Court of Appeal
Supreme Court

New South Wales

Case Name:	Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd
Medium Neutral Citation:	[2019] NSWCA 61
Hearing Date(s):	8 March 2019
Decision Date:	29 March 2019
Before:	Bathurst CJ and Leeming JA at [1]; Bell P at [26]
Decision:	1. Leave to appeal granted. 2. Appeal dismissed with costs.
Catchwords:	PRIVATE INTERNATIONAL LAW – partial stay of proceedings – related contracts – different jurisdiction and governing law clauses in each contract – possibility of concurrent proceedings – discretionary judgment – relevant considerations CIVIL PROCEDURE – stay of proceedings – related contracts – exclusive jurisdiction clause in one contract – where partial stay of proceedings generates the possibility of concurrent proceedings – discretionary judgment – competing considerations of enforcement of jurisdiction clause and resolving all aspects of dispute in one forum CIVIL PROCEDURE – application for leave – discretionary decision – principles in House v The King (1936) 55 CLR 499; [1936] HCA 40 – requirement of identifying correct test and why claimed error was material in cases where applicant claims wrong legal test applied – requirement of concluding discretion has miscarried where reliance placed on inadequate or excessive weight being given to factors – requirement

ordinarily of drawing attention of primary judge to particular matter if complaint is made that a finding was not made – consideration of Lovell v Lovell (1950) 81 CLR 513; [1950] HCA 52, Australian Coal and Shale Employees' Federation v The Commonwealth (1953) 94 CLR 621; [1953] HCA 25 and Gronow v Gronow (1979) 144 CLR 513; [1979] HCA 63

APPEALS – application for leave to appeal from discretionary decision to stay part of proceedings – whether any error of principle – significance of prospect of multiple proceedings – standard of appellate review – whether discretion miscarried

APPEALS -–– formulation of grounds of appeal from discretionary decisions

Legislation Cited:

Civil Jurisdiction and Judgments Act 1982 (UK), s 32
Supreme Court Act 1970 (NSW), s 101
Uniform Civil Procedure Rules 2005 (NSW), rr 11.4, 11.8AA, 12.11

Cases Cited:

Adams v Raintree Vacation Exchange LLC, 702 F 3d 436 (7th Cir, 2012)
Age Co Ltd v Liu (2013) 82 NSWLR 268; [2013] NSWCA 26
Aguas Lenders Recovery Group LLC v Suez SA, 585 F 3d 696 (2nd Cir, 2009)
Akai Pty Ltd v People's Insurance Co Ltd (1996) 188 CLR 418; [1996] HCA 39
Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep 90
Aldo Group Inc v Moneris Solutions Corp (2013) 118 OR (3d) 81
Australian Coal and Shale Employees' Federation v The Commonwealth (1953) 94 CLR 621; [1953] HCA 25
Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd [2018] NSWSC 1236
Be Financial Pty Ltd v Das [2012] NSWCA 164
British Aerospace plc v Dee Howard Co [1993] 1 Lloyd's Rep 368
Certain Lloyds Underwriters v Kathy Giannopoulos; Certain Lloyds Underwriters v Marlene Giannopoulos

[2009] NSWCA 56
Comandate Marine Corp v Pan Australia Shipping Pty Ltd (2006) 157 FCR 45; [2006] FCAFC 192
ComJet Aviation Management LLC v Aviation Investors Holdings Ltd, 303 AD 2d 272 (NY App Div, 2003)
Compagnie des Messageries Maritimes v Wilson (1954) 94 CLR 577; [1954] HCA 62
Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd [1999] 1 Lloyd's Rep 767
CSR Ltd v Cigna Insurance Australia Ltd (1997) 189 CLR 345; [1997] HCA 33
Donohue v Armco Inc [2001] UKHL 64; [2002] 1 All ER 749; [2002] 1 Lloyd's Rep 425
Douez v Facebook Inc [2017] 1 SCR 751
Duong v Tran [2010] NSWCA 280
Euromark Ltd v Smash Enterprises Pty Ltd [2013] EWHC 1627
FAI General Insurance Co Ltd v Ocean Marine Mutual Protection & Indemnity Association Ltd (1997) 41 NSWLR 559
Faxtech Pty Ltd v ITL Optronics Ltd [2011] FCA 1320
Fiona Trust & Holding Corp v Privalov [2007] UKHL 40; [2008] 1 Lloyd's Rep 254
Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160
Freeford Ltd v Pendleton, 53 AD 3d 32 (NY App Div, 2008)
Gillfillan v Australian Securities & Investments Commission [2012] NSWCA 370
Global Partners Fund Ltd v Babcock & Brown Ltd (in liq) [2010] NSWCA 196; 79 ACSR 383
Gronow v Gronow (1979) 144 CLR 513; [1979] HCA 63
Henry v Henry (1996) 185 CLR 571; [1996] HCA 51
Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) (1998) 90 FCR 1
House v The King (1936) 55 CLR 499; [1936] HCA 40
Huddart Parker Ltd v The Ship "Mill Hill" (1950) 81 CLR 502; [1950] HCA 43
Hugel v Corp of Lloyd's, 999 F 2d 206 (7th Cir, 1993)
Idoport Pty Ltd v National Australia Bank Ltd & Ors; Idoport Pty Ltd v Argus; Idoport Pty Ltd v National Australia Bank Ltd & Ors [2002] NSWCA 271
Incitec Ltd v Alkimos Shipping Corp (2004) 138 FCR

496; [2004] FCA 698
Jaycar Pty Ltd v Lombardo [2011] NSWCA 284
Kidd v van Heeren [1998] 1 NZLR 324
Lovell v Lovell (1950) 81 CLR 513; [1950] HCA 52
M v Director General, Department of Family and Community Services [2013] NSWCA 118
M/S Bremen v Zapata Off-Shore Co, 407 US 1 (1972)
Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66; [2008] HCA 42
Marano Enterprises of Kansas v Z-Teca Restaurants LP, 254 F 3d 753 (8th Cir, 2001)
Micallef v ICI Australia Operations Pty Ltd [2001] NSWCA 274
Mobis Parts Australia Pty Ltd v XL Insurance Co SE [2016] NSWSC 1170
Nobarani v Mariconte [2018] HCA 36; 92 ALJR 806
Park Trent Properties Group Pty Ltd v Australian Securities and Investments Commission [2016] NSWCA 298
Pompey Industrie v ECU-Line NV [2003] 1 SCR 450
PPK Willoughby Pty Ltd v Baird [2019] NSWCA 48
R v Baker [2000] NSWCCA 85
Rinehart v Welker (2012) 95 NSWLR 221; [2012] NSWCA 95
Royal Bank of Scotland plc v Babcock & Brown DIF III Global Co-Investment Fund LP [2017] VSCA 138
Sebastian Holdings Inc v Deutsche Bank AG [2010] EWCA Civ 998; [2011] 1 Lloyd's Rep 106
Secretary, Department of Family and Community Services v Smith (2017) 95 NSWLR 597; [2017] NSWCA 206
Société Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871
Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460
Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272; [2009] HCA 8
The Angelic Grace [1995] 1 Lloyd's Rep 87
The Eleftheria [1970] P 94
Trust Risk Group SpA v AmTrust Europe Ltd [2015] EWCA Civ 437; [2015] 2 Lloyd's Rep 154
TS Production LLC v Drew Pictures Pty Ltd (2008) 172

	FCR 433; [2008] FCAFC 194 UBS AG v HSH NordBank AG [2009] EWCA Civ 585; [2009] 2 Lloyd's Rep 272 Vaiusu v R [2017] NSWCCA 71 Vines v Australian Securities and Investment Commission [2007] NSWCA 126 Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd [2018] SGCA 65 Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538; [1990] HCA 55 VTB Capital plc v Nutritek International Corp [2013] UKSC 5; [2013] 2 AC 337 Young v Hones (No 2) [2014] NSWCA 338
Texts Cited:	V Black and SGA Pitel, "Forum-Selection Clauses: Beyond the Contracting Parties" (2016) 12 Journal of Private International Law 26 Adrian Briggs, Agreements on Jurisdiction and Choice of Law (2008, Oxford University Press) M Douglas, "Anti-Suit Injunctions in Australia" (2017) 41(1) Melbourne University Law Review 66 Alex Mills, Party Autonomy in Private International Law (2018, Cambridge University Press) Peter Nygh, Autonomy in International Contracts (1999, Oxford University Press)
Category:	Principal judgment
Parties:	Australian Health & Nutrition Association Ltd (First Applicant/Appellant) Rebel Sport Ltd (Second Applicant/Appellant) Hive Marketing Group Pty Ltd (First Respondent, Submitting Appearance) Emirat Ltd (Second Respondent)
Representation:	Counsel: I Pike SC, L Rich (Applicants/Appellants) J Darams (Second Respondent) Solicitors: Baker McKenzie (Applicants/Appellants) Squire Patton Boggs (First Respondent) James Tuite & Associates (Second Respondent)
File Number(s):	2019/45537; 2018/273868

Decision under appeal:

Court or Tribunal:	Supreme Court
Jurisdiction:	Equity – Commercial List
Citation:	[2018] NSWSC 1236
Date of Decision:	10 August 2018
Before:	McDougall J
File Number(s):	2018/170625

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

1 **BATHURST CJ AND LEEMING JA**: We agree with Bell P's reasons and proposed orders. What follows is by way of elaboration rather than qualification and presupposes familiarity with the President's judgment.

2 The proposed grounds of appeal disclose errors of a kind not infrequently seen in this Court where an attempt is made to appeal from an interlocutory decision based on the exercise of a discretion, to which the principles of restraint in *House v The King* (1936) 55 CLR 499; [1936] HCA 40 apply.

3 Proposed ground 1(a) alleged error on the part of the primary judge "by imposing too high a test" in order not to give effect to the exclusive jurisdiction clause. But even if that were established, this Court will if possible itself re-exercise the discretion which has miscarried. It thus becomes essential for an appellant (a) to formulate the correct test to be applied, and (b) to demonstrate that when that test is applied, it will generate a different outcome, such that the alleged error is one that is material. This reflects two basal principles. The first is that the right of appeal invoked by Sanitarium and Rebel in s 101 of the *Supreme Court Act 1970* (NSW) is from a judgment or order of the Court in a

Division, and not the reasons given for that judgment or order. The second is that ordinarily only errors which are material in the sense that they deprive the party of the possibility of a successful outcome will warrant appellate intervention: see *Nobarani v Mariconte* [2018] HCA 36; 92 ALJR 806 at [37]-[38]. At no time did Sanitarium or Rebel articulate what they maintained was the correct test.

4 Proposed ground 1(b) alleged error on the part of the primary judge by "fundamentally mistaking the facts" by "finding that [Rebel] should have been aware of the [RTA] (to which it was not a party) and was, in effect, to blame and so should bear the risk of being required or forced to litigate in a foreign jurisdiction" and by "failing to find that it was [Emirat] that was or should have been aware of the terms of the Promotion Agreement". This formulation discloses a difficulty of a different kind.

5 The primary judge was called upon to exercise discretionary powers to stay the proceedings, or alternatively to authorise service out of the jurisdiction. A deal of evidence was adduced to inform the exercises of discretion for which each party contended. It is ordinarily incumbent on a party contending on appeal that a discretion has miscarried to demonstrate that the judge's attention was drawn to the particular matter of which complaint was made. "[W]hen a court is invited to make a discretionary decision, to which many factors may be relevant, it is incumbent on parties who contend on appeal that attention was not given to particular matters to demonstrate that the primary judge's attention was drawn to those matters, at least unless they are fundamental and obvious": *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; [2008] HCA 42 at [120]. But Mr Pike SC frankly acknowledged that the primary judge was not asked by any party to make the findings to which proposed ground 1(b) was directed (transcript, 8 March 2019, 32.29-36). Neither of those findings is so "fundamental" or "obvious" that the making or failure to make the finding discloses appellable error.

6 What is more, this proposed ground does not fairly capture the reasons given by the primary judge. The finding of which complaint is made is found in [45] of his Honour's reasons, which relevantly provided:

> "I do not think that the interest of Rebel in litigating in this court is a consideration of sufficient strength, or substance, so as to deprive Emirat of the benefit of its exclusive jurisdiction clause. Rebel must have known, when it signed the promotion agreement, that Emirat had agreed to underwrite Hive's obligation to indemnify Rebel for the value of vouchers that Rebel honoured. If Rebel chose not to investigate the terms on which that indemnity was offered, it can hardly complain because they are, in this one respect, unsatisfactory to it. And if Rebel did investigate, it can hardly complain if Emirat later insists on the observance of one of those terms."

7 The evaluative conclusion in the first sentence is explained by the three sentences which follow. The second sentence is incontrovertibly true. The third and fourth sentences do not amount to a finding that Rebel was aware, or should have been aware, of the terms of the RTA. Still less is there a finding of blameworthiness. Rather, there is a nuanced approach which identifies both possibilities as to Rebel's knowledge of the exclusive jurisdiction clause in the RTA, and applies either alternative to downplay or perhaps to negate the discretionary considerations Rebel had invoked. In short, proposed ground 1(b) does not do justice to the careful evaluative approach undertaken by the primary judge.

8 Passing over proposed ground 1(c), proposed ground 2 picks up the closing words of the formulation of principle in *House v The King.* This ground was not sought to be developed orally, save for the statement that "We also rely upon ... what I'll call the last limb of *House v The King*, which is the unjust or plainly unreasonable [ground] and I always refer to it as the *Wednesbury* unreasonableness [ground]". Taking those words in isolation may lead to error.

9 It is one thing for the reasons given by the primary judge to disclose appellable error. If so, that is addressed by the formulations of principle in the first half of the passage from *House v The King*. That is not an end of the matter. There may be cases where the reasons do not disclose why the impugned orders were made. In such cases, even though no error of principle or other well recognised basis for appellate intervention may be discerned on the face of the reasons, an appellate court may nonetheless intervene. The reason is that it may be *inferred* in light of the result that there was appellable error in the

unstated reasons which led to the order. This is plain from the passage when read as a whole:

> "It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred." (*House v The King* at 505)

10 It is wrong to seek to apply the references to "unreasonable or plainly unjust" in that passage in isolation. The premise of this aspect of the test in *House v The King* is that the reasons do not explain the result reached.

11 On no view was there any inadequacy in the reasons given by the primary judge for granting the limited stay. Sanitarium and Rebel did not submit that there was. It is revealing that their written submissions were confined to a submission that the primary judge had erred "either imposing too high a test, or materially mistaking the facts" (submissions dated 6 November 2018, paragraph 13) and made no attempt to elaborate proposed ground 2. The written submissions were right to ignore proposed ground 2. Either the reasons of the primary judge disclose appellable error or they do not. There is no occasion for resorting to the drawing of an inference as explained in the second half of the passage from *House v The King* because the result, described by the primary judge as finely balanced, is unexplained. A similar mode of reasoning was rejected by this Court in *Park Trent Properties Group Pty Ltd v Australian Securities and Investments Commission* [2016] NSWCA 298 at [52]-[53], where it was observed that taking these words in isolation tended to dilute the test.

12 In oral submissions, a further attack was made invoking a different line of authority. These submissions arguably went beyond the proposed grounds of appeal, but no such point was taken by the respondent. It was said that it was sufficient to establish appellable error if it be shown that the primary judge failed to take into account or gave insufficient weight to some relevant matter. True it is that that is how this Court expressed the necessary requirements of establishing *House v The King* error in *Micallef v ICI Australia Operations Pty Ltd* [2001] NSWCA 274 at [45] and [78]-[83], which was restated in identical

terms in *Young v Hones (No 2)* [2014] NSWCA 338 at [15]. Those were the two decisions to which senior counsel referred, although the same statements may be found in a number of other decisions of this Court. Quite commonly, although not invariably, the proposition that there may be appellate review of a discretionary decision where there has been a "failure to give sufficient weight to some relevant matter" is juxtaposed with the proposition that it is insufficient that the appellate court concludes that it would have exercised the discretion differently: see for example *Certain Lloyds Underwriters v Kathy Giannopoulos; Certain Lloyds Underwriters v Marlene Giannopoulos* [2009] NSWCA 56 at [89]-[90]; *Duong v Tran* [2010] NSWCA 280 at [31]. Indeed, Heydon JA, with whom Sheller JA and Studdert AJA agreed, himself restated that qualification in *Micallef v ICI Australia* immediately after identifying the various bases on which appellate intervention might occur.

13 The language employed in *Micallef* and other cases on which the oral submissions made on behalf of Sanitarium and Rebel were based needs to be recognised for what it is. On the one hand, appellate intervention in the exercise of a discretion may be available where insufficient weight has been given to something relevant. On the other hand, it is fundamental that deference is to be given by an appellate court to the discretionary decisions of judges at first instance, insofar as it is insufficient for the appellant merely to persuade the appellate court that it would have decided the matter differently. Statute has given a right of *appeal* to a disappointed litigant, and committed a process known as an *appeal* to the appellate court. Statute has not conferred a right to a hearing *de novo*. This is the point made by Heydon JA in *Micallef* immediately following his Honour's observation that it is insufficient that the appellate court might itself exercise the discretion differently: "The law committed the exercise of the discretion to Garling DCJ."

14 It is always important to read the words in reasons for judgment in context, and as a whole. It is wrong to take part of the formulation of when an appellate court will intervene in the exercise of a discretion in isolation, as if it were sufficient in every case merely to establish that insufficient weight had been given to a matter. It is necessary to apply the nuanced formulation of principle as a whole.

15 It was in that context that Aickin J said in *Gronow v Gronow* (1979) 144 CLR 513 at 537; [1979] HCA 63 that:

> "Statements of the general principles to be applied by an appellate court when asked to set aside an order made in the exercise of a judicial discretion generally include a reference to the trial judge giving inadequate weight to some factors and excessive weight to others. It is however a mistake to suppose that a conclusion that the trial judge has given inadequate or excessive weight to some factors is in itself a sufficient basis for an appellate court to substitute its own discretion for that of the trial judge."

16 This has long been clear law. In sentencing appeals, it is well established that merely claiming that insufficient weight, or excessive weight, was given to one factor is normally not a proper ground. As Spigelman CJ said in *R v Baker* [2000] NSWCCA 85 at [11], the circumstances in which matters of "weight" will justify intervention by an appellate court are narrowly confined. That was a Crown appeal, but the same principle has regularly been applied in other appeals against sentence: see for example *Vaiusu v R* [2017] NSWCCA 71 at [29] and the cases there cited.

17 In civil appeals, it was made clear by Mason P, with whom Stein and Giles JJA agreed, in *Idoport Pty Ltd v National Australia Bank Ltd & Ors; Idoport Pty Ltd v Argus; Idoport Pty Ltd v National Australia Bank Ltd & Ors* [2002] NSWCA 271 at [30]:

> "The later decisions recognise that failure to give 'sufficient weight' to a relevant consideration may betoken error. However, as Kitto J pointed out in *Lovell* (at 533):
>
> > The proposition that the appeal court will consider whether 'no sufficient weight' has been given to relevant considerations is not inconsistent with the principle that the appeal court does not deal with the appeal as if it were exercising the original jurisdiction; even if it considers that insufficient weight has been given to some relevant consideration, it will still not substitute its judgment for that of the primary judge unless it comes clearly to the conclusion for that reason that the discretion has been exercised wrongfully."

18 Kitto J returned to the matter in *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621 at 627; [1953] HCA 25, saying:

> "[T]he true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to

> overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts."

19 What was said by Kitto J in *Lovell v Lovell* (1950) 81 CLR 513; [1950] HCA 52 and *Australian Coal and Shale Employees' Federation v The Commonwealth* has been followed in this Court in *Vines v Australian Securities and Investment Commission* [2007] NSWCA 126 at [12]-[13] (Spigelman CJ), *Gillfillan v Australian Securities & Investments Commission* [2012] NSWCA 370 at [176] (Sackville AJA, Beazley and Barrett JJA agreeing); *M v Director General, Department of Family and Community Services* [2013] NSWCA 118 at [9] (Basten, Barrett JJA and Bergin CJ in Eq) and *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597; [2017] NSWCA 206 at [29] (Gleeson JA, Macfarlan and Payne JJA agreeing).

20 The point of the foregoing is to reiterate that error will be avoided if the statements of principle (which concededly are sometimes, when nothing turns on it, referred to elliptically) are read as a whole and in their context, and it is steadily borne in mind that it is insufficient merely to establish that insufficient weight has been given to a relevant matter. The nature of the process is that of an appeal, one element of which is deference to the tribunal at first instance.

21 For those reasons, and as the President has explained, it was entirely appropriate for prominence to be given in oral submissions to proposed ground 1(c), being the only proposed ground not attended by the difficulties referred to above.

22 On the way in which the discretion was to be exercised, we would add only the following to what has been said by the President. There is a degree of similarity in the principles governing anti-suit injunctions and stays, insofar as both remedies may be founded upon an exclusive jurisdiction clause. In particular, there is the "strong bias" in favour of holding parties to their promise, to which Dixon J referred in *Huddart Parker Ltd v The Ship "Mill Hill"* (1950) 81 CLR 502 at 509; [1950] HCA 43. (Incidentally, the approach taken to such clauses is a paradigm example of the inaptness of some all-embracing doctrine of "efficient breach", dispatched in this country by *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; [2009] HCA 8 at [13]. It is not merely

the availability in appropriate cases of equitable remedies such as injunctions and specific performance, but also the vindication of such clauses in the exercise of discretion in granting a stay or setting aside of service, that renders it quite wrong to describe a contracting party as having a choice either to abide by its promise or else to pay damages.)

23 But that similarity should not disguise the quite different character of what is occurring. In the case of an anti-suit injunction based on an exclusive jurisdiction clause, a party is seeking injunctive relief, to prevent an actual or apprehended breach of a contract by its counterparty, from a court which has personal jurisdiction over both parties. Damages may be an inadequate remedy, but even so relief may nonetheless be refused on equitable grounds (for example, delay or unclean hands, as noted by Lord Bingham in *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 All ER 749 at [24]) or else given only on terms. Further, the exercise of jurisdiction may interfere with the processes of a foreign court, and is to be exercised in accordance with comity in the sense described in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 395-396; [1997] HCA 33.

24 On the other hand, a party seeking to stay proceedings commenced in the face of a promise to litigate elsewhere will be seeking relief from a court which, quite commonly, will *not* have personal jurisdiction over that party. Indeed, the moving party will, quite commonly, be utilising a procedure (such as a conditional appearance) enabling such an application to be made without submitting to the court's jurisdiction. Whether or not that is so, that party will usually be seeking a stay or the setting aside of service, rather than injunctive relief flowing directly from its rights in contract. Further, those contractual rights are qualified, because it is well established that a contractual provision could not (absent statute) oust or lessen the jurisdiction of the courts of the Crown: *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577 at 582, 585-587, 589; [1954] HCA 62.

25 Lord Bingham was conscious in *Donohue v Armco Inc* of the differences between the equitable relief of an anti-suit injunction, as opposed to the application for a stay (noting at [24] that "I am mindful that the principles

governing the grant of injunctions and stays are not the same"). Lord Goff, delivering the advice of the Privy Council in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 at 896 expressed the same view. One author has recently emphasised the desirability of precision in identifying the basis on which the jurisdiction is exercised, and the subtle distinctions which may apply: M Douglas, "Anti-Suit Injunctions in Australia" (2017) 41(1) *Melbourne University Law Review* 66 at 87-89. However, those differences ought not to distract, in the present case, from the significance to be attached in both cases to upholding a promise to litigate in a particular forum.

26 **BELL P**:

Introduction

27 This application for leave to appeal involves "litigation about where to litigate", to paraphrase Lord Templeman in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 464. Unlike that famous case, which marked a seminal turning point in the law relating to *forum non conveniens* in England, the four parties in the present case adverted to questions of forum in their contractual arrangements. As shall be seen, however, there were two relevant contracts with two different jurisdiction clauses, one of which was exclusive and one of which was not; and not every party to the litigation was a party to both of these contracts.

28 Leave to appeal is sought from the decision of McDougall J (*Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2018] NSWSC 1236) to enforce an exclusive jurisdiction clause for the courts of England contained in one of these contracts with the result that the proceedings against one of the two defendants in the Supreme Court of New South Wales were stayed. The case against the remaining defendant remains on foot in New South Wales. There may therefore be concurrent proceedings in two jurisdictions although this is not presently the case.

29 Whether the primary judge erred in principle in the exercise of his discretion to stay part of the proceedings is the important question raised in the present case.

Background

30 Australian Health & Nutrition Association Ltd (**Sanitarium**) is a well-known Australian company associated with, inter alia, the "UP&GO" and "Weet-Bix GO" products. In 2017, Sanitarium conducted a promotion (**the Promotion**) whereby, during the promotion period, purchasers of UP&GO and Weet-Bix GO could obtain $5 and $10 gift vouchers for redemption at Rebel Sports stores operated by Rebel Sport Ltd (**Rebel**).

31 By a Risk Transfer Agreement (**the RTA**) entered into on 27 March 2017 between Sanitarium, Emirat Ltd (**Emirat**) and Hive Marketing Group Pty Ltd (**Hive**), Sanitarium agreed to pay Emirat $649,874.52 plus GST in return for Emirat assuming all financial liability for redemptions of the gift vouchers up to but not exceeding $14,186,000. The commercial effect of this was that Emirat assumed the risk of the promotion being more successful than the amount of $649,874.52. This amount may be characterised as a premium for a particular form of commercial insurance. In the RTA, Hive was described as the local agent for Emirat assisting it in the provision of the Services, the Services being in effect the undertaking by Emirat to underwrite the Promotion.

32 Some seven weeks after the RTA had been entered into, Rebel and Sanitarium entered into a separate agreement with Hive (**the Promotion Agreement**) which, inter alia, made provision for the reimbursement of Rebel by Hive of the value of the vouchers redeemed at Rebel stores.

33 It may at once be observed that although the commercial enterprise involving the Promotion involved four participants – Sanitarium, Rebel, Hive and Emirat – Rebel was not a party to the RTA and Emirat was not a party to the Promotion Agreement. This was the case even though, as shall be seen, Rebel was referred to in the RTA and Emirat was referred to in the Promotion Agreement.

34 The potential complexity arising from the absence of a single contract in relation to the Promotion and its financing to which each participant was a party was compounded by the fact that the RTA was governed by English law and contained an English exclusive jurisdiction clause whilst the Promotion

Agreement was governed by New South Wales law and contained a non-exclusive jurisdiction clause for the courts of New South Wales.

35 A dispute in relation to the reimbursement of Rebel (which had honoured some $1.67 million worth of vouchers which had been presented to it for redemption during the promotion period) gave rise to proceedings in the Commercial List of the Equity Division of the Supreme Court of New South Wales in which Sanitarium and Rebel were plaintiffs and Hive and Emirat defendants. As Emirat has no presence in the jurisdiction (being incorporated in the United Kingdom) and did not appear, it was necessary for it to be served with process pursuant to r 11.4 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**).

36 Rule 12.11 of the UCPR allows a party served with process outside of the jurisdiction to apply to the Court for a range of orders, including a stay or dismissal of proceedings and the setting aside of service. Moreover, r 12.11(3) allows such an application to be made by a party served outside the jurisdiction without that party being required to enter an appearance so long as the notice of motion seeking the relevant relief is filed within the time that would otherwise apply in relation to the entry of an appearance. Rule 11.8AA(1) also makes provision for a plaintiff who or which has served a defendant outside of the jurisdiction to seek leave to proceed against that defendant in circumstances where it has not entered an appearance.

37 Emirat took advantage of its ability to file a notice of motion pursuant to r 12.11 without entering an appearance and sought the stay or dismissal of the proceedings against it and the setting aside of service on it. This motion was heard simultaneously with a notice of motion filed on behalf of Sanitarium and Rebel seeking leave to proceed against Emirat.

38 The primary judge granted Emirat the relief sought in its notice of motion and dismissed Rebel and Sanitarium's motion for leave to proceed against Emirat.

39 The result of these orders is that the Commercial List proceedings brought by Sanitarium and Rebel remain on foot solely against Hive. Rebel and Sanitarium seek leave to appeal from this interlocutory decision.

40 Although Hive supported the position advanced by Rebel and Sanitarium at first instance, it has entered a submitting appearance on the leave application in this Court (other than as to costs) and does not seek to advance any submissions either in support of or against the grant of leave to appeal. The Commercial List proceedings have been held in abeyance pending the determination of this application.

41 An application for leave to appeal in this Court generally requires the applicant to establish that there is an issue of principle, a question of public importance or a reasonably clear injustice going beyond something that is merely arguable: *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 at [46]; *Be Financial Pty Ltd v Das* [2012] NSWCA 164 at [32]-[38]; *Age Co Ltd v Liu* (2013) 82 NSWLR 268; [2013] NSWCA 26 at [13]; *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597; [2017] NSWCA 206 at [28]; *PPK Willoughby Pty Ltd v Baird* [2019] NSWCA 48.

42 Before turning to consider the primary judge's decision and the case for leave, it is necessary to consider in a little more detail the terms of the respective agreements and the way in which the dispute arose and how it is articulated in the Commercial List Statement.

The Risk Transfer Agreement

43 The Recitals to the RTA provided that:

> "WHEREAS:
>
> A. [Sanitarium] is in the business of health food and drink manufacture and distribution.
>
> B. EMIRAT has been appointed by [Sanitarium] to supply Services to [Sanitarium] in relation to the Promotion, including discharging [Sanitarium] from the variable costs associated with the fulfilment of the Promotion, by means of transference, for an agreed fee.
>
> C. HIVE will act as a local agent for EMIRAT assisting EMIRAT in the provision of the Services.
>
> D. This Agreement is intended to regulate the relationships between EMIRAT and [Sanitarium] and HIVE in relation to the Promotion."

44 Clause 2, entitled "Provision of Services", provided as follows:

> "2.1 EMIRAT shall provide to [Sanitarium] such Services as described in Schedule 1 during the Term of this Agreement.

2.2 HIVE shall assist EMIRAT in supplying the Services to [Sanitarium] by performing those duties and responsibilities described in Schedule 1.

2.3 The Services shall be provided in accordance with the terms of this Agreement and the Promotion will not be undertaken without this Agreement having been signed by all parties.

2.4 Once the Agreement is submitted to [Sanitarium] and HIVE it must be signed by [Sanitarium] and HIVE and submitted in the original to EMIRAT. The Agreement shall only take effect only after EMIRAT'S counter signature and payment of the Fee.

2.5 This Agreement shall constitute a distinct contract enforceable according to its terms."

45 The services to be provided by Emirat were set out in Schedule 1 to the RTA as follows:

"Risk transference:

Risk management by means of transference of the associated variable costs of participation in the promotion only. EMIRAT will assume all financial liability for the Redemptions of the promotion, up to but not exceeding $14,186,000AUD (fourteen million, one hundred and eighty-six thousand Australian Dollars only) ('Sum Covered').

For the avoidance of doubt, EMIRAT will have no responsibility for any costs other than those specifically of the Redemptions, unless agreed in writing.

Fulfilment:

- Provide an agreed float of $100,000.00AUD (one hundred thousand Dollars only) for Redemptions of the Gift to HIVE prior to the start of the Promotion.
- Verification of Claims received via [Sanitarium's] supplied report and approval of Valid Claims and decline of Invalid Claims. The response to the Consumer of such Invalid Claims will not be the responsibility of EMIRAT"

46 Hive's duties and responsibilities were described as follows:

"- HIVE will pay for a float of $100,000.00AUD that will be paid to Rebel on issuance of a valid GST invoice (provided 7.2 has occurred).
- HIVE and EMIRAT will review the reporting supplied by [Sanitarium] each week during the Promotional Period.
- Once reviewed, EMIRAT will pay HIVE weekly for all Valid Claims over and above the float and in turn, HIVE will pay Rebel for all Valid Claims over and above float on issuance of a valid GST invoice within 7 days of EMIRAT approving the Valid Claims.
- HIVE is not responsible for validating or invalidating claims for whatever reason and will carry no liability for paying claims to Rebel without EMIRAT'S prior approval.

- EMIRAT will be responsible for validating or invalidating all Claims and Rebel invoices and HIVE will only pay Rebel for the invoices once EMIRAT has approved them.
- HIVE will provide a Financial Claim Status report and will share the report with [Sanitarium], Rebel and EMIRAT on a weekly basis."

47 As is noted in [31] above, by cl 7.1 of the RTA, Sanitarium agreed to pay Emirat $649,874.52 plus GST.

48 The terms of cl 5.4, headed "Material Facts", should also be noted. That clause provided that:

> "5.4.1 [Sanitarium] warrants that it has disclosed all Material Facts to EMIRAT prior to the commencement of this Agreement. [Sanitarium] shall indemnify EMIRAT against any and all losses, costs and expenses incurred by EMIRAT by reason of the nondisclosure by [Sanitarium] of any Material Facts, either prior to the start of this Agreement or if and when new Material Facts come to light during the Term.
>
> 5.4.2 Should new Material Facts come to light during the Term which are different or additional to those provided when the Fee was quoted, without prejudice to any of its other rights and remedies, EMIRAT reserves the right to suspend its provision of the Services until the situation has been resolved to the satisfaction of EMIRAT."

49 Material Facts were defined in the RTA as meaning:

> "… those facts which will be regarded as likely to influence the acceptance or assessment of the Promotion by EMIRAT, including but not limited to the redemption levels from the previous Promotions. In the event of doubt as to whether certain facts are material, [Sanitarium] will make EMIRAT aware of the facts in question."

50 Finally, for present purposes, cl 20 of the RTA was in the following terms:

> "The parties shall strive to settle any dispute arising from the interpretation or performance of this Agreement through friendly consultation within 30 days after one party asks for consultation. In case no settlement can be reached through consultation, each party can submit such matter to the court. The English Courts shall have the exclusive jurisdiction for all disputes arising out of or in connection with this Agreement."

51 This is an extremely broadly drawn exclusive jurisdiction clause, the contractual drafting employing language which has attracted generous and liberal interpretation by both English courts (see, for example, *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep 254) and Australian courts: *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; [2006] FCAFC 192 at [164]-[165]. Strictly speaking, the

construction of the exclusive jurisdiction clause is for the proper law of the contract but, if and to the extent there is any difference in approach between Australian and English law in this regard (as to which, see *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95 at [122] per Bathurst CJ), any such difference is of no significance in the present case.

The Promotion Agreement

52 The Recitals to the Promotion Agreement relevantly provided that:

> "A. Sanitarium intends to conduct a consumer promotion as detailed in Item 2 of Schedule 1 ('Promotion') whereby consumers will have the chance to claim the gift as specified in Item 3 of Schedule 1 ('Gift').
>
> B. Hive operates and delivers bespoke consumer promotions, facilitates prize management and provides risk management solutions for marketing campaigns that have variable redemption, and is, along with Momentum Worldwide, responsible for facilitating the Promotion for Sanitarium.
>
> C. Rebel has agreed to make available the Gift to Hive and Sanitarium, and further to supply Hive and Sanitarium with the Rebel Imagery for inclusion in the Advertising Material in connection with the Promotion."

53 The "Gift" referred to in the Recitals was a Rebel voucher awarded in the form of an E-Gift Card redeemable at participating Rebel stores or online (Item 3 of Schedule 1). Customers of specially marked packets of UP&GO or Weet-Bix GO could submit a unique code to receive a Rebel voucher online having a value of $5 or $10 depending on the product purchased.

54 Key commercial terms of the Promotion Agreement were set out in Item 4 of Schedule 1. These included the following:

> "(a) that Rebel will supply the Gifts at costs, and Sanitarium, via Hive, will reimburse Rebel for the the [sic] cost of any Gifts redeemed at Rebel store(s) or online in accordance with the directions set out in Item 9.
>
> (b) that Hive will supply a float of AUD$100,000 that will be paid to Rebel prior to the Promotional Period Commencement Date on the issuance of a valid GST invoice.
>
> …
>
> (d) on the first Monday of each month during the Promotion Period and thereafter each first Monday of each month during the Term of this Agreement as set out in Item 7, Rebel will provide a summary reconciliation report listing the total quantity of Gifts redeemed (including the total financial value) in the previous month in accordance with Item 3. With this summary reconciliation report, Rebel will also supply an Invoice for the total financial value of these Gifts redeemed that Sanitarium, via Hive, is required to pay to Rebel for. This invoice can not be deducted from the initial float supplied (as set out in Point C) until notified by Hive, and or its insurer Emirat Limited ('Emirat'). In the

event the invoice amount exceeds [sic] the initial float, Hive will pay Rebel for all valid redeemed Gifts over and above the float, and Hive will be reimbursed by Emirat subject to the below.

(e) Hive and its insurer, Emirat, will review the reporting supplied by Rebel each week during the Promotional Period. Emirat will pay Hive for all redeemed Gifts over and above the float. However, in the event any such review results in any overpayment of amounts to Rebel, Rebel must promptly reimburse Hive for such overpayments.

…

(g) that the invoice(s) from Rebel will have a 14 business day payment terms [sic] from issue date."

55 Consistent with these terms, Item 9 of Schedule 1 of the Promotion Agreement also relevantly provided:

"The parties understand and agree that Hive, on behalf of Sanitarium, will pay Rebel the value of each Gift redeemed at a Rebel store or online in accordance with the below process:

- Hive will supply a float of AUD$100,000 that will be paid to Rebel on issuance of a valid GST invoice prior to the commencement of the Promotional Period.
- Hive and its insurer, Emirat Limited ('Emirat'), will review the reporting supplied by Rebel each month during the Promotional Period as set out in Item 2. Invoices supplied with reporting are not be deducted [sic] from the initial float supplied until approved by Hive and/or Emirat. In the event the invoice amount exceeds the initial float, Hive will pay Rebel for all valid redeemed Gifts over and above the float, and Hive will be reimbursed by Emirate [sic] subject to the below.
- Once reviewed, Emirat will pay Hive for all redeemed Gift over and above the float. However, in the event any such review results in any overpayment of amounts to Rebel, Rebel must promptly reimburse Hive for such overpayments.
- Hive will provide a Financial Claim Status report and will share the report with Sanitarium, Rebel and Emirat on a monthly basis."

56 Clause 10.3 of the Promotion Agreement provided that:

"This Agreement is governed by the law in force in New South Wales. The parties submit to the non-exclusive jurisdiction of the courts having jurisdiction in New South Wales and any courts, which may hear appeals from those courts in respect of any proceedings in connection with this Agreement."

Dispute as to payment and commencement of proceedings

57 Rebel issued invoices to Hive with an aggregate value of $1,670,079 in the period 4 May 2017 to 5 February 2018. Hive paid the first two of these invoices which were for $100,000 each. None of the remaining invoices has been paid.

58 By letter of 13 July 2017, Emirat purported to suspend the provision of its services under cl 5.4.2 of the RTA for alleged breaches of that agreement, resulting, inter alia, in an alleged over-run of Facebook promotional material and an over-printing of "on-pack" stickers which alone was alleged to have increased the financial risk of the promotion to Emirat by $890,130.

59 By letter dated 25 August 2017, Emirat purported to terminate the RTA with immediate effect complaining that "the Promotional Website was not sufficiently programmed or secure to prevent manipulation and circumvention of the Promotional terms" and that this constituted a material breach of the RTA.

60 The Commercial List proceedings were commenced on 31 May 2018. In those proceedings:

(1) both Sanitarium and Rebel sought a declaration that the Promotion Agreement remained in full force and effect;

(2) Sanitarium sought orders against Hive and Emirat that the RTA remained in full force and effect and that the purported suspension and termination of that agreement was of no force or effect;

(3) Rebel sought an order that Hive pay it the amount of $1,470,079 together with interest calculated from 14 days after the date of each unpaid invoice; and

(4) in the alternative to (3) above, Sanitarium sought an order that Emirat pay it $1,470,079 plus interest.

61 By its Commercial List Response, Hive denied that its refusal to pay the unpaid invoices was wrongful and in breach of the Promotion Agreement. This denial does not disclose why Hive maintains it is not liable to Rebel. However, in Part A of its Commercial List Response, Hive asserts that Emirat's termination of the RTA brought to an end Hive's obligations under the Promotion Agreement and the RTA. Under Part B of that Response, dealing with "Issues Likely To Arise", Hive identifies as relevant issues:

(1) the entitlement of Emirat to suspend and terminate the RTA; and

(2) whether any moneys are payable by Hive to Rebel under the Promotion Agreement "when it was [Emirat] who indemnified the financial risk of the promotion pursuant to the Risk Transfer Agreement."

62 Hive has foreshadowed a cross-claim against Emirat but has held off filing any such cross-claim in the New South Wales proceedings (or bringing such a claim in England) pending the outcome of the notices of motion before the

primary judge and the application for leave to appeal from the primary judge's decision.

63 The following observations may be made in relation to the above:

(1) Hive does not contend that the Promotion Agreement has been suspended or terminated;

(2) Rebel seeks no monetary or declaratory relief against Emirat;

(3) Sanitarium seeks no monetary relief against Hive;

(4) Sanitarium's monetary claim against Emirat is made in the alternative to Rebel's monetary claim against Hive; and

(5) any cross-claim brought by Hive against Emirat would fall within the scope of the exclusive jurisdiction clause (cl 20) of the RTA.

Proceedings before the primary judge

64 At first instance, Sanitarium and Rebel (which were jointly represented despite being unrelated entities and having different contractual rights and obligations) led evidence to the effect that the likely cost of conducting the dispute in the Supreme Court of New South Wales would be in the order of $300,000 whereas the cost of conducting the same dispute in the High Court of England and Wales would be in the order of £462,000 to £662,000.

65 Hive's evidence was also to the effect that it would be expensive and onerous for Hive to litigate in England, and Hive made the (factually correct) point that the Promotion was solely conducted in Australia, was only open to Australian residents and was governed (as between Sanitarium, Rebel and Hive) by New South Wales law.

66 The contentions advanced on behalf of Rebel and Sanitarium were reasonably straightforward, and commenced with the fact that Rebel, not being party to the RTA, was not a party to the English exclusive jurisdiction clause contained within it. It was then submitted that the staying of proceedings against Emirat would fracture the litigation in the sense of generating a multiplicity of proceedings with the spectre of inconsistent findings where there was one overall transaction that gave rise to related issues arising out of the same underlying facts and a single commercial enterprise.

67 It was also submitted, as recorded by the primary judge at [30], that it would be:

> "… contrary to the interests of justice to force Sanitarium and Rebel to litigate in England, given that the Promotion Agreement was one for performance in this country, the relevant witnesses were citizens of this country, and that the costs of litigating in England were likely to be out of all proportion to the amount at stake (a factor to be contrasted … with the costs that would be incurred here)."

68 This last submission, at least insofar as it was made on behalf of Sanitarium as opposed to Rebel, sat most uncomfortably with Sanitarium's agreement to the English exclusive jurisdiction clause in the RTA, given that the matters relied upon were either known or capable of being known by it when the exclusive jurisdiction clause was entered into. This was not a matter lost on the extremely experienced primary judge.

69 As against the stance taken by Rebel, Sanitarium and Hive, the vanilla submission made on behalf of Emirat was that it had bargained for the exclusive jurisdiction of the English courts, and that the claims sought to be made against it fell squarely within the terms of that exclusive jurisdiction clause. As such, it was contended that effect should be given to that contractually negotiated bargain by dismissing or staying the proceedings against Emirat.

70 The primary judge acceded to Emirat's argument in a decision that was accepted by senior counsel for the applicants on the leave application to involve the exercise of a discretion. In reaching his decision, his Honour referred to the decision of the High Court in *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418; [1996] HCA 39 (**Akai**), the decision of this Court in *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196; 79 ACSR 383 (**Global Partners**), the decision of Allsop J (as his Honour then was) in *Incitec Ltd v Alkimos Shipping Corp* (2004) 138 FCR 496; [2004] FCA 698 (**Incitec**) and the decision of Brandon J (as his Lordship then was) in *The Eleftheria* [1970] P 94.

71 The essence of the primary judge's reasoning was as follows:

> "[41] So viewed, the fundamental question for decision on Emirat's application seems to me to come down to this: is the spectre of multiplicity and inconsistency, which is within the power of one out of four litigants to raise from the grave or dispel, a sufficient reason for depriving another litigant of the benefit of its contract against the remaining two litigants? In a sense, Rebel's position is that it can bring about the consequences of multiplicity and possible

inconsistency simply by proceeding with its action in this court against Hive alone. The risk that Rebel may do so is said to be a sufficient reason for overriding the strong inclination towards recognising Emirat's right to insist upon the benefit of its exclusive jurisdiction clause.

[42] The simple fact is that the parties, having documented their overall transaction in two separate contracts to which not all are parties and which contain inconsistent jurisdiction clauses, have created a situation where one or other, Emirat or Rebel, will suffer disadvantage. Emirat will suffer disadvantage if it is deprived of the benefit of the exclusive jurisdiction clause. Rebel will suffer disadvantage if, effectively for practical rather than legal reasons, it is constrained to continue with its litigation in the courts of England.

[43] The position of Sanitarium and Hive is, in my view, neutral in the analysis. It is neutral because each has bound itself, at least in respect of differences under the risk transfer agreement, to accept the exclusive jurisdiction of the courts of England.

[44] The issues cannot be divorced. As between Sanitarium and Rebel on one side and Hive on the other, a key issue will be Hive's entitlement to refuse to indemnify Rebel in circumstances where Emirat has refused to indemnify Hive. That will involve, necessarily, an analysis of the legal and factual justifications for Emirat's position. Exactly the same issues will be raised in the litigation between Sanitarium, Hive and Emirat. Something must give. Is it to be the commercial interest and contractual right of one of the litigants to maintain its exclusive jurisdiction clause? Or is it to be the commercial interest of another litigant to maintain its understandable desire to litigate in a more convenient and less expensive forum?

[45] So analysed, I do not think that the interest of Rebel in litigating in this court is a consideration of sufficient strength, or substance, so as to deprive Emirat of the benefit of its exclusive jurisdiction clause. Rebel must have known, when it signed the promotion agreement, that Emirat had agreed to underwrite Hive's obligation to indemnify Rebel for the value of vouchers that Rebel honoured. If Rebel chose not to investigate the terms on which that indemnity was offered, it can hardly complain because they are, in this one respect, unsatisfactory to it. And if Rebel did investigate, it can hardly complain if Emirat later insists on the observance of one of those terms.

[46] The facts with which I am concerned are substantially different to those with which Allsop J was concerned in Incitec. His Honour, having considered the relevant facts at some length, concluded at [66] that '[t]he balance is a fine one'. On the very different facts before me, the same could be said.

[47] In circumstances where the risk that is said to justify depriving one party to the litigation of the benefit of a contractual right that it enjoys against two of the three others can be either promoted or dispelled by the actions of the fourth, I do not feel inclined to say that the risk provides any sufficient justification for depriving a party of its contractual right."

Draft notice of appeal

72 Two substantive grounds are sought to be raised by Rebel and Sanitarium in their draft notice of appeal. They are that:

"1. In dismissing the proceedings as between the First Appellant and the Second Respondent on the basis of a foreign exclusive jurisdiction clause, the Primary Judge erred by:

a. imposing too high a test for the First Appellant to satisfy in order for the Court not to give effect to the exclusive foreign jurisdiction clause; and

b. fundamentally mistaking the facts by:

i. finding that the Second Appellant should have been aware of the terms of the Risk Transfer Agreement (to which it was not a party) and was, in effect, to blame and so should bear the risk of being required or forced to litigate in a foreign jurisdiction; and

ii. failing to find that it was the Second Respondent that was or should have been aware of the terms of the Promotion Agreement, having knowingly permitted its agent, Hive, to enter into a contractual agreement whereby there was an inevitable consequence that the Second Respondent could be dragged into litigation in NSW; and

c. failing to give effect to established principle that multiplicity of proceedings and the risk of inconsistent curial findings is to be avoided where possible and, in so failing, either allowing a multiplicity of proceedings, or in order to avoid multiplicity, forcing an innocent third party to the foreign exclusive jurisdiction clause (the Second Appellant) to litigate in a foreign jurisdiction when it never agreed to do so and has validly commenced proceedings in NSW.

2. Alternatively, the Primary Judge's decision to dismiss the proceedings as between the First Appellant and the Second Respondent was so unreasonable or unjust that it should be inferred that the discretion as to whether or not to dismiss or stay the proceedings as between First Appellant and the Second Respondent miscarried."

73 The principal focus in the course of oral submissions was on ground 1(c). Bearing in mind the discretionary and interlocutory nature of the decision the subject of the application for leave, that was entirely appropriate. The applicants recognised the difficulty of establishing ground 2 in light of the principles associated with *House v The King* (1936) 55 CLR 499; [1936] HCA 40 and ground 1(b)(ii), being expressed in terms of a failure to find certain facts, is problematic in circumstances when it is not apparent that a finding in these terms was sought from the primary judge: *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; [2008] HCA 42 at [120].

74 No argument was made in the present case that, at least where the stay application turns on the construction of multiple jurisdiction clauses, an appellate court should be more prepared to intervene or interfere with a first instance discretionary decision to grant a stay of proceedings than would be the case in relation to a stay based upon pure *forum non conveniens* style discretionary considerations: cf the discussion by Beatson LJ in *Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWCA Civ 437; [2015] 2 Lloyd's Rep 154 at [31]-[43] (**Trust Risk Group**); see also at [72]-[76] per Christopher Clarke LJ, and compare in the context of appellate review of a "clearly more appropriate forum" stay (or, in Australia, as per *Voth Manildra Four Mills Pty Ltd* (1990) 171 CLR 538, a "not clearly inappropriate forum" stay) *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5; [2013] 2 AC 337 at [69], [97]-[98] and [156].

Analysis

75 Whenever a dispute arises between parties based in different jurisdictions, or even between parties from the same jurisdiction but where the dispute has a connection with another jurisdiction, there is the scope for either jurisdiction to become involved in the resolution of that dispute, and, as such, the possibility arises of a multiplicity of suits between the same parties in relation to, or arising out of, the same dispute. It is this very possibility that often leads commercial parties to make provision in their contractual arrangements for the courts of a particular nominated forum to have exclusive jurisdiction to resolve disputes arising out of, or having a connection with, the parties' contract. Such a forum may be neutral or, as was the case with cl 20 of the RTA in the present matter (see [50 Ref3560539] above), the "home" forum of one of the parties.

76 It is scarcely surprising that common law courts have traditionally supported such arrangements by manifesting a strong disposition towards the enforcement of such clauses whilst never accepting that private parties can "oust" the court's jurisdiction by such agreements. In Australia, this approach is based upon a series of decisions of the High Court (see *Huddart Parker Ltd v The Ship "Mill Hill"* (1950) 81 CLR 502; [1950] HCA 43 (**Huddart Parker**); *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577; [1954] HCA 62; *Akai* at 427-9 and 445), and a similar robust approach to the

enforcement of such clauses is readily discernible in other jurisdictions, at least where such clauses are between commercial parties dealing with each other at arm's length: see, for example, *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425 (**Donohue v Armco**) (England); *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] SGCA 65 at [112] (**Vinmar**) (Singapore); *Pompey Industrie v ECU-Line NV* [2003] 1 SCR 450 (Canada); *M/S Bremen v Zapata Off-Shore Co*, 407 US 1 (1972) (United States); *Kidd v van Heeren* [1998] 1 NZLR 324 (New Zealand). (A somewhat less robust approach to the enforcement of such clauses in the context of consumer contracts has developed in Canada: *Douez v Facebook Inc* [2017] 1 SCR 751).

77 Where a commercial dispute only involves contracting parties, respect for party autonomy and holding parties to their bargain ("*pacta sunt servanda*") will usually result in courts giving effect to exclusive jurisdiction agreements either by staying or restraining (by anti-suit injunction) proceedings commenced in a forum other than that nominated in the exclusive jurisdiction clause or agreement: in addition to the cases referred to in the previous paragraph, see *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection & Indemnity Association Ltd* (1997) 41 NSWLR 559 for an example of the grant of a stay of New South Wales proceedings where proceedings were commenced in the face of a foreign exclusive jurisdiction clause; for an example of an anti-suit injunction being granted to restrain a party from proceeding abroad in the face of a local exclusive jurisdiction clause, see *The Angelic Grace* [1995] 1 Lloyd's Rep 87; and see generally Alex Mills, *Party Autonomy in Private International Law* (2018, Cambridge University Press); Peter Nygh, *Autonomy in International Contracts* (1999, Oxford University Press).

78 The case law discloses not so much a "test" for or governing the exercise of discretion in this area but rather an approach which begins with a "firm disposition in favour of maintaining [the] bargain unless strong reasons be adduced against a stay": *Akai* at 445. This has been described as a "prima facie position". In *Donohue v Armco* at [25], Lord Bingham said that:

> "Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive

> jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause."

79 In *Global Partners*, Spigelman CJ observed (at [89]) that:

> "The kinds of considerations which may lead to the prima facie position being overturned have been frequently expressed in forceful words of equivalent import such as:
>
> > 'A strong bias in favour' (*Huddart Parker v The Ship "Mill Hill"*, supra at 509).
> >
> > 'Strong reasons' *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 259 per Gaudron J; *Akai v The People's Insurance Co* supra at 429 per Dawson and McHugh JJ and at 445 per Toohey, Gaudron and Gummow JJ.
> >
> > 'Strong cause' *The Eleftheria* supra at 99.
> >
> > 'Substantial grounds' *FAI v Ocean Marine Mutual* supra at 569; *Incitec v Alkimo Shipping Corp* supra at [42].
> >
> > 'Strong countervailing circumstances' *Incitec v Alkimo Shipping Corp* supra at [43]."

80 The relatively straightforward nature of enforcement of such clauses by the remedy of a stay of proceedings or an anti-suit injunction becomes more complex in a number of different situations. One is where the party commencing proceedings in the face of an exclusive jurisdiction clause seeks to take advantage of what is or may be a mandatory law of the forum (*Akai* being a case in point where the *Insurance Contracts Act 1984* (Cth) was engaged; see also *Faxtech Pty Ltd v ITL Optronics Ltd* [2011] FCA 1320 where a claim under the *Trade Practices Act 1974* (Cth) was in issue). Another situation is where not all parties to the litigation are parties to the relevant exclusive jurisdiction clause (*Global Partners* and *Incitec* being examples of this phenomenon; see also *Mobis Parts Australia Pty Ltd v XL Insurance Co SE* [2016] NSWSC 1170 (**Mobis**); *Royal Bank of Scotland plc v Babcock & Brown DIF III Global Co-Investment Fund LP* [2017] VSCA 138 (**Royal Bank of Scotland**); V Black and SGA Pitel, 'Forum-Selection Clauses: Beyond the Contracting Parties' (2016) 12 *Journal of Private International Law* 26). As has already been noted, the present case is a further example of this second type of case.

81 In such cases, two very powerful policy considerations may be in play and, depending on the facts, in tension. They are, on the one hand, the desire to and importance of holding commercial parties to their bargain, and, on the

other hand, trying to ensure that all aspects of a dispute between all parties (including, relevantly, non-contracting parties) be resolved in one place at the one time, the rationale for this being not only judicial "tidiness" and "efficiency" but, perhaps more profoundly, the high desirability of minimising the possibility or prospect of different courts reaching different decisions (whether as to the facts or the law or both) in relation to the same dispute, a consequence apt to undermine confidence in the rule of law were it to materialise.

82 These competing policy considerations loomed large in the decision of Allsop J in *Incitec*. The second of the policy concerns I have identified above was characterised by his Honour, in the context of a review of a number English decisions, as "the deep and strong antipathy of courts for the promotion of circumstances allowing for inconsistent curial approaches to the same dispute": at [53]. His Honour also referred to the then recent decision of the House of Lords in *Donohue v Armco*. That case concerned the propriety of the grant of an anti-suit injunction to give effect to an English exclusive jurisdiction clause in circumstances where the consequence of that injunction being granted, in the context of a multi-party dispute, would have been to generate litigation both in England and New York, New York proceedings having been commenced first and involving defendants who were not party to the English exclusive jurisdiction clause the enforcement of which was sought to be achieved through the mechanism of an anti-suit injunction.

83 Lord Bingham (with whom Lords Mackay, Nicholls and Hobhouse agreed) observed (at [33]-[34]) that:

> "The crucial question is whether, on the fact of this case, the Armco companies can show strong reasons why the court should displace Mr Donohue's clear prima facie entitlement [to an anti-suit injunction]. If strong reasons are to be found (and the need for strong reasons is underlined in this case by the potential injustice to Mr Donohue, already noted, if effect is not given to the exclusive jurisdiction clauses) they must lie in the prospect, if an injunction is granted, of litigation between the Armco companies on one side and Mr Donohue and the PCCs on the other continuing partly in England and partly in New York. *What weight should be given to that consideration in the circumstances of this case?*
>
> I am driven to conclude that *great weight* should be given to it. The Armco companies contend that they were the victims of a fraudulent conspiracy perpetrated by Messrs Donohue, Atkins, Rossi and Stinson. Determination of the truth or falsity of that allegation lies at the heart of the dispute concerning the transfer agreements and the sale and purchase agreement. It will of

> course be necessary for any court making that determination to consider any contemporary documentation and any undisputed evidence of what was said, done or known. But also, and crucially, it will be necessary for any such court to form a judgment on the honesty and motives of the four alleged conspirators. It would not seem conceivable, on the Armco case, that some of the four were guilty of the nefarious conduct alleged against them and others not. It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice." (Emphasis added)

84 His Lordship concluded (at [36]) that:

> "… the ends of justice would be best served by a single composite trial in the only forum in which a single composite trial can be procured, which is New York, and accordingly I find strong reasons for not giving effect to the exclusive jurisdiction clause in favour of Mr Donohue. In New York proceedings Mr Donohue will be entitled to claim that the sale and purchase agreement is governed by English law. And Lord Grabiner, representing Armco, has accepted that Armco's breach of contract in suing elsewhere than in the contractual forum could found a claim by Mr Donohue for any damage he has suffered as a result. The qualification is that he should be protected against liability under the RICO claims made against him because of the obvious injustice to him which such liability would in the circumstances involve."

85 This decision has been explained as having been made on the basis that there was no other way to prevent an unjustifiable fragmentation of the litigation: Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (2008, Oxford University Press) at [6.67]. Professor Briggs observed that "if this meant that a non-contractual tail was being allowed to wag the contractual dog, that was simply a consequence of the doctrine of privity and its inability to impose burdens on strangers to the agreement". In the United States, the purity of privity of contract has been attenuated in this area by the emergence of the "closely-related" entity doctrine (see, for example, *Hugel v Corp of Lloyd's,* 999 F 2d 206 (7th Cir, 1993); *Marano Enterprises of Kansas v Z-Teca Restaurants LP,* 254 F 3d 753 (8th Cir, 2001); *ComJet Aviation Management LLC v Aviation Investors Holdings Ltd* 303 AD 2d 272 (NY App Div, 2003); *Freeford Ltd v Pendleton,* 53 AD 3d 32 (NY App Div, 2008); *Aguas Lenders Recovery Group LLC v Suez SA,* 585 F 3d 696 (2nd Cir, 2009); *Adams v Raintree Vacation Exchange LLC,* 702 F 3d 436 (7th Cir, 2012)) which has been considered in Canada (see *Aldo Group Inc v Moneris Solutions Corp* (2013) 118 OR (3d) 81 at [50] (Ontario Court of Appeal)) and resonances of which may be discernible

in the decision of Spigelman CJ in *Global Partners* at [79] and, in particular, in his Honour's reference to certain "non-parties" to the relevant agreement who were "so closely connected" with its implementation that they should have the benefit and burden of the exclusive jurisdiction clause.

86 Four observations may be made in relation to the passages extracted above from Lord Bingham's speech in *Donohue v Armco*. First, the concern to minimise or avoid a multiplicity of suits was expressed to be a matter of "weight" in the exercise of the Court's discretion. True it is that the discretion involved in that case related to the grant of an anti-suit injunction and not a stay of proceedings but, subject only perhaps to considerations of comity in this context (cf *The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 96 per Leggatt LJ; at 96 per Millett LJ), I see no relevant point of distinction in that regard, his Lordship's reference to the need to show "strong reasons" not to enforce the anti-suit injunction echoing the language of Sir Owen Dixon in *Huddart Parker* at 508-509 (and see the various formulations collected by Spigelman CJ in *Global Partners* set out in [79] above). Secondly, his Lordship's reference in the final sentence of [36] of his speech to the "qualification" to his exercise of discretion not to grant the injunction translated into an undertaking being extracted from the Armco parties not to enforce against Mr Donohue and two other parties any multiple or punitive damages awards whether pursuant to the Federal Racketeer Influenced and Corrupt Organization Act (18 USC §1962) or awarded at common law. This was the price for the dissolution of the anti-suit injunction that had been granted in the Court of Appeal. Thirdly, the result of the decision of the House of Lords did not in fact guarantee a single set of proceedings insofar as it contemplated the possibility of a subsequent claim in England by Mr Donohue for damages for breach of the exclusive jurisdiction clause. Fourthly, the nature of the dispute in *Donohue v Armco* was far more complex and the number of parties far greater than in the present case before this Court.

87 Whereas *Donohue v Armco* involved a decision *not to grant* an anti-suit injunction in order *not* to fracture or fragment litigation in a complex transnational dispute, some 15 years earlier, in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 (**Aerospatiale**), the Privy Council

granted an anti-suit injunction with a view to corralling all parties to a dispute into one forum in circumstances where the continuation of an aspect of the litigation in Texas as opposed to Brunei, where proceedings were on foot, would work oppressive consequences upon the party seeking anti-suit relief.

88 The decision of the High Court of Australia in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; [1997] HCA 33 (**CSR**) to stay New South Wales proceedings when there were concurrent proceedings on foot in New Jersey (to which Cigna Corporation was a party, it not being a party to the New South Wales proceedings, and which involved a claim under the Sherman Act (15 USC §1), which was not in issue in the New South Wales proceedings) may also be seen as being actuated, in part at least, by a desire to avoid a multiplicity of suits. So much can be seen by the focus on "the controversy as a whole" (at 400 and 401) and the Court's reference (at 399) to its earlier decision in *Henry v Henry* (1996) 185 CLR 571 at 591; [1996] HCA 51.

89 Although none of *Aerospatiale*, *CSR* or *Henry v Henry* involved exclusive jurisdiction clauses, these cases all highlight the law's concern to avoid or minimise the prospect of concurrent proceedings. It should be noted, however, that just as the decision of the House of Lords in *Donohue v Armco* did not foreclose the possibility of some future litigation in England (see [86] above), the stay of New South Wales proceedings ordered by the High Court in *CSR* was expressly stated to be "pending the outcome of the US proceedings" (at 402). And, even with the best will in the world, it will not always be possible to achieve a situation where parallel or concurrent or overlapping proceedings (or the possibility thereof) can be avoided. The decision of the Full Court of the Federal Court in *TS Production LLC v Drew Pictures Pty Ltd* (2008) 172 FCR 433 is a case in point, as is that Court's decision in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1, where the existence of an arbitration clause in a charterparty and the requirements for a mandatory stay under s 7(2) of the *International Arbitration Act 1974* (Cth) of any claim falling within the scope of that clause meant that an aspect of the overall dispute between two of the three parties had to be separately determined.

90 In cases such as the present, when not all parties to the proceedings are party to an exclusive jurisdiction clause, the court should not, in my view, start with a prima facie disposition in favour of a stay of proceedings, which is the default starting point where the litigation only involves parties who are bound by the exclusive jurisdiction clause (cf the various formulations collated by Spigelman CJ in *Global Partners* set out at [79] above). In the passage from Lord Bingham's speech in *Donohue v Armco,* which I have cited at [78] above, his Lordship was careful to qualify his observations with the phrase "and the interests of other parties are not involved". The importance of holding parties to their bargain is a very powerful consideration but is not one that should be elevated or given some special status in the hierarchy of factors where not all parties to the dispute are parties to the exclusive jurisdiction clause.

91 The decision of the primary judge in the present case involved, as Rebel and Sanitarium accept, the exercise of a judicial discretion. His Honour was alive to and indeed adverted to the desirability of avoiding a multiplicity of suits. His reasoning made it plain that he gave great weight in his deliberations to that consideration, but the case law does not require that a stay of proceedings always be granted, nor that a stay be granted presumptively, where there is the possibility of a multiplicity of proceedings or even of inconsistent decisions, as undesirable as that possibility may be. That would be to apply "too broad and indiscriminate a brush" to the "parties' careful selection of palette": *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 Lloyd's Rep 767 at 777 per Rix J (as his Lordship then was).

92 The discretion is ultimately to be exercised by reference to the facts of the particular case and a careful consideration, in light of those facts, of the nature and complexity of the matters in issue, the degree of risk of inconsistent decisions and the weight to be attributed to that possibility as against the weight to be attributed to the consequences of one party losing the real benefit of an exclusive jurisdiction clause for which it bargained and secured as part of the overall commercial arrangement between the parties.

93 How that balance is struck will often be a delicate and difficult matter as both of the broad policy considerations referred to in [81_Ref3812064] above are

powerful. Those considerations are not such, however, that one will always or necessarily trump the other. Neither is determinative: *Global Partners* at [84]. Everything will depend upon the facts and circumstances of the particular case. I have already observed that the facts and nature of the dispute in the present case are far less complex than those in *Donohue v Armco*. Further, as Beatson LJ observed in *Trust Risk Group* at [49]:

> "There may be a difference between a complex series of agreements about a single transaction or enabling particular types of transactions, and the situation in which there is a single contract creating a relationship which is followed by a later contract embodying a subsequent agreement about the relationship."

94 The court's discretionary judgment may also be influenced by the particular construction given in a particular case to the competing jurisdiction clauses, where more than one is potentially in play: see, for example, *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998; [2011] 1 Lloyd's Rep 106 at [42]-[49] per Thomas LJ, a case that involved no less than eight interrelated agreements; *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585; [2009] 2 Lloyd's Rep 272 per Collins LJ (as his Lordship then was). Equally, where there is only one exclusive jurisdiction clause but not all parties to the litigation are parties to it, the nature of their corporate connection with a party who is may dictate that the forum nominated in the exclusive jurisdiction clause is or becomes that in which all aspects of the dispute should be heard. This was the result brought about by the stay of New South Wales proceedings granted in *Global Partners*. The later decision of the Victorian Court of Appeal in *Royal Bank of Scotland* illustrates the verity, however, that in this area, each case and each exercise of discretion involved necessarily turns upon the individual facts of the particular case: see especially at [136] per Whelan JA.

95 In the present case, there is no guarantee that there will be a multiplicity of proceedings. If Rebel succeeds in its claim against Hive, there will be no necessity for Sanitarium to pursue Emirat in England (unless Hive is not sufficiently solvent to satisfy the judgment debt). If Rebel fails in its claim against Hive, it has no cause of action against Emirat (or at least no cause of action that it has thus far articulated) and thus no reason to complain about the proceedings against Emirat being stayed. Further, any failure by Rebel against Hive will not preclude Sanitarium from pursuing Emirat in England under the

RTA, and it is difficult to see what benefit there is to Sanitarium in taking an active role in the New South Wales proceedings as it seeks no monetary relief against Hive.

96 The refusal to grant a stay of the New South Wales proceedings against Emirat would also not necessarily have brought about a situation in which all aspects of the dispute between all parties would be resolved in the one forum, *viz* New South Wales. That is because, although this Court would have jurisdiction in respect of the claims brought against Emirat pursuant to Schedule 6 of the UCPR, there would be no guarantee that Emirat would participate in such proceedings and, if it did not, any money judgment obtained against it would probably not be enforceable in the United Kingdom by reason of s 32 of the *Civil Jurisdiction and Judgments Act 1982* (UK), headed "Overseas judgments given in proceedings brought in breach of agreement for settlement of disputes", and which provides:

> "(1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if –
>
> (a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and
>
> (b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and
>
> (c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court.
>
> (2) Subsection (1) does not apply where the agreement referred to in paragraph (a) of that subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given.
>
> (3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2)."

97 Further, notwithstanding the approach taken in *Donohue v Armco*, there could not be any guarantee that an English court would not grant an anti-suit injunction restraining Sanitarium from continuing any claim in New South Wales against Emirat even if this Court granted leave to appeal and upheld the appeal and lifted the stay obtained by Emirat in the proceedings below. The decision of Thomas J (as his Lordship then was) in *Akai Pty Ltd v People's*

Insurance Co Ltd [1998] 1 Lloyd's Rep 90 is a striking precedent for that outcome, the anti-suit injunction granted in that case restraining Akai Pty Ltd from continuing with its proceedings in New South Wales, notwithstanding that the High Court of Australia had lifted the stay of proceedings that the People's Insurance Company had originally obtained.

98 In my opinion, the approach of the primary judge involved the careful exercise of the discretion he undoubtedly possessed, and was not attended by any error in principle.

99 I should also add that I do not consider that the decision of the primary judge gives rise to any injustice to Rebel or that the primary judge should be taken to have "forc[ed] an innocent third party to the foreign exclusive jurisdiction clause … to litigate in a foreign jurisdiction when it never agreed to do so and has validly commenced proceedings in [New South Wales]", to pick up the language of the draft notice of appeal (see [72 _Ref3881975] above). The only monetary remedy that Rebel seeks in the proceedings is against Hive, and that claim remains on foot and available to Rebel in New South Wales. It is governed by New South Wales law, it is capable of being dealt with in New South Wales and, given the expeditious rate of disposition of matters in the Supreme Court's Commercial List, will be heard and determined within a short period of time after the parties are ready for hearing. Further, the only declaratory relief that is or could be sought by Rebel is in relation to the Promotion Agreement. That claim, too, is not affected by the stay of proceedings against Emirat.

100 If, notwithstanding these matters, Rebel (as opposed to Sanitarium) still considers the possibility that an English court may differ from a New South Wales court as to whether Emirat was entitled to terminate the RTA and is genuinely concerned about that possibility, as the primary judge observed, it lies in its power to avoid that possibility by bringing its claim in England. But in no sense, as I have said, is it being forced to do so.

101 Turning to Sanitarium, it ill behoves it (or Hive, as it did at first instance) to point to the geographical centre of gravity of the dispute in New South Wales, the likely preponderance of witnesses here (although, as with most commercial

disputes, its disposition is likely to be largely by reference to documents) or the relativities of cost of litigation in England as opposed to New South Wales in circumstances where each of Sanitarium and Hive had unambiguously agreed that, as between themselves and Emirat, all disputes arising out of or related to the RTA were to be heard exclusively in the English courts. The same point was made by Allsop J in *Incitec* where his Honour said (at [49]) that:

> "… the extent that the operation of the exclusive jurisdiction clause causes financial or forensic inconvenience to the party which bound itself to the clause, that, of itself, is to be seen as only the direct consequence of the bargain entered and, generally, can be set to one side."

102 Similar observations were made by Waller J (as his Lordship then was) in *British Aerospace plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368 at 376 (**British Aerospace**), who said:

> "It seems to me on the language of the clause that I am considering here, it simply should not be open to DHC to start arguing about the relative merits of fighting an action in Texas as compared with fighting an action in London, where the factors relied on would have been eminently foreseeable at the time that they entered into the contract … it seems to me that the inconvenience for witnesses, the location of the documents, the timing of a trial, and all such like matters, are aspects which they are simply precluded from raising."

103 These observations, with which I agree, diverge to a certain extent from Brandon J's identification in *The Eleftheria* at 100 of factors of geographical connection, relative convenience and expense of trial and governing law as relevant considerations in cases involving the enforcement of exclusive jurisdiction clauses. To the extent of that difference, the views expressed by Allsop J in *Incitec* and Waller J in *British Aerospace* are, in my opinion, to be preferred. See also *Global Partners* at [91]; *Mobis* at [37]; *Euromark Ltd v Smash Enterprises Pty Ltd* [2013] EWHC 1627 at [17]; *Vinmar* at [72] and [112].

Conclusion

104 It was open to the primary judge to grant a partial stay of proceedings on Emirat's application and to refuse Rebel and Sanitarium leave to proceed against Emirat in the face of an exclusive jurisdiction clause to which Sanitarium was a party and of which Rebel must have been aware at least immediately prior to the commencement of proceedings (if not earlier) as Rebel

and Sanitarium were represented by the same firm of solicitors. No error of principle or relevant injustice has been identified.

105 Because the issues that the current application has presented are of some importance, I would grant leave to appeal but dismiss the appeal with costs.

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