant contends that [the judge below] was in error in concluding that the cause of action did not involve a foreign tort because it was based at least in large part upon negligent representations received and acted upon in New South Wales. The appellant points to the observations of Lord Pearson, speaking for the Judicial Committee, in *Distillers Co [Biochemicals Ltd] v Thompson*:[17]
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> "In a negligence case the happening of damage to the plaintiff is a necessary ingredient in the cause of action, and it is the last event completing the cause of action. But the place where it happens may be quite fortuitous and should not by itself be the sole determinant of jurisdiction."

15. (1990) 171 CLR 538.
16. *Voth* at 566–7.
17. [1971] 1 NSWLR 83 at 89; [1971] AC 458 at 467–8 ("*Distillers*").

It was held in *Jackson v Spittall*,[18] that the question whether a cause of action is to be classified as local or foreign is to be answered by ascertaining the place of "the act on the part of the defendant which gives the plaintiff his cause of complaint". It may sometimes be that the "cause of complaint" is the failure or refusal of the defendant to do some particular thing — in other words, an omission. It makes no sense to speak of the place of an omission. However, it is possible to speak of the place of the act or acts of the defendant in the context of which the omission assumes significance and to identify that place as the place of the "cause of complaint". That is what was done by Goddard LJ in *George Monro Ltd v American Cyanamid and Chemical Corp*,[19] where the failure to warn as to the nature of goods was treated as an aspect of their sale. Sale took place outside the jurisdiction and accordingly, in the view of his Lordship, the tort was committed outside the jurisdiction.

The authority of *Jackson v Spittall* was expressly affirmed in *Distillers*.[20] In the latter case Lord Pearson said[21] that "[t]he right approach is … to look back over the series of events … and ask … where in substance did this cause of action arise?" This approach can be traced to what was said by Winn J in *Cordova Land Co Ltd v Victor Brothers Inc*.[22] And that approach was later expressly approved, although in a slightly different legal context, in *Metall & Rohstoff v Donaldson Inc*.[23]

The approach formulated in *Distillers* does no more than lay down an approach by which there is to be ascertained, in a commonsense way, that which is required by *Jackson v Spittall*, namely, the place of "the act on the part of the defendant which gives the plaintiff his cause of complaint". That approach has particular point if, as was the case in *Distillers*, it is necessary to ascribe a place to an omission for the purpose of determining where, if at all, a tort was committed.

One thing that is clear from *Jackson v Spittall* and from *Distillers* is that it is some act of the defendant, and not its consequences, that must be the focus of attention. Thus, in *Distillers* the act of ingestion of the drug Distaval by the plaintiff's mother was ignored, the place of that act being treated like the place of the happening of damage, as one that might have been "quite fortuitous".

17 Subject to an exception, the general tenor of this passage is straightforward: the place of the tort is where the negligent act occurred. To suggest otherwise is to subvert the basic principle that the law governing the substantive dispute in an action for negligence is the lex loci delicti commissi, that is, *the law of the place where the wrong was committed*.[24] However, when the negligence alleged constitutes an omission, given the nature of that thing, where the negligence occurred is harder to ascertain.[25] In these instances, it is relevant to consider Spigelman CJ's summary in *Amaca Pty Ltd v Frost*:[26]

> Expressed, as they necessarily must be expressed, at a high level of generality, the authoritative tests for determining the place of a tort are to identity the place:
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> • Which gives the plaintiff cause for complaint (*Jackson v Spittall*).

18. (1870) LR 5 CP 542 at 552.
19. [1944] KB 432 at 439.
20. At NSWLR 88; AC 467.
21. At NSWLR 90; AC 468.
22. [1966] 1 WLR 793 at 798 and 801.
23. [1990] QB 391 at 443.
24. *John Pfeiffer*; *Zhang*.
25. Of course, the distinction between positive act and omission is dubious. As Kirby J points out in *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 241, [172]: "There is no doubt that the metaphysical distinction between acts and omissions can frequently be a disputed one."
26. (2006) 67 NSWLR 635 at 644, [38] ("*Frost*").

- Where in substance the cause of action arose (*Distillers Co (Biochemicals) Ltd*).
- Where the act or omission assumes significance (*Voth*).

Each of these tests will lead to the same result. The common theme is a concern with substance, not form.

18 In *Voth*, the majority considered that the accountant's breach of duty constituted a negligent omission to advise the plaintiff as to the existence of a certain tax (that is, an omission) or, alternatively, a negligent misstatement of fact (that is, a positive act).[27] They stated:[28]

> [T]here are cases where, when information is being imparted, the failure to draw attention to some particular matter is, for practical purposes, the same as a positive statement as to that matter. That was the situation in *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]*.[29] And it would seem that that is also the present case, for, in a context in which the appellant was providing professional accountancy services on the basis that withholding tax was not payable, the failure to draw attention to the requirement that it be paid was, for all practical purposes, equivalent to a positive statement that it was not payable. When the case is approached on that basis it is clear that, in substance, the cause of complaint is the act of providing the professional accountancy services on an incorrect basis. The same is true if the matter is approached as an omission, for the omission takes its significance from that same act of providing those services.

19 This passage informs the tests in *Jackson v Spittall*,[30] *Distillers* and *Voth*.[31] It is clear from the final lines of that passage that the omission is not considered to have satisfied these tests where damage occurs, but rather the omission is considered to have satisfied these tests where that thing which was not done (that is omitted) should have, in fact, been carried out. So much is supported by New South Wales authority.[32] In a slightly different context, Gleeson CJ, McHugh, Gummow and Hayne JJ in *Dow Jones & Co Inc v Gutnick*[33] stated:[34]

> Attempts to apply a single rule of location … have proved unsatisfactory if only because the rules pay insufficient regard to the different kinds of tortious claims that may be made. Especially is that so in cases of omission. In the end the question is "where in substance did this cause of action arise"?[35] In cases, like trespass or negligence, where some quality of the defendant's conduct is critical, it will usually be very important to look to where the defendant acted, not to where the consequences of the conduct were felt.

20 This bears upon the second and third allegations of negligence by the respondent, which may be considered omissions for the relevant purposes. Whether the act that gave the applicant her cause for complaint constitutes the failure by the respondent to provide a safe system of work or the failure by the respondent to warn of the dangers of asbestos dust, it should be considered to

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27. *Voth* at 568.
28. *Voth* at 569.
29. (1981) 150 CLR 225.
30. (1870) LR 5 CP 542.
31. (1990) 171 CLR 538.
32. *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554 ("*Hall*"); *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20 ("*Grigor*").
33. (2002) 210 CLR 575.
34. At 606, [43].
35. *Distillers*; *Voth* at 567.

have occurred in New Zealand. It should be considered to have occurred in this place because, if the respondent was going to fulfil its duty of care by providing Mr Puttick with a safe workplace or warning Mr Puttick of the dangers of asbestos, the respondent would have done so in New Zealand, not Belgium nor Malaysia. For all intents and purposes, Mr Puttick's contact with the respondent ceased upon his leaving the country; or, to put it another way, there is no allegation that could reasonably be made that the respondent failed to do something in Belgium or Malaysia. In other words, the "quality of the defendant's conduct" that is to be examined occurred entirely in New Zealand. Further, to consider that they occurred in Belgium and/or Malaysia is to focus upon the damage caused to Mr Puttick and is thereby contrary to the High Court instruction considered above.

21 The same result eventuates if the alleged negligence is considered to be constituted by positive acts. Whether it is alleged that the respondent breached its duty of care in exposing Mr Puttick to asbestos dust, by providing an unsafe system of work (cf by failing to provide a safe system of work) or by providing inadequate warnings as to potential dangers in overseas factories (cf by failing to warn of the dangers of asbestos dust), the applicant cannot point to an act committed by the respondent in Belgium or Malaysia that constitutes these alleged wrongs — only acts in New Zealand. For these reasons, I would conclude that the lex loci delicti commissi is the law of New Zealand.

22 Further, it is not the case here that the alleged tortious act "passe[d] across space and time before it is completed",[36] such as in cases involving libel through international communications. In these cases, the place of the tort is often considered to be where the information was received.[37] To this effect, the majority in *Voth* stated:[38]

> If a statement is directed from one place to another place where it is known or even anticipated that it will be received by the plaintiff, *there is no difficulty in saying that the statement was, in substance, made at the place to which it was directed, whether or not it is there acted upon* … But in every case the place to be assigned to a statement initiated in one place and received in another is a matter to be determined by reference to the events and by asking, as laid down in *Distillers*, where, in substance, the act took place. [Emphasis added.]

23 In this case, the respondent provided information to Mr Puttick in New Zealand and that information was received by Mr Puttick in New Zealand. As was the case in *Voth,* the relevant act of the respondent was "complete in itself, or, if not complete in itself, one that was initiated and completed in the one place".[39] In this respect, the above passage is not applicable here. However, the above passage is relevant in that the information was acted upon by Mr Puttick in Belgium and Malaysia. In this respect, that facet should not, given the application of the test in *Distillers*, bear upon my conclusion.[40]

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36. *Voth* at 567.
37. See *Dow Jones & Co Inc v Gutnick* at 607, [44].
38. At 568.
39. *Voth* at 569.
40. See also *Voth* at 569.

New South Wales authority on lex loci delicti commissi

24 Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ recently said in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[41] that:[42]

> … Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong.[43] Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.

25 This passage, as well as the imperative of conformity between jurisdictions in private international law,[44] bears upon the precedential value of three New South Wales Court of Appeal cases upon which the applicant relied; namely, *Hall*,[45] *James Hardie Industries v Grigor*[46] and *Amaca Pty Ltd v Frost*.[47]

26 The applicant relied on these cases to establish a general proposition that, in an action for negligence arising out of a plaintiff's exposure to asbestos dust, the place of the tort is the place where that exposure occurred. Accordingly, so the argument ran, the place of the tort was Belgium and Malaysia. However, these cases do not stand for that general proposition — to consider as much is to fixate upon the factual matrix in those cases to the exclusion of their underlying reasoning. On the contrary, if these cases stand for a general proposition, it is that, in cases such as the present, the place of the tort is the place "where the warning should have operated to protect the plaintiff" or "where the system of work should have been safe".[48] In this case, that place is New Zealand.

27 In *Hall*, the plaintiff was a New Zealand factory worker who was employed by a New Zealand subsidiary of James Hardie. The two Australian parent companies of that New Zealand subsidiary, both within the James Hardie family, manufactured asbestos in New South Wales. The parent companies sent asbestos from New South Wales to the New Zealand subsidiary. In the New Zealand premises of the subsidiary the plaintiff was exposed to asbestos dust and consequently died from mesothelioma. None the less, the plaintiff sued the New South Wales parent companies in the Dust Diseases Tribunal of New South Wales, claiming that the lex loci delicti commissi was that of New South Wales. When the plaintiff's claim was properly characterised, the plaintiff alleged the defendant was negligent in failing to warn of the dangers of asbestos and failing to ensure a safe system of work.[49]

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41. (2007) 236 ALR 209.
42. At 151–2, [135].
43. *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.
44. In *Voth* at 560, Mason CJ, Deane, Dawson and Gaudron JJ state that, "No doubt, if *Spiliada* were to enunciate a principle which commanded general acceptance among other countries, it would obviously be desirable in the interests of international comity that this Court, in common with the courts of other countries, should adopt a uniform approach." It should be noted that their Honours considered that, with respect to *Spiliada*, "they were not persuaded that there exists any real international consensus favouring a particular solution to the question" and, accordingly, they declined to follow that case.
45. (1998) 43 NSWLR 554.
46. (1998) 45 NSWLR 20.
47. (2006) 67 NSWLR 635.
48. *Hall* at 577; *Grigor* at 31.
49. *Hall* at 575.

28 In *Grigor*, the plaintiff was exposed to asbestos dust in New Zealand while renovating a house. Similarly, rather than suing the New Zealand company (who had manufactured raw asbestos into "Fibrolite" in New Zealand), the plaintiff chose to sue related companies who manufactured the raw asbestos in New South Wales. Again, the chosen forum was the Dust Diseases Tribunal of New South Wales and the lex loci delicti commissi was that of New South Wales. Similarly, when the plaintiff's claim was properly characterised, the plaintiff alleged the defendant was negligent in failing to warn of the dangers of asbestos.[50]

29 The judgment of Sheller JA in the former of these cases, *Hall*,[51] was quoted and applied by Spigelman CJ in *Grigor*.[52] Both these cases applied the same reasoning in reaching the conclusion that, contrary to the plaintiffs' argument, the lex loci delicti commissi was that of New Zealand and not that of New South Wales. In *Hall*,[53] Sheller JA said:[54]

> [I]f the defendants owed the plaintiff a duty of care it was breached when and at the place where the plaintiff was exposed to dust from the asbestos without adequate warning. *Although there was no complete tort until the damage occurred … it is manifestly just and reasonable that a defendant should have to answer for its wrongdoing in the country where it did the wrong.* In this case, properly understood, the defendants did the wrong complained of in New Zealand. [Emphasis added.]

30 From this passage it is clear that Sheller JA did not consider there to have been extant damage to the plaintiff by virtue of the plaintiff's exposure to the dust alone. His Honour continues:[55]

> *In the present case the wrongful act of failing to warn or failing to provide a safe system of work occurred in the place where the plaintiff was exposed without previous warning to asbestos dust.*
>
> If the defendants owed a duty of care to the plaintiff by supplying asbestos to James Hardie & Co (NZ), knowing that it would be used by James Hardie & Co (NZ)'s employees in the course of their employment, the breach was a failure to warn of the dangers of exposure to asbestos dust and fibres in the circumstances in which those employees worked. So far as the plaintiff relied on the relationship between James Hardie & Co (NZ) and the defendants, the case particularised was one not of failing to warn James Hardie & Co (NZ) but of failing to ensure, by means of the control capacity they were said to have, that the workplace was safe. *In one case the place of the tort was the place where the warning should have operated to protect the plaintiff, in the other, the place where the system of work should have been safe. Both places were in New Zealand and I have no doubt that it was there that the tort complained of, properly analysed, occurred.* Treating the export of asbestos from Australia as one step in a series which ultimately led to the plaintiff being exposed at Penrose to the asbestos dust does not make the place of the tort relied upon New South Wales. [Emphasis added.]

31 In this case, the applicant cannot reasonably allege that the respondent should have been present in Belgium or Malaysia to fulfil its duty of care. In this light, the wrongful act of failing to warn or failing to provide a safe system of work should be considered to have occurred in the place not where the plaintiff was exposed to asbestos dust, but before that time, whence the plaintiff was sent to

50. *Grigor* at 31.
51. Above.
52. At 31.
53. Above.
54. At 576.
55. At 576–7.

Belgium and Malaysia by his employer, namely, New Zealand. With respect to the defendant's alleged negligence in failing to warn the plaintiff of the dangers of asbestos dust, the place of the tort was the place where the warning should have operated to protect the plaintiff, namely, New Zealand. With respect to the defendant's alleged negligence in failing to provide a safe system of work, the place of the tort is where the system of work should have been safe, namely, New Zealand.

32 The conclusion in *Frost*,[56] the third New South Wales case on which the applicant relies, is the same. However, the reasoning of Spigelman CJ in that case is slightly different to that in *Hall*[57] and *Grigor*[58] and deserves close attention. In fact, in *Frost*, those cases receive only a minor mention.[59] In that case, the plaintiff was exposed to asbestos fibres while employed in New Zealand. The fibres were manufactured by a member of the James Hardie family in New South Wales. Similarly, the plaintiff instituted proceedings in the Dust Diseases Tribunal of New South Wales and alleged that the lex loci delicti commissi was that of New South Wales. The acts alleged by the plaintiff to be negligent were as follows:

(e) Continuing to use asbestos in the Hardie Products when it knew or ought to have known that persons such as the plaintiff were at risk of inhaling asbestos dust and fibres from the products and thereby suffering the Asbestos Diseases.

(k) Failing to substitute the asbestos in the Hardie Products at its New South Wales manufacturing centre with a non-asbestos material.

33 Having examined the leading High Court authorities, Spigelman CJ sets out the extract quoted above and then continues:[60]

> [39] The learned authors of P E Nygh and M Davies *Conflict of Laws in Australia* (7th ed) conclude their discussion of the place of the wrong, with the following passage at par 22.6:
>
> "The mere fact that damage occurred in a particular jurisdiction is not sufficient, but nevertheless the tendency in cases of "double locality" torts has been to stress the place at which the activity of the defendant was directed, rather than the place where the activity complained of originated." [Footnotes omitted.]
>
> [40] The authority given for this proposition is *Voth* at 568 where, after noting in a negligent misstatement case that the place where such a statement was acted upon may "be entirely fortuitous", the joint judgment said:
>
> "If a statement is directed from one place to another place where it is known or even anticipated that it will be received by the plaintiff, there is no difficulty in saying that the statement was, in substance, made at the place to which it was directed, whether or not it is there acted upon. And the same would seem to be true if the statement is directed to a place from where it ought reasonably be expected that it will be brought to the attention of the plaintiff, even if it is brought to the attention in some third place. But in every case the place to be assigned to a statement initiated in one place and received in another is a matter to be determined by reference to the events and by asking, as laid down in *Distillers*, where, in substance, the act took place."

56. [2006] NSWCA 173.
57. (1998) 43 NSWLR 554.
58. (1998) 45 NSWLR 20.
59. At 641, [22] and 624, [27]–[28].
60. At 644–5, [39]–[44].

> [41] Although the use of the word "directed" was employed in *Voth* in the context of a statement, it does have an analogy in a case where goods are manufactured in one locality with a view to their distribution in another locality. I agree with the learned authors of Nygh and Davies that, in such a case, particular weight must be given to the place where the act was directed, rather than to the place where it originated.
>
> [42] This is not a case, like *Distillers Co (Biochemical) Ltd,* where the nature of the product was such that it could be consumed anywhere in the world and that, accordingly, it could be said that the place where damage occurred was "fortuitous". On agreed fact (8)(b), the Hardie Products were to be distributed in Australia and New Zealand and, accordingly, exposure to the risk would occur in one of two nations.
>
> [43] The act of manufacture simpliciter is not, in my opinion, the relevant act of the defendant. The product was inherently dangerous, in the sense that it could not be safely used without special precautions. It was not, however, defective in the sense that something went wrong in the manufacturing process. It was always intended that the product would be distributed in New Zealand. The respondent, to whom the duty was owed, was always located in New Zealand.
>
> [44] In my opinion, with respect to the two particulars considered by Judge Curtis, the place of manufacture cannot be identified, in this case, as the place of the tort. The admitted breaches were breaches of duty owed *to* a person *in* New Zealand. The element of causation occurred in New Zealand. In my opinion, as a matter of substance, the place where "the cause of action arose" (*Distillers Co (Biochemicals) Ltd*) was where the respondent was exposed to the risk, that is, New Zealand. Until that happened there was no "cause for complaint" (*Jackson v Spittall*). It was at that point that the earlier conduct "assumed significance" (*Voth*). [Emphasis added.]

34 From this passage, it is clear that Spigelman CJ considered the case as being analogous to "a statement … directed from one place to another place where it is known or even anticipated that it will be received by the plaintiff", as was considered in *Voth*.[61] However, no such analogy exists here because the imparting of information from Tasman to Mr Puttick should have occurred in New Zealand.[62]

35 In my view, the New South Wales authorities should be understood in light of a particular facet common to each of them; properly characterised, the relevant breach of duty by the defendant was temporally concomitant with the exposure to the asbestos dust. However, that does not mean these cases ought be understood to stand for the general proposition that, in matters that involve exposure to asbestos dust, the place of the tort is the place of exposure. Such assertion would unnecessarily import a causative element into the applicable test — a test which is not entirely consistent with the current taxonomy of duty, breach and causation within the law of negligence. More specifically, that unnecessary element demands that the place of the tort is where something occurs from which the requisite damage to the plaintiff will unavoidably flow.

36 This reasoning accords with Spigelman CJ's warning in *Frost*[63] that "[e]ach case turns on its facts and it will rarely be appropriate to try to reason on the basis of factual analogies".[64] Further, this reasoning conforms with what his Honour refers to as the concern of the law in this area "with substance over form".[65] To take the New South Wales cases as authority for the proposition which the

61. *Voth* at 568.
62. See [23].
63. Above.
64. At 641, [20].
65. At 644, [38].

applicant asserts would be to draw a factual analogy which, given the different circumstances of this case, would be unjustified.

37 Although the prospect was considered by the judge below,[66] it was never forcefully submitted by counsel for the applicant that the appropriate law was that of Victoria. For the avoidance of doubt, however, the law's disposition against randomness in the determination of the lex loci delicti commissi, manifesting itself in references to "fortuity",[67] militates against that conclusion. From my understanding of the facts, it was not anticipated when the plaintiff was sent to Belgium and Malaysia, that he would one day move to Victoria. Accordingly, it should be considered coincidental that the plaintiff did in fact move to Victoria (with the dust latent in his lungs) and that Victoria is the place where the dust manifested itself in the form of mesothelioma.

38 For the reasons stated, the place of the tort is New Zealand and the lex loci delicti commissi is the law of New Zealand. Accordingly, the judge below did not err in coming to the same conclusion.

The use of the lex loci delicti commissi as a discretionary factor

39 The applicant submitted that the judge below, having determined that the applicable law was that of New Zealand, placed too much on this factor, thereby contravening the majority judgment in *Voth* which instructs that "the substantive law of the forum is a very significant factor in [determining whether to grant a stay] but the court should not focus upon that factor to the exclusion of all others".[68] This submission misconstrues the reasons of the judge below and should be rejected.

40 His Honour's reasoning can be summarised briefly. The judge below first directed his attention to matters of practical importance and concluded:[69]

> If this dispute were to go to trial, it is in my opinion unlikely that the health of Mr Puttick, including the cause of his death, will be contentious. If this is right, the plaintiff's need to call medical evidence will be limited. By contrast, a central — and highly controversial — point of difference will be the degree of control exercised by the defendant over Tasman. This being so, many — if not the great majority — of the witnesses and the relevant documents will be based or located in New Zealand.
>
> 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*[70] and *Voth v Manildra Flour Mills Pty Ltd*[71] — should not decline to exercise the jurisdiction which, as the defendant in effect 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.

41 This analysis does not disclose any error. His Honour's consideration of the practicality of running the case in Victoria is without error due to the High Court's endorsement of Deane J's view in *Oceanic* which gives a broad scope to

66. See *Puttick v Fletcher Challenge Forests Ltd* at [13].
67. See, for example, *Voth* at 567.
68. *Voth* at 566; see also *Zhang* at 504, [26].
69. *Puttick v Fletcher Challenge Forests Ltd* at [20]–[21].
70. (1988) 165 CLR 197.
71. (1990) 171 CLR 538.

the words "vexatious" and "oppressive".[72] Further, the analysis of *Oceanic* and *Voth* by the judge below evinces nothing more than an awareness of the appropriate test to be applied.

42 His Honour then considered the question of lex loci delicti commissi and concluded that the applicable law is that of New Zealand.[73] I agree with that conclusion. It is a relevant consideration in the exercise of the discretion.[74] The judge below then proceeded to consider that, in light of the general undesirability of a Victorian court making a pronouncement upon a foreign legislative regime, the proceedings should be stayed permanently on forum non conveniens grounds.[75] There was no error in the judge below considering the prospect of applying foreign law in the manner that he did.[76]

43 Clearly, in the first instance, his Honour has given weight to the impracticality of continuing the trial in Victoria — a thing which weighed against the applicant in any event but not to the requisite degree; and then, in the second instance, given weight to the undesirability of applying New Zealand law — a thing which led to the conclusion that Victoria was clearly an inappropriate forum. So much accords with the "subjective balancing process" described by Deane J in *Oceanic*.[77]

Conclusion

44 Having concluded that the discretion of the judge below did not miscarry, it is unnecessary for me to consider whether the proceedings should in any event be struck out because no remedy is available under New Zealand law.

45 I would grant the applicant leave to appeal and dismiss the appeal.

46 **Maxwell P.** The circumstances giving rise to this appeal, and the issues to be determined, are set out by the Chief Justice and it is unnecessary to repeat them. For the reasons which follow, I would grant leave to appeal, allow the appeal, set aside the stay order and dismiss the stay application. I would also dismiss the cross-appeal. I deal first with the question of leave to appeal.

Is leave to appeal required?

47 In *Dodoro v Knighting*, Callaway JA said:[78]

> The general rule is that an order is interlocutory unless, in the words of Windeyer J in *Hall v Nominal Defendant* it "finally determine[s] the rights of the parties in a principal cause pending between them". Whether it does so is determined by the legal, not the practical, effect of the order.

48 Fletcher argues that, applying this principle, an order staying an action on the ground that the forum is clearly inappropriate does not finally determine "the rights of the parties in a principal cause". There is direct authority on the point: *Oceanic Sun Special Line Shipping Co Inc v Fay*[79] and *Hi-Fert Pty Ltd v*

72. See above at [11].
73. *Puttick v Fletcher Challenge Forests Ltd* at [27].
74. See at [11] above.
75. *Puttick v Fletcher Challenge Forests Ltd* at [36].
76. *Zhang* at 559, [181].
77. (1988) 165 CLR 197 at 247.
78. (2004) 10 VR 277 at 281, [17].
79. (1988) 165 CLR 197 at 201.

Kiukiang Maritime Carriers Inc (No 3).[80] Fletcher also relies on what it calls "silent authority", that is, cases where the need for leave to appeal was assumed: see, for example, *Akai Pty Ltd v People's Insurance Co Ltd*;[81] *Bank of America v Bank of New York*;[82] and *James Hardie Industries Pty Ltd v Grigor*.[83]

49 As Fletcher points out, its position derives some support from the line of authority which holds that the dismissal of an action on the ground that no reasonable cause of action is disclosed is interlocutory and not final.[84] At the same time, Fletcher concedes, "the hand of history has been treated as significant on this point." By contrast, the stay of an action on the *Anshun* ground (abuse of process because the matters in question could and should have been litigated in earlier proceedings between the parties) is final and not interlocutory. The legal effect of such an order is to dispose finally of the rights of the parties in relation to those matters.[85]

50 As the law stands, however, it would seem that leave to appeal is required. That is, in my view, an unsatisfactory state of affairs. The "inappropriate forum" stay is permanent and has the effect of denying the plaintiff any right to sue in the jurisdiction. I doubt that Parliament would have intended that an order having such drastic consequences should be appellable only by leave. This case illustrates, once again, that the distinction between "final" and "interlocutory" is of limited utility in differentiating between those appeals which should proceed only by leave and those which should proceed as of right.

The place of the tort[86]

51 Identifying the location of a tort is "not always easy".[87] No universal rule of location exists. In the end, the High Court has said, the question is "Where in substance did [the] cause of action arise?".[88]

52 In *Gutnick* the High Court went on to say:[89]

> In cases, like trespass or negligence, where some quality of the defendant's conduct is critical, it will usually be very important to look to where the defendant acted, not to where the consequences of the conduct were felt.

The court here referred to what it had earlier said in *Voth v Manildra Flour Mills Pty Ltd*,[90] as follows:

> [I]t is some act of the defendant, and not its consequences, that must be the focus of attention. Thus, in *Distillers* the act of ingestion of the drug Distaval by the plaintiff's mother was ignored, the place of that act being treated like the place of the happening of damage, as one that might have been "quite fortuitous".

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80. (1998) 86 FCR 374 at 397.
81. (1996) 188 CLR 418 at 431.
82. (1995) ATPR 41-390.
83. (1998) 45 NSWLR 20 at 43 ("*Grigor*").
84. See *Little v Victoria* [1998] 4 VR 596 and the authorities there cited; *Re Luck* (2003) 203 ALR 1; 78 ALJR 177.
85. See *Port of Melbourne Authority v Anshun Pty Ltd* (1980) 147 CLR 35.
86. The related Latin phrase is "lex locus delicti". As I suggested in the course of argument, I consider that, in the interests of comprehensibility, Latin phrases such as this should no longer be used.
87. *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 606, [43] ("*Gutnick*").
88. Ibid. See *Distillers Co (Bio-Chemicals) Ltd v Thompson* [1971] 1 NSWLR 83 at 90; [1971] AC 458 at 468.
89. At 606, [43].
90. (1990) 171 CLR 538 at 567 ("*Voth*").

53 Mrs Puttick alleges that her husband contracted mesothelioma as a result of having been exposed to asbestos in the period 1981–89, while visiting asbestos factories in the course of his employment with a subsidiary of Fletcher ("Tasman"). During that period, he made three visits to an asbestos factory in Belgium and eight visits to an asbestos factory in Malaysia.

54 The amended statement of claim alleges that, by reason of the "direction, management and control" which Fletcher exercised over Tasman and over the work of its employees, Fletcher owed a duty of care to Tasman's employees (including Mr Puttick):

> … who might be harmed by a failure to exercise reasonable care and who were reliant on [Fletcher] to take such reasonable care for their health and safety.

As Fletcher concedes, the correctness of this allegation — and hence the existence of the duty — must be assumed for the purposes of an application of this kind.

55 The particulars of negligence allege that Fletcher Challenge breached that duty of care by:

- causing or permitting Mr Puttick to be exposed to asbestos in Belgium and Malaysia;
- failing to provide and maintain a safe system of work for Mr Puttick while he was working in Belgium and Malaysia;
- failing to warn or instruct Mr Puttick or Tasman about the need for protective clothing and equipment while working with or while exposed to asbestos.

56 The judge concluded that the location of the tort was New Zealand. He said:[91]

> … *The act of which Mrs Puttick complains is the direction given to her husband to inspect asbestos plants*. These, it is true, happened to be in Malaysia and Belgium. If the owners of the plants were being sued, the *lex locus delicti* would doubtless be the law of the country in which the plant was situated. But the owners of the plants are not being sued. The defendant is a New Zealand company, said to have exercised total control over its New Zealand subsidiary; and it was the New Zealand subsidiary by which Mr Puttick was employed and by which he was instructed to proceed to his inspections of the Malaysian and Belgium plants. *The instruction was issued and received in New Zealand. That country is in substance the place where the present cause of action arose. The plaintiff does not allege as against the defendant any act or omission in either Malaysia or Belgium*. [Emphasis added.]

57 The judge noted that Mr Puttick had no cause of action in tort until he suffered injury as a result of having inhaled the asbestos fibres. As to whether Mr Puttick had any "cause for complaint" at any earlier time,[92] his Honour said:[93]

> [27] … However a lawyer might answer that question, a lay person would probably respond that a cause for complaint arose immediately the relevant instruction was given. Whether a complete cause of action in law had been made out would to the lay person be irrelevant. Any employee instructed to undertake on the employer's behalf a dangerous assignment without any reasonably available measures being taken to avoid or minimise the risk, or warn of it, would complain the moment the truth were known and some kind of protest could be lodged.

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91. *Puttick v Fletcher Challenge Forests Ltd* [2006] VSC 370 at [25].
92. The phrase "cause for complaint" comes from the decision in *Jackson v Spittall* (1870) LR 5 CP 542.
93. At [27]–[28].

> [28] At all events, we are here dealing with an issue without [scil about] substance. Regardless of whether a cause for complaint arose only when the cause of action was complete, the defendant's (or its subsidiary's) conduct first assumed significance in New Zealand; and it was there that, in substance, the cause of action arose.

58 With respect, I am unable to accept this conclusion. It is of course necessary to identify — and then locate — the conduct of the defendant which is, in substance, the "cause for complaint". But to confine the relevant conduct to the single act of instructing Mr Puttick to go to overseas asbestos plants ("the travel direction") is, in my view, to misapprehend the cause of action and, hence, the ground of complaint. The "cause for complaint" which founds this negligence action is the conduct of the employer in causing, and permitting, Mr Puttick to work in unsafe workplaces in Malaysia and Belgium. All of the particulars of negligence are expressive, one way or another, of that complaint.[94]

59 While the relevant conduct began with the employer giving the travel direction in New Zealand, that was merely the first step. By itself it created no cause of action. The conduct about which complaint is made was not complete until Mr Puttick actually worked, without protection, in the unsafe workplaces. The particulars of negligence make that unambiguously clear.

60 Certainly it is a key element of the complaint that the employer failed to warn Mr Puttick, at the time he was given the travel direction in New Zealand, of the dangers of asbestos, and then failed to train or equip him before he left New Zealand so that he could protect himself against those dangers when he visited the asbestos plants. But those omissions merely created the *risk* of harm to Mr Puttick, a risk which the employer could have eliminated at any point up to the moment of Mr Puttick's entry into the first overseas asbestos factory. The employer's continuing failure to act (to warn, train or equip him) meant that the risk continued to exist. But the risk did not "assume significance" for Mr Puttick until he was actually exposed, without warning or protection, to asbestos.

61 Because the complaint concerns omissions by the employer, it is necessary to identify where those omissions took place. As the High Court said in *Voth*:[95]

> It makes no sense to speak of the place of an omission. However, it is possible to speak of the place of the act or acts of the defendant *in the context of which the omission assumes significance* … [Emphasis added.]

In *Voth* itself, the relevant omission was the failure of the defendant accountant to draw his client's attention to the requirement to pay withholding tax. The act of the defendant "in the context of which that omission assumed significance" was the act of providing accountancy services. That act was an act complete in itself, or, if not complete in itself, one that was initiated and completed in the one place.[96]

62 In the present case, however, the conduct of the employer which provided "the context" for its omissions was not "initiated and completed in the one place". While the conduct was initiated in New Zealand, with the giving of the travel direction, it was not completed until the travel direction had been fully complied with, that is, until Mr Puttick had completed the asbestos factory visits.

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94. It was accepted by senior counsel for the respondent that the court should look to the particulars to identify the substance of the claim.
95. At 567.
96. At 569.

63 The employer's duty of care to Mr Puttick was likewise a continuing duty. Its duty was to provide him with a safe workplace, that is, to take reasonable care to ensure that every place in which he was required to work was a safe place in which to work. The effect of the travel direction was that the respective overseas asbestos factories would become Mr Puttick's workplaces for the duration of his visits to them. So the employer had a continuing duty of care to Mr Puttick in respect of those temporary workplaces until he had completed the final factory visit. The duty of care was operative for so long as the travel direction was operative.

64 It follows that I respectfully disagree with the conclusion of the Chief Justice that the employer's failure to provide a safe system of work occurred in New Zealand. The course of conduct constituting that failure began in New Zealand, when the employer failed to warn Mr Puttick about the dangers of asbestos, but the employer's breach of duty was not complete — and did not assume significance — until Mr Puttick entered the unsafe workplaces without protection. Adopting the language of the New South Wales Court of Appeal, in a decision to which reference is made below, "the place of the tort was … the place where the system of work should have been safe", that is, the place where Mr Puttick "was exposed without previous warning to asbestos dust".[97]

65 With respect, this statement seems to me to be unarguably correct. Where else can the employer be said to have "failed to provide a safe system of work" but in the place where the employee is required to work under unsafe conditions? So much seems to have been assumed, without argument, in *John Pfeiffer Pty Ltd v Rogerson*.[98] In that case, R was employed by JP in the Australian Capital Territory ("the ACT"), where JP had its principal business office. R was sent by JP to work in a hospital in New South Wales, where he was injured. It was held at first instance that JP had failed to provide a safe system of work. The High Court appeal was decided on the basis that the place of that tort was New South Wales, not the ACT (where R had received his instructions). Eames J reached a similar conclusion in *Porter v Bonojero Pty Ltd*.[99] In that case, the defendant company, which operated from South Australia, employed P as a truck driver to drive in Victoria. He was injured while driving in Victoria. Eames J held that the employer's failure to supply P with safe plant and equipment occurred in Victoria.[100]

66 The matter may be tested another way. If the travel direction had been revoked before Mr Puttick reached his first overseas destination, he would have had no cause of action, no "cause for complaint". This is so not because at that point he had suffered no injury but because he had not been required to work in an unsafe workplace. At that point, therefore, the employer's duty had not been breached; the particulars of negligence as pleaded could not have been made out.

67 This analysis accords with the approach of the New South Wales Court of Appeal, which has had to consider very similar issues three times in the last decade. I turn to examine those decisions.

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97. *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554 at 576–7 ("*Hall*").
98. (2000) 203 CLR 503.
99. [2000] VSC 265.
100. At [118]–[122].

Appellate decisions in New South Wales 1998–2006

68 In *James Hardie & Co Pty Ltd v Hall*,[101] the appellant company ("JHC") was a supplier of raw asbestos to a related New Zealand company ("JHNZ"), which had employed P. The administrator of P's estate issued proceedings in New South Wales against JHC, alleging failure to warn P and JHNZ about the risks associated with the asbestos and failure to ensure a safe system of work for P at the New Zealand plant. The trial judge held that the place of the tort was New South Wales, since the essential breach of duty by JHC lay in its having loaded for export asbestos which it knew was dangerous to use.

69 The Court of Appeal overturned that decision, holding that the place of the tort was New Zealand. Although JHC's positive conduct — shipping the asbestos without an accompanying warning — took place in New South Wales, the court held that the breaches of duty occurred in New Zealand. In the court's view, New Zealand was the place where P was exposed to the dust from the asbestos without adequate warning or protection; where the warning should have operated to protect him; and where the system of work should have been made safe.[102]

70 Accepting for the purposes of the appeal that JHC owed P a duty of care, Sheller JA said that the duty:[103]

> … was breached when and at the place where [P] was exposed to dust from the asbestos without adequate warning. Although there was no complete tort until the damage occurred … it is manifestly just and reasonable that a defendant should have to answer for its wrongdoing in the country where it did the wrong. In this case, properly understood, [JHC] did the wrong complained of in New Zealand.
>
> …
>
> [T]he wrongful act of failing to warn or failing to provide a safe system of work occurred in the place where [P] was exposed without previous warning to asbestos dust.
>
> If the defendants owed a duty of care to [P] by supplying asbestos to [JHNZ], knowing that it would be used by [that company's] employees in the course of their employment, the breach was a failure to warn of *the dangers of exposure to asbestos dust and fibres in the circumstances in which those employees worked*. So far as [P] relied on the relationship between [JHNZ] and [JHC], the case particularised was one not of failing to warn [JHNZ] but of failing to ensure, by means of the control capacity [JHC was] said to have, that the workplace was safe. *In one case the place of the tort was the place where the warning should have operated to protect [P], in the other, the place where the system of work should have been safe. Both places were in New Zealand* and I have no doubt that it was there that the tort complained of, properly analysed, occurred. Treating the export of asbestos from Australia as *one step in a series which ultimately led to [P] being exposed* [in New Zealand] to the asbestos dust does not make the place of the tort relied upon New South Wales. [Emphasis added.]

71 In *Hall*, the act of exporting the asbestos occurred in New South Wales but the court regarded it as only "one step in a series" which led to P working in an unsafe workplace in New Zealand.[104] The tort was held to have occurred in that (overseas) workplace. The present case is similar, but the circumstances point even more strongly to the place of the tort being the overseas workplace. The

101. Above at n 110.
102. At 576–7 per Sheller JA, with whom Beazley and Stein JJA agreed.
103. *Hall* at 576–7.
104. At 577. As Sheller JA noted (at 575, the Privy Council in *Distillers Co* at NSWLR 90; AC 468 said: "The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?".

positive act of giving Mr Puttick the travel instruction, which occurred in New Zealand, was only "one step in a series" which led to Mr Puttick working in unsafe workplaces overseas. But — unlike the positive act of manufacture in *Hall* — the positive act of giving the travel instruction directly caused Mr Puttick to be in those unsafe workplaces.

72 Importantly for present purposes, the High Court refused an application by JHC for special leave to appeal from the decision of the Court of Appeal in *Hall*. As noted by Spigelman CJ in a subsequent decision of the court, special leave was refused because "there was no sufficient reason to doubt [the] conclusion about the location of the tort".[105] *Hall* therefore laid down, authoritatively, the correct approach to locating a breach of an employer's duty to ensure a safe workplace.

73 A month later, in *James Hardie Industries Ltd v Grigor*,[106] the Court of Appeal applied the reasoning in *Hall* to reach a similar result. No issue of workplace safety arose, however. Mr Grigor had purchased asbestos products in New Zealand, and used them in the course of renovations. He developed mesothelioma. He alleged negligence on the part of James Hardie Industries ("JHI"), which had manufactured the asbestos in New South Wales and supplied it to a New Zealand subsidiary, from which Mr Grigor had made the purchase. It was alleged that JHI had failed to warn Grigor of the risks; had failed to withdraw the asbestos material knowing that it was dangerous; and had failed to direct its New Zealand subsidiary to warn Grigor and/or to withdraw the product.

74 The trial judge concluded that the location of the tort was New South Wales since it was there that JHI's failure to warn had occurred. That is, the failure to provide warnings, by way of notices on packages of the product, had occurred at the New South Wales factory where they were manufactured. The Court of Appeal disagreed. Applying the passages from *Hall* which I have set out above, the court concluded that the act of failing to warn took place where Mr Grigor was exposed without warning to the asbestos, that is, in New Zealand.[107]

75 The Court of Appeal had to deal with these issues again in 2006, in *Amaca Pty Ltd v Frost*.[108] Mr Frost contracted asbestos-related diseases after exposure to asbestos fibres in New Zealand. The fibres came from insulation products manufactured in New South Wales by James Hardie & Co. As in *Grigor* Mr Frost alleged that the manufacturer had failed to warn him (or his employer) of the risks associated with the use of its asbestos products; had supplied the products from New South Wales when it knew or ought to have known of the risks; and had failed to withdraw the products when it knew of the risks. No issue of workplace safety arose. As in *Grigor*, the trial judge held that the place of the tort was New South Wales, being the place of manufacture of the asbestos products.

76 Once again, the Court of Appeal disagreed. Spigelman CJ (with whom Santow and McColl JJA agreed) said:[109]

> To focus attention on an act of the defendant, which the High Court has said is a matter that "it will usually be very important to look to" (*Dow Jones & Co Inc v Gutnick*

105. *Amaca Pty Ltd v Frost* (2006) 67 NSWLR 635 at 642, [22]: see [75]–[78] below.
106. (1998) 45 NSWLR 20 ("*Grigor*").
107. At 31C per Spigelman CJ, 41E per Mason P. See also *James Hardie & Co Pty Ltd v Carley* [1999] NSWCA 80.
108. (2006) 67 NSWLR 635.
109. At 640, [13].

at 606 [43]), it is necessary to first identify the relevant "act". This can involve questions of characterisation which, notoriously, are matters on which judgments can and do reasonably differ. In the present case the question could be posed in terms of whether or not the relevant act was the act of manufacture simpliciter or, alternatively, whether it was the act of manufacture and distribution to a point where the Respondent was placed at risk.

77 The Chief Justice cited the following passage from Nygh and Davies, *Conflict of Laws in Australia*:[110]

> The mere fact that damage occurred in a particular jurisdiction is not sufficient, but nevertheless the tendency in cases of "double locality" torts has been to stress *the place at which the activity of the defendant was directed, rather than the place where the activity complained of originated*. [Emphasis added.][111]

His Honour referred to what was said in *Voth* about a statement being "in substance, made at the place to which it was directed", and drew an analogy with the case "where goods are manufactured in one locality with a view to their distribution in another locality". Since the relevant products were to be distributed in Australia and New Zealand, his Honour said, exposure to the risk would occur in one of two nations.[112] It could not, therefore, be said that the place where damage occurred was "fortuitous".[113]

78 His Honour's conclusion was in these terms:

> [43] The act of manufacture simpliciter is not, in my opinion, the relevant act of the defendant. The product was inherently dangerous, in the sense that it could not be safely used without special precautions. It was not, however, defective in the sense that something went wrong in manufacturing process. It was always intended that the product would be distributed in New Zealand. [Mr Frost], to whom the duty was owed, was always located in New Zealand.
>
> [44] In my opinion, with respect to the two particulars considered by [the trial judge],[114] the place of manufacture cannot be identified, in this case, as the place of the tort. The admitted breaches were breaches of duty owed *to* a person *in* New Zealand. The element of causation occurred in New Zealand. In my opinion, as a matter of substance, the place where "the cause of action arose" (*Distillers Co (Biochemicals) Ltd*) was where [Mr Frost] was exposed to the risk, that is, New Zealand. Until that happened there was no "cause for complaint" (*Jackson v Spittall*). It was at that point that the earlier conduct "assumed significance" (*Voth*). [Emphasis in original.]

79 Once again, this analysis applies, but with even greater force, to the present case. As I have characterised the employer's conduct, the act of issuing the travel direction was not so much an act "directed at" the overseas asbestos factories as an act which continued in effect until Mr Puttick had complied with it by entering those factories. There was nothing remotely "fortuitous" about Mr Puttick being

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110. 7th ed, (2002), cited at in *Amaca Pty Ltd v Frost* at 644, [39].
111. At para 22.6.
112. *Amaca Pty Ltd v Frost* at 644–5, [40]–[42].
113. See *Voth* at 567, citing *Distillers Co v Thompson*.
114. Those particulars were:

> "(e) Continuing to use asbestos in the Hardie Products when it knew or ought to have known that persons such as the plaintiff were at risk of inhaling asbestos dust and fibres from the products and thereby suffering the Asbestos Diseases;
>
> …
>
> (k) Failing to substitute the asbestos in the Hardie Products at its New South Wales manufacturing centre with a non-asbestos material …"

exposed to harm in Malaysia and Belgium, for they were the very places to which the direction *required* him to travel. Even if, contrary to my view, it were correct to speak of "the issue of the travel direction simpliciter", that act was clearly — explicitly — directed at the overseas asbestos factories. Moreover, it was in those factories that "the element of causation occurred". In the present case, as in *Frost*, the overseas locations were the place where "the earlier conduct assumed significance".

80 These New South Wales authorities constitute a powerful line of authority. The line of reasoning is, in my respectful opinion, compelling and it allows of only one conclusion in the present case. That conclusion accords with my own view, as earlier set out but, even if I had been of a different view, I would have thought that this court should not depart from the approach of another intermediate court of appeal — repeatedly adopted — on an important issue in private international law, especially given that the issue arises in a similar factual context.[115] I have already referred to the authority of the decision in *Hall* on the central issue in this case, namely, the location of a breach of the duty to ensure a safe workplace.

81 For these reasons, I consider that the answer to the question "Where in substance did this cause of action arise?" is:

> In the unsafe overseas factories, in Malaysia and Belgium, where the employer by its travel instruction required Mr Puttick to work.

The discretion falls to be re-exercised

82 On the view I have formed, the judge fell into error in deciding that the location of the tort was New Zealand. As appears from *Voth* and from the New South Wales Court of Appeal decisions to which I have referred, such an error re-opens the discretion in respect of the application for stay, and it falls to this court to exercise the discretion afresh.[116]

83 The applicable principles are clear. As applicant for a stay, Fletcher must establish that the Supreme Court of Victoria is a "clearly inappropriate forum". The applicable test is whether the continuation of the proceeding in this court would be:[117]

> … productive of injustice, because it 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.

The High Court has emphasised that this is "not a question of striking a balance between competing considerations".[118] Rather:[119]

> The question whether the local court is a clearly inappropriate forum focuses … upon the inappropriateness of the local court and not the appropriateness or comparative appropriateness of the suggested foreign forum.

84 At first instance, what was decisive was the learned judge's conclusion that the place of the tort was New Zealand and, hence, that the question of the defendant's liability in negligence was to be determined according to New Zealand law. The

115. See, for example, *R v NZ* (2005) 63 NSWLR 628 at 667–8, [165] per Howie and Johnson JJ; *S v Boulton* (2006) 151 FCR 364 at 369–70, [25] per Black CJ.
116. *Voth* at 570; *Grigor* at 32B and 41E.
117. *Zhang* (2002) 210 CLR 491 at 521, [78], applying *Voth* at 564–5.
118. *Zhang* at 521, [78].
119. *Voth* at 565.

other considerations relied on by Fletcher persuaded his Honour that New Zealand would be "the more appropriate forum" but did not satisfy him that Victoria would be "clearly inappropriate".[120]

85 Fletcher relied on an affidavit of Paul Gillard, its general manager (corporate), which stated the following:

(a) the head office of Fletcher was at all relevant times in New Zealand. That was where the Board met and where all the senior personnel were employed whose evidence would be relevant to the allegation that Fletcher controlled Tasman;

(b) all the relevant business documents of Fletcher are located in New Zealand, and most of them will have been archived there; and

(c) all of the witnesses likely to be called by Fletcher, relating to the period 1981–89, were thought to be resident in New Zealand.

86 In response, the applicant argues that Fletcher will have to obtain, review and assemble relevant documents wherever the trial is held. The documents can be electronically imaged and transmitted and, she argues, if an original were needed it could be obtained relatively quickly. Moreover, she submits, once Fletcher has identified which witnesses are needed to be called, application can be made for witnesses resident in New Zealand to have their evidence taken by video link.[121] The submission continues:

> If they must travel to Australia, this is inconvenient at worst. It is not oppressive or vexatious. It may even represent a basis for saying, on one view, New Zealand is a more appropriate forum. But that is not enough.

87 In my view, this submission is clearly correct and must be upheld. I accept, of course, that there is real inconvenience for a New Zealand company to have to litigate in an Australian city, but on no view could this be said to make the litigation "seriously and unfairly burdensome" so as to render the Supreme Court of Victoria a "clearly inappropriate forum". The degree of inconvenience will be rather less than it would once have been, given high-speed electronic communication and the audio-visual aids which are available.

88 Nor is the applicant's own position to be disregarded. It is clear from her affidavit that this is the obviously appropriate forum for her. She has lived in Melbourne since January 2001. She operates a small business, which is the sole source of income for herself and her two young children. She is also studying part-time at RMIT University. All of the medical records relating to her late husband are in Melbourne, as are all of his treating doctors. The expert witnesses proposed to be called on her behalf are in Melbourne, Sydney and Perth. Records relating to the asbestos factory in Malaysia are believed to be in Melbourne and Sydney.

89 For these reasons, in my view, Fletcher has failed to discharge the onus of showing that this court would be a clearly inappropriate forum. I would therefore dismiss the application for a stay.

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120. Reasons for judgment at [21].

121. Fletcher Challenge raised the possibility of video-link evidence in its own submissions, in answer to the applicant's statement that the expert witnesses she would need to call were all in Australia.

Cross-appeal

90 In the alternative to its application for a permanent stay, Fletcher sought an order striking out the amended writ and the amended statement of claim. The learned judge having acceded to the stay application, it was unnecessary for him to deal with the strike-out application. By way of cross-appeal, Fletcher Challenge asked this court to deal with the strike-out application, in the event that the appeal against the stay order was successful.

91 The cross-appeal proceeded on the assumption that the appeal would succeed, if at all, only on a limited basis: that is, this court would affirm the view of the learned primary judge — that the tort occurred in New Zealand — but would (on this assumption) conclude that his Honour's discretion had miscarried on some other ground and would, in re-exercising the discretion, dismiss the stay application. It would then have fallen for this court to decide whether, as Fletcher wished to contend, the applicant's claim should be struck out on the ground that it could not possibly succeed under the applicable New Zealand law, that being the Injury Prevention, Rehabilitation, and Compensation Act 2001 (NZ) and/or the Accident Compensation Act 1982 (NZ).

92 My conclusion that the tort occurred in the overseas factories means that New Zealand compensation law has no application. The ground of attack on which the strike-out application was based therefore disappears. It follows that the cross-appeal must be dismissed.

93 **Chernov JA.** In my view, the decision below is interlocutory and not final. Whether a decision is final or interlocutory is often difficult to determine and, as Brooking JA observed in *Border Auto Wreckers (Wodonga) Pty Ltd v Strathdee*,[122] the answer may be "ascertained with tolerable certainty by reference to decided cases specifically in point". Turning to the relevant cases, in *Dodoro v Knighting*[123] Callaway JA pointed out that all orders are either final or interlocutory and that the general rule is that an order is interlocutory unless, as Windeyer J explained in *Hall v Nominal Defendant*,[124] it "finally determine[s] the rights of the parties in a principal cause pending between them". Importantly, whether it does so is determined by the legal, not the practical, effect of the order.[125]

94 As has been noted, *Hall* made it plain that an order is interlocutory unless it finally determines the rights of the parties in the principal cause between them. In that case, the court below dismissed an application for an extension of time within which to bring a proceeding against the nominal defendant. The majority of the High Court considered that the order was interlocutory. Taylor J, with whom Owen J agreed, said[126] that the impugned order was made in a proceeding that was:

> … preliminary to the bringing of an action and although it deprived the appellant of the benefit of the order of the learned judge of first instance, it did not operate to prevent him from making a further application for an extension of time … In my opinion, the

122. [1997] 2 VR 49 at 52.
123. (2004) 10 VR 277 at 281, [17].
124. (1966) 117 CLR 423 at 443.
125. *Dodoro v Knighting* at 281, [17]; *Carr v Finance Corporation of Australia Ltd (No 1)* (1981) 147 CLR 246 at 248 per Gibbs CJ; *Little v State of Victoria* [1998] 4 VR 596 at 597–8 per Callaway JA; *Re Luck* (2003) 203 ALR 1 at 78; ALJR 177 at 178.
126. At 440–1.

> order in question was not final in the sense in which that term is used in relation to judgments and was interlocutory only so that the appeal was, to say the least, incompetent without leave.

Windeyer J considered that the decision was interlocutory because it did not finally determine the principal cause between the parties. His Honour said:[127]

> In most cases the test that seems to be most satisfactory, and the one that accords most nearly with what has been said on the subject in this Court, is it seems to me to look at the consequences of the order itself and to ask does it finally determine the rights of the parties in a principal cause pending between them. It is never enough to ask simply does the order finally determine the actual application or matter out of which it arises; because, subject to the possibility of an appeal, every order does that, unless it be an order that is expressly declared to be subject to variation.

95 Thus, a refusal of relief below is interlocutory if it is theoretically possible to make a fresh application for the same relief (even where such application would have little realistic prospect of success). Consequently, it has been held that an order striking out or forever staying or dismissing a proceeding because it is frivolous, vexatious or an abuse of process or because it does not disclose a reasonable cause of action is regarded as interlocutory[128] (unless the abuse of process lies in an attempt to litigate an issue which is res judicata).

96 Given that the respondent's summons of 6 March 2006 sought a stay of the proceeding essentially on the ground of forum non conveniens, I consider that the decision below does not determine finally the principal proceeding between the parties and, therefore, is interlocutory. Thus, in order to pursue the proposed appeal, the applicant requires leave to do so. It follows that she must establish that the correctness of the impugned decision is attended with sufficient doubt to warrant its reconsideration on appeal and that substantial injustice will result if the decision is not set aside. I consider that these requirements have not been made out by the applicant.

97 The essential question that requires determination is whether his Honour relevantly erred in concluding that, as a matter of substance, the basis of the cause of action in this case arose in New Zealand — that is, that the relevant act or acts of the respondent which were said to have been negligent and relevantly productive of the deceased's injury occurred primarily in New Zealand. It seems to me that his Honour's conclusion to that effect is not attended with relevant doubt. Accepting the applicant's allegations as reflecting fact, it is alleged that the respondent:

(a) caused or permitted the deceased to be exposed to asbestos in Belgium and Malaysia;
(b) failed to provide and maintain a safe system of work for the deceased while he was working in Belgium and Malaysia; and
(c) failed to warn or instruct the deceased or its subsidiary about the need for protective clothing and equipment while working with or while exposed to asbestos.

And, as the respondent submitted, correctly, I think:

> Of the 22 matters pleaded as particulars of negligence, almost all are failures of [Fletcher Challenge], either arising directly or by reason of a species of non-delegable

127. At 443.
128. See *Little v State of Victoria* [1998] 4 VR 596; *Re Luck* at ALR 79; ALJR 179.

> duty, to take some action with regards to the place and system of work in which Mr Puttick was required to work by reason of his employment contract with Tasman …
>
> On any view … the acts or omissions of [the respondent] which give the deceased his cause of complaint, occurred and could only have occurred in New Zealand.

As the learned trial judge said:[129]

> The act of which Mrs Puttick complains is the direction given to her husband to inspect asbestos plants … The defendant is a New Zealand company, said to have exercised total control over its New Zealand subsidiary; and it was the New Zealand subsidiary by which Mr Puttick was employed and by which he was instructed to proceed to his inspections of the Malaysian and Belgium plants. The instruction was issued and received in New Zealand. That country is in substance the place where the present cause of action arose. The plaintiff does not allege as against the defendant any act or omission in either Malaysia or Belgium.

It is unsurprising, therefore, that his Honour concluded that the conduct of the respondent (or its subsidiary) "first assumed significance in New Zealand, and it was there that, in substance, the cause of action arose".

98 That the disease may have been contracted in Malaysia or Belgium or both is, in my opinion, beside the point. The result would be the same, I think, if the disease was contracted on the moon. Similarly, I consider that it is irrelevant for present purposes that the applicant had no "cause for complaint" at the time of the respondent's alleged breaches because no injury had occurred and, therefore, his cause of action was not complete. I agree, with respect, with the trial judge that the respondent's "conduct first assumed significance in New Zealand; and it was there that, in substance, the cause of action arose".

99 It seems to me that the three New South Wales cases on which the applicant relies support the conclusion that, in substance, the tort here occurred in New Zealand. Thus, in *James Hardie & Co Pty Ltd v Hall*,[130] the failure to warn, which was a principal allegation of the plaintiff, occurred in New Zealand. Similarly, in *James Hardie Industries Pty Ltd v Grigor*,[131] the failure relevantly to direct the subsidiary as to the necessity to warn also occurred in New Zealand. Similarly, in *Amaca Pty Ltd v Frost*[132] the Chief Justice said that the breaches were of a duty that was owed to a person in New Zealand where the employee was exposed to the risk. Here, it is alleged that the deceased was not provided with the necessary instructions in New Zealand when he was directed to visit the plants overseas. And, for the reasons I have given, I think that in this case it is irrelevant where in the world the deceased actually inhaled the fumes that caused his injury or disease. What is relevant, I think, is that he did so because the respondent failed to give him necessary instructions, and that occurred in New Zealand.

100 I also consider that the learned trial judge did not relevantly err in concluding that the Supreme Court was an inappropriate forum for the trial of this proceeding given the statutory position in New Zealand with respect to industrial accident compensation and its interaction with common law claims for damages for personal injuries where the accident was said to have arisen by reason of the breach of duty by the employer. Furthermore, it seems to me that the

129. [2006] VSC 370 at [25].
130. (1998) 43 NSWLR 554.
131. (1998) 45 NSWLR 20.
132. (2006) 67 NSWLR 635.

controversial question whether the respondent relevantly controlled the subsidiary that employed the deceased is to be analysed in the New Zealand context, while questions such as the cause of death of the deceased and associated medical issues are, in relative terms, not likely to be controversial. His Honour was also correct, I think, for the reasons he gave, in rejecting the applicant's submission that the New Zealand legislation encouraged litigation in overseas jurisdictions.

101 In the circumstances, I would refuse leave to appeal and dismiss the summons. But if I am wrong and leave should have been granted, for the reasons given, I would dismiss the appeal.

Leave to appeal granted; appeal dismissed; no order on cross-appeal.

Solicitors for the appellant: *Slater & Gordon*.

Solicitors for the respondent: *Freehills*.

[On 4 September 2008, the High Court of Australia heard and reserved its decision in an appeal in this case: [2008] HCA Trans 322 — Ed, VR.]

D J BRACKEN
BARRISTER-AT-LAW