High Court of Australia Transcripts

Society of Lloyd's v White M101/1999 (11 February 2000)

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry

Melbourne No M101 of 1999

B e t w e e n -

THE SOCIETY OF LLOYD'S

Applicant

and

PETER EVERETT WHITE

Respondent

Application for special leave to appeal

McHUGH J

KIRBY J

CALLINAN J

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON FRIDAY, 11 FEBRUARY 2000, AT 9.02 AM

MR A.J. MYERS, QC: May it please the Court, I appear with, **MR P.J. JOPLING, QC** and **DR I.J. HARDINGHAM, QC**, on behalf of the applicant. (instructed by Freehill Hollingdale & Page)

MR G.A.A. NETTLE, QC: May it please the Court, I appear with my learned friend, **MR M.K. MOSHINSKY**, for the respondent. (instructed by Foster Hart)

McHUGH J: Yes, Mr Myers.

KIRBY J: I was so anxious to hear you, Mr Myers, there was not even time for the Queen.

MR MYERS: Yes, well, there are probably two views about that. Your Honours, we say that the primary judge in this matter plainly erred in refusing a stay. This was a case in which there was a forum selection clause in the contract. The proper law of the agreement was the law of England. It was so agreed by a clause for the choice of the proper law and, objectively speaking, the connections with England were overwhelming. There was an action commenced by Mr White in England before he commenced the action in Australia - - -

KIRBY J: Are you not addressing us as you would the primary judge? I must say, if I had been the primary judge, I would have found that very persuasive but you are now at the third level.

MR MYERS: Yes, we say that the primary judge was plainly wrong, manifestly wrong. He took into account wrong considerations or did not give sufficient weight to the correct considerations which one must judge in the end by his conclusion. The Court of Appeal said that there were incidental errors which must mean there were errors in the primary judge's reasoning but there was no manifest injustice. We say that this is such a plain case. Now, undoubtedly, it is unusual to appeal to this Court, or to seek leave to appeal to this Court, from a refusal of leave in a Court of Appeal of a State.

KIRBY J: It certainly is. I do not remember it in my four years.

MR MYERS: Well, there is one case that is somewhat in point.

KIRBY J: You have found a case?

MR MYERS: *CSR v Cigna*, which is one of the cases on the list is exactly this sort of case and your Honours gave special leave and eventually decided the case in favour of the applicant.

McHUGH J: *Grant v Downs* was a well known - - -

MR MYERS: *Grant v Downs* is another case.

KIRBY J: Once a decade.

MR MYERS: Well, I have the disadvantage of being on the receiving end of a case concerning takeovers, which I cannot now remember, from South Australia about 10 or 11 years ago in which - - -

KIRBY J: That was that decade.

MR MYERS: That was last century, your Honour, yes, last millennium.

McHUGH J: Some of us still think the century still exists.

MR MYERS: Thank you, your Honour. Now, we say, in any event, the trial judge was manifestly wrong. In the end he gave undue weight to the consideration that to give effect to the exclusive jurisdiction clause would likely prevent Mr White invoking the *Trade Practices Act* and prescribed interest provisions of the Companies' legislation. That, indeed, seems to be the only thing to which he gave weight because, absent that, the decision would have been, undoubtedly, the other way. In any of these cases, obviously the law of the selected forum may be somewhat different from the local law, but that does not justify the court in taking the parochial view that because Australian causes of action are not available then a stay should not be granted.

Of more significance might be whether the law of the selected forum is manifestly unfair. Well, English law is not, in this respect or, one would say, generally. The processes in England are processes in which one can have some confidence. The other matter is that the remedies that Mr White is seeking here, the setting aside of the agreements and damages, are the remedies that he is seeking in the *Jaffray* proceedings in England. It might be that there are some additional causes of action but the remedies that are sought are the same and the factual substratum is substantially the same.

His Honour failed to give any, or any sufficient weight to the circumstance that Mr White's agreement with Lloyd's was an agreement for an international business transaction. The agreement was to enable Mr White to participate in an international insurance market which is conducted in London according to English law. The market was regulated by Lloyd's by English statutory authority. The market could only effectively operate as between Lloyd's and its members and as between underwriters, such as Mr White, and insured persons if a single system of laws regulated the market.

His Honour referred to some United States decisions but apparently they did not carry any weight with him, yet those decisions illustrate the proper approach. In the United States, the Supreme Court has articulated a clear policy of supporting international transactions by giving effect to forum selection clauses in agreements which have an international aspect. That was done, primarily, in a case called *The Bremen* and in subsequent decisions.

KIRBY J: Would you lose that argument if you were refused special leave? You could still maintain that

argument, could you not, at the trial?

MR MYERS: Well, one would effectively lose it because there would be a trial in Australia.

KIRBY J: Yes, but you could contend, could you not, at the trial, that the exclusion of jurisdiction was still operating?

MR MYERS: One could say that the forum selection clause should be given effect to at the trial and then there would, presumably, be the same interlocutory ruling and then one would be faced with the difficulty - - -

KIRBY J: It would remain in being for you to contest after the final order. The final order might be in your favour on the merits of the case.

MR MYERS: But, your Honour, the question is, what is going to be the forum for the trial? If the trial - - -

KIRBY J: I realise that, and I must say again, had I been the primary judge, I would have found this a very compelling argument but we are now at the second level. The Court of Appeal has refused to intervene and you have the additional problem of getting us involved in an interlocutory matter on a practice question.

MR MYERS: Well, one understands that. But it is an important question. It is a very important question. May I just focus on what has happened in the United States? No less than seven of the Courts of Appeal of United States federal circuits have considered this very issue in relation to Lloyd's. Every single one has decided in favour of Lloyd's.

McHUGH J: Yes, but do they use the clearly inappropriate forum test?

MR MYERS: No, they do not, but this is a question of giving effect to the forum selection clause, your Honour, not a general consideration of whether there should be a stay or not and the clearly inappropriate forum test is apt for that more general question. Here there is a forum selection clause that the parties have chosen to put in their agreement and one of the parties starts an action in the appropriate forum, Mr White, in England, and then he starts a proceeding in Australia.

KIRBY J: Well, he starts a proceeding - you put it that way and make it vivid but, in fact, he is defending himself in both jurisdictions. He is defending himself in Australia, in Victoria, to an action brought by the Commonwealth Bank.

MR MYERS: But the proceeding against Lloyd's is a proceeding that he has commenced here. He can succeed or not against the Commonwealth Bank and if he does not succeed, if he succeeds in London, that will increase his damages.

CALLINAN J: Mr Myers, has there been legislation in England since some of the events, the subject matter of the claim by the respondent?

MR MYERS: There has been legislation but I do not think it materially affects the issue. There was a new *Lloyd's Act* in 1982 which gave some additional regulatory powers to Lloyd's but it does not bear directly upon these issues.

McHUGH J: It does to this extent, does it not, that under section 14(3) of the 1982 Act you cannot maintain an action for negligent misrepresentation against Lloyd's?

MR MYERS: Against Lloyd's? Yes, certainly, but his Honour said that if that was the only issue, he would decide it the other way.

McHUGH J: Yes.

MR MYERS: It is quite legitimate. We are familiar with provisions of legislation here which says you can only sue a regulator if the regulator acts in bad faith.

McHUGH J: Yes.

CALLINAN J: Yes, but legislation that has retrospective effect which that legislation has, does it not, or purports to have, might be different? Is that right? It speaks retrospectively, does it not, that English Act?

MR MYERS: I simply do not know the answer to that. It speaks - I would not say that that was clear, your Honour.

McHUGH J: I am not sure that it is to apply because did not the judge say that the claims under the English Misrepresentation Act 1967 apply to representations made before the 1982 Act?

MR MYERS: Yes, he did. Yes, your Honour is right. In any event, what we point out is the extraordinary contrast between the parochial approach that has been adopted in Victoria and the approach that has been adopted in the United States which is apt to properly uphold international transactions.

McHUGH J: But your argument does come very close, Mr Myers, to saying, in effect, that as a matter of law the decision should have gone in your favour at first instance. Not in legal theory but it comes very close to it.

MR MYERS: Well, we say that it is so bad that it could not be upheld by a reasonable or correct, or proper, application of principle. Certainly, we say that, and we say that if you look at the judge's reasoning, the only thing upon which his Honour seems to have focussed is the existence of these two separate causes of action.

McHUGH J: He laid some weight on the fact that the respondent claimed that the jurisdiction clause itself was part of, in effect, a fraud or, at least, misrepresentation or misleading conduct.

MR MYERS: Yes, but that, itself, cannot be the answer because the forum selection clauses could be knocked out by simply pleading, "We object to the forum selection clause."

McHUGH J: I know, it cannot be a complete answer but - - -

MR MYERS: If one has to deal with that, there would have to be some prima facie evidence or something of that kind.

KIRBY J: There is a mention of it. How many of these sorts of cases are there hovering in the wings? I think there is said to be six.

MR MYERS: We believe six or seven in Australia.

KIRBY J: Are they all of a like character to this - - -

MR MYERS: Yes, they are, we believe. We do not know. The proceedings have not been served. It is believed there are six or seven writs issued in New South Wales that have not been served and it is not possible to inspect the writs in New South Wales as it is in this State, so one does not know. Now, this Court has not really grappled with a case like this, as the United States Supreme Court has.

McHUGH J: I know, but we have dealt with these issues in cases like *Henry v Henry*, in *Akai v People's Insurance Company* and *CSR v Cigna*.

MR MYERS: *Akai* is the closest, your Honour, but the facts there are very different. The law was very different. There were two sections of the Act which informed, influenced the majority in their decision. There was section 8 of the statute in *Akai* which avoided a choice of law clause which meant that in a case such as this the judge could not look to the choice of law clause, he would have to look at the objective circumstances and treat the matter as though there were no choice of law clause.

Secondly, section 52 in the *Akai Case* avoided exclusory provisions. Now, there was an issue as to the construction of a clause such as section 52. There is no such section that is relevant in these proceedings. There is a section in the *Trade Practices Act*, section 68, which is in much the same terms, almost identical terms, as section 52 in *Akai*, but it does not relate to the sections of the *Trade Practices Act* that have been put in issue by Mr White. So, the legal substratum considered in *Akai*, and which was the basis of the majority's decision, is clearly not present in this case and, secondly, the facts in *Akai* were quite different. Every connection, objectively speaking, of the *Akai Case*, was with New South Wales. In this case, one might say that none of the connections are with Australia except that Mr White lives here and it is alleged that - - -

McHUGH J: Some of the representations - - -

MR MYERS: It is alleged that some of the representations made by Mr Donner were made here. But his Honour found that Mr Donner was not an agent of Lloyd's so that is irrelevant and it is obvious that Mr Donner is not an agent of Lloyd's. Mr Donner is a managing agent. He is not representative of the Society of Lloyd's which is the regulatory body.

KIRBY J: I think your point about the United States courts is quite telling because the American courts are not slow in their long-armed reach of American law and - - -

MR MYERS: Precisely, and *Haynsworth* and *Bremen*, and so on, I cannot read it to your Honours, but they refer to public policy considerations that are necessary to be given effect to, to uphold international trade, to uphold agreements and so on, and they say, "We cannot be parochial". The United States courts say it, even in the face of an anti-waiver provision in the 1933 Securities Law, so they would have reached a different decision from the majority in *Akai*.

KIRBY J: *Akai* was definitely right.

MR MYERS: But, in any event, I do not have to deal with that or say anything about it. But the United States courts would have reached a different conclusion and, apparently, those cases were not referred to in *Akai*. I cannot see them adverted to in the reasons for judgment and quite clearly the United States - - -

McHUGH J: I do not think Justice Dawson and I - we dissented. I do not think we referred to them.

KIRBY J: *Akai* upheld my dissenting opinion in the Court of Appeal.

MR MYERS: Yes, it did, your Honour, and, well - - -

KIRBY J: The less said the better, I think. What about Canada and New Zealand?

MR MYERS: In any event, I mean, we make no bones about it. We say that the tendency of *Akai*, you know, what was the underlying considerations that informed the majority decision are probably wrong. But we do not need to say that to say that the Court should reconsider or should consider this matter because this sort of case was not considered in *Akai* where there was special legislation.

KIRBY J: Are there any New Zealand or Canadian cases of an analogous kind?

MR MYERS: Not that we could find that are really in point but the United States cases are so in point and there are seven Federal Courts of Appeal - - -

KIRBY J: They would all be following each other. Presumably, they would be following each other although the circuits do not always do that.

MR MYERS: No, they do not always do that. In the California Circuit, at first, there was a decision in favour of the Lloyd's member and against Lloyd's. This is in a case of *Roberts*, I think it is, and later the court convened, as it can there, en banc, and 11 justices overturned the decision of three originally in favour of the member and against Lloyd's. Your Honours, we say that the matter is of general importance really for the reasons that I have adverted to. The matter of the effect of choice of forum clauses in international agreements is important to international transactions to which many Australians may be parties. One can consider the present case. One may suppose that Australians would not have been able to be members of Lloyd's if Lloyd's had believed that Australian courts would not give effect to clause 2.2.

KIRBY J: Tell me this, what would we be adding to the principles in *CSR*? I mean, I am very sympathetic to the notion of Australian law being in harmony on such matters with the developments of international principle, but what would we be adding to *CSR*?

MR MYERS: *CSR* did not deal with a forum selection clause. It was dealing with just a lis alibi pendens sort of issue.

KIRBY J: So *Akai* is the closest.

MR MYERS: I am focussing, for these purposes, my remarks about the effect of forum selection clauses.

McHUGH J: Yes, but what is the proposition that you would urge on this Court to lay down which might have some binding effect?

MR MYERS: A forum selection clause should be given effect to unless the forum selection clause was produced by fraud or the party seeking to escape enforcement will, for all practical purposes, be deprived of his day in court or there is a fundamental unfairness in the chosen law.

KIRBY J: You would have to add, or unless it, in its terms, is fundamentally inconsistent in Australia with the will of the Parliament.

MR MYERS: With a strong public policy of Australia, yes, I would. That would be the fourth condition.

McHUGH J: Why was not the judge entitled in this case to take the view that the *Trade Practices Act* seeking, as it does, to regulate commercial morality in this country, is a powerful factor to be weighed against the exclusive jurisdiction clause?

MR MYERS: Because there is no provision in the *Trade Practices Act* avoiding a choice of law clause or a choice of forum clause, for relevant purposes.

McHUGH J: But there is a provision which talks about false or misleading conduct in trade or commerce.

MR MYERS: But there will always be differences between the law of the forum. If one says what, with respect, your Honour is saying, you never give effect to a choice of law clause because - - -

McHUGH J: Yes, you may. It is a discretionary judgment. There cannot be, well, there seldom can be one right answer to a discretionary judgment issue. You are really urging on the Court to say there can only be one view open to this, about this case.

MR MYERS: What I am saying, in truth, is that in the circumstances of this case, you must say that the judge erred and he did not give sufficient weight to the policy of upholding forum selection clauses. If this sort of approach is to be taken, Australian courts are acting in a parochial way and they will be depriving Australians of the benefit of international transactions. May I add one other thing? There was exactly the contrary decision reached in 1994 in *Lloyd's v Williams*.

McHUGH J: I appreciate that. The judge distinguished the case. I am not sure whether he did but, anyway, your opponent certainly seems to distinguish it.

MR MYERS: There are differences.

McHUGH J: Yes.

MR MYERS: But we cannot really see the distinction. The *Corporations Law*, the trade practices law was considered, and an opposite result was reached.

McHUGH J: I appreciate that but if I might say so, with great respect, commercial lawyers often think there can only be one right answer to - - -

MR MYERS: Your Honour, I am not urging that there is only one right answer but it gets to a point where one must say that the answer that was given is manifestly wrong and if the lower courts are going to - courts at first instance are going to do this sort of thing, then we are in a lot of difficulty.

McHUGH J: No, but, at least as far as I am concerned, this decision is binding on nobody. On identical facts, it could come before another judge tomorrow in Victoria and would come to the opposite view.

KIRBY J: The realities are, though, that they would follow this decision as it has been passed upon by the Court of Appeal and by this Court, are they not?

MR MYERS: Yes, they are.

McHUGH J: I hope not.

MR MYERS: They are. If it please your Honours, my red light is well and truly on.

McHUGH J: Thank you, Mr Myers. Yes, Mr Nettle.

MR NETTLE: If the Court please, I have submitted that the application for leave should be refused really for the reason that there is no question of general public importance which arises. As the application is now prosecuted, the only questions which are put forward as said to be of general public importance are those identified by the applicant at page 163 of the application book. Might I invite your Honours' attentions to them in order to found the submission that both of those questions at the level of principle have already been decided by this Court in recent decisions.

KIRBY J: But it is said that - *Akai* is the closes case, obviously, and it is said that the statutory foundation is different. I must say that in my decision in *Akai* I was very much affected by the statutory provision of the *Insurance Contracts Act* - - -

MR NETTLE: May I, just before I depart from here, invite your Honours' attention to the next page. It is interesting for the fact that it contains the submission by the applicant - top of it - that section 14(3) of the Lloyd's Act does indeed preclude the prosecution of the claim in England other than one which is based upon fraud.

CALLINAN J: So that the 1982 Act, is it not - - -

MR NETTLE: That is certainly the contention of the applicant, namely, that the only cause of action which can successfully be prosecuted in England is one which is based upon fraud or lack of good faith.

CALLINAN J: What do you say about that contention?

MR NETTLE: Your Honour, I do not know what the answer is according to English law but the fact of the matter is that it is being contended by the applicant and, therefore, there is reason to suppose there is some probability that there cannot be prosecuted in England any action other than one which is based upon fraud.

McHUGH J: What do you say about the passage that appears in the judge's judgment at page 116, line 17, where he says:

Alternative claims are based on the English Misrepresentation Act 1967.....and on breach of duty of care prior to the commencement of the Lloyd's Act 1982.

MR NETTLE: Well, it is the other view which is open, namely, that there is no retrospective operation

in section 14(3) of the Lloyd's Act. But that does not dispose of the matter for the reason that, as your Honours may recall in the statement of claim, two sorts of representations are alleged: the original representations constituted of what Donner said back in 1980 and what Donner gave from Lloyds in the way of documents in 1980 and, subsequently, the continuing or later representations constituted to the flow of documentation directly from Lloyd's to White over the period 1982 to 1986 as a consequence of which he continued to write syndicates. So, a large part, if not even the whole of his claim, would appear to be barred otherwise than for frauds and misrepresentation in the United Kingdom.

KIRBY J: Presumably, all of these issues were argued out and six circuits of the United States Courts of Appeal have reached a different view. That is a very powerful argument in my thinking. If you could put it out of my mind, well, do so.

MR NETTLE: I will come to the American stuff in a moment but can I just say this to your Honour? The American federal decisions are based upon a federal Act which gives supremacy to the choice of jurisdiction clause. In State jurisdictions, as in California in *West*, a copy of which has been provided to the Court, the converse view has been reached consistently, as it were, with the line of principle taken in *Akai* that supremacy is to be given to the policy of the local statute - in that case prospectus provisions - which is not to be subverted by choice of jurisdiction clauses. Thus, in *West*, in the Californian court of the State Court of Appeal, stay was refused.

KIRBY J: But I thought we were told the court sat en banc to override that.

McHUGH J: No.

MR NETTLE: There has been no overriding of *West* in 1997. Your Honours have a copy of it.

McHUGH J: That is a decision of the Supreme Court of California, is it not?

MR NETTLE: Tab 16 of the book of authorities, a decision of the Californian State Court of Appeal - - -

KIRBY J: It seems to say it is.....because of federal legislation. That is the bottom line. You say it is the federal decision of - - -

MR NETTLE: And for the reasons given by the Californian State Court of Appeal as to why he is not bound to follow the federal decisions and should not.

McHUGH J: Did it go to the Supreme Court or was the decision - - -

MR NETTLE: This decision did not, your Honour.

McHUGH J: No.

MR NETTLE: It did not. May I particularly call your Honours' attention - - -

McHUGH J: I notice that the court distinguished *Roby* and *Bonny*.

MR NETTLE: Yes, quite, on the basis of the difference between the imperatives operating at the federal level and those which operated at State. Can I particularly draw your Honours' attention to page 14 of the reasons for judgment in the last full paragraph there:

Our review of these Supreme Court cases compels the conclusion that under federal law, forum selection may prevail in a conflict between competing important public policies; both forum selection and choice of law may prevail when there is no conflict with public policy; but choice of law may not prevail in a conflict with a strong public policy favoring the application of a specific statutory scheme.

Then, their Honours on the Court of Appeal, at page 15 in the first full paragraph beginning with "Drawing an analogy", express views which it is submitted, with respect, are wholly consistent with what was said by this Court in *Akai*. Namely, that:

The protection of its investors is a fundamental policy of this state, and by making the choice of foreign law void, the Legislature has deemed that California has a materially greater interest than -

forum selection.

McHUGH J: Yes, but you have not a section here which makes the choice of law clause void, have you?

MR NETTLE: Can I go directly to that point, your Honour? It is the one also raised by his Honour Justice Kirby. It is a distinction without a difference, it is submitted for this reason. The *Trade Practices Act*, like the prospectus provisions, operate regardless of whether there is a contractual provision purporting to provide that they do not. It is the policy of the Parliament, both of the Commonwealth in the case of trade practices and of the State in the case of the prospectus provisions that those provisions operate regardless of a contracting out provision.

In cases such as *Henjo v Marrickville*, and the cases which are followed, and in the case of *Hurst v Vestcorp* in the Court of Appeal in New South Wales which has also been followed, it has been said that the clear policy imperative of the statute is such as to render void or in the case of trade practices, actionable, even where there has been an attempt to contract out. It follows from that that to give supremacy to a choice of law an exclusive jurisdiction clause, the effect of which is to deprive to a plaintiff the rights conferred upon him or her by the Commonwealth statute is, in effect, to permit contracting out when the courts have already said that the policy and effect of those Commonwealth Acts is to prevent contracting out.

In other words, to allow here a stay of the Australian proceeding so that only proceedings which can be prosecuted are those in England, would be to permit the contract made between the parties to provide that

regardless of how misleading and deceptive the conduct was in this country, it is not actionable in this country. Thus, albeit it in different form, in effect, to the same extent there is the same collision between the clear policy of the Commonwealth Parliament and the choice of law clause resulting in the supremacy having to be given to the Commonwealth legislation.

That is why, it is submitted, the judge at first instance was clearly right and the Court of Appeal was correct in refusing leave to appeal in holding that there was here the good reason which is required by conflict laws not to give effect to the choice of law clause. In the particular circumstances of this case where there were representations and conduct engaged in in this country and documents circulated without compliance with the Prospectus Act provisions of this country, and where legislation has been passed in the United Kingdom to deprive to the affected plaintiff any rights other than an action based upon fraud, there would be a deprivation to the plaintiff of all of the rights and remedies which are conferred upon and by the Commonwealth legislation if this proceeding were to be stayed.

That was a very good reason for the judge to hold that the proceeding ought not be stayed and that, it is submitted, your Honours, was wholly consistent with what was said both in *Akai* and in *CSR*. Might I remind you, with respect, of exactly what it was that was ultimately said by the majority in *Akai*?

McHUGH J: It is tab 1.

MR NETTLE: Your Honours, I have that in tab 1, (1996) 1988 CLR 418 at page 447. It is the passage that begins the top of 447 with the words "Before doing so, we not that considerations of public policy" and concludes at the end of the second paragraph "militates against a stay". In particular, the last 10 lines of that section:

But the policy of the Act, evinced by s 8, is against the use of private engagements to circumvent its remedial provisions. To grant a stay in the present case would be to prefer the private engagement to the binding effect upon the State court of the law of the Parliament. This indicates a strong reason against the exercise of the discretion in favour of a stay. The policy of the law and of the Constitution militates against a stay.

Now, your Honours, it is submitted, for the reasons already advanced, it can make no difference that there is not in the *Trade Practices Act* a provision which says you will not contract out of section 52 for it has been held time and time again that the effect of the section is that you may not contract out of section 52. It is the intent of the Parliament that people, domestic or foreign, not in this country, engage in misleading and deceptive conduct without the remedies which that Act provides.

Equally, it is submitted, it is the clear policy of the State legislatures, through the *Companies Act*, that people not circulate material which is misleading, in the form of a prospectus, without first having had it registered and vetted so as to guard against the consequences of - - -

KIRBY J: It does raise a chaotic and very inconvenient prospect though, does it not, that in every

country where there were names there will be litigation? I suppose you say, "Well, it depends on the law of the particular place. It depends on their statutory policy and, anyway, Lloyd's is a big organisation and if they contract internationally they have to expect the possibility of meeting international causes of action"?

MR NETTLE: Your Honour, I readily accept that it creates difficulties for some, but may we make this submission? Were it to be held otherwise, it would mean that any foreign corporation, any foreign individual, anybody, can come to this country and by the device of a choice of law clause, insert it into a general undertaking, put under the nose of a contracting party halfway through the relationship, and legislation of the foreign jurisdiction from which they come, render as at nought, the provisions of the legislation of this country which provide that those people will not in this country engage in misleading and deceptive conduct.

KIRBY J: I begin to see a clue as to why United States Congress and the United States courts have upheld this in the United States. They are big players in this. Their exclusive clauses will normally favour them.

MR NETTLE: Perhaps so, and frequently in the federal decisions which one sees it is said that remedies are sufficient to overcome the problems which have occurred, are available in the United Kingdom. If, and in so far as that be the basis of those decisions, and it is said time and again in the two decisions which are relied upon by the applicant, clearly, it is wrong. There are not, in this case, remedies available in the sense of being anywhere near equal to what is available in this country. First of all, in large parties confined to fraud. Secondly, he does not have the advantage of the *Trade Practices Act* remedial provisions under section 87. It is clear from the authorities which we have cited that recision is not an available option in the United Kingdom. Thirdly, he does not have the benefit of the Prospectus Act provisions which would render void the undertakings and arrangements which were entered into and permitted restitution subject to terms.

Now, there is the distinction, it is submitted, your Honour Justice Kirby, between this case and what the Americans may have passed upon but, more importantly, this is not a case of long-arm legislation or of this Court giving effect to an external reach by the Parliament of the Commonwealth, this is doing no more than giving effect in this country to rules laid down by the Parliament as to the conduct which will be observed in this country.

KIRBY J: But it is said to be parochial in a time of international business and international agreements of this kind to deny that possibility in this particular case. I mean, there are names everywhere, all around the developed world. It is going to be very inconvenient to have the proceedings and they can reach different results in different jurisdictions.

MR NETTLE: Each case depends upon its own facts but it is true that at the level or principle this much falls out. Because of what this Court has already decided as recently as three years ago where the effect of a contract is to subvert the clear policy of Commonwealth legislation, there is a good reason,

depending upon the facts, not to grant a stay which a choice of jurisdiction clause would otherwise compel. With great respect, that is the law and it equally must be right. Once you get to that point, what one has in this case is simply an application to the particular facts of a good principle which has already been laid down clearly by this Court.

It cannot be right, it is submitted, to move away from substance and go to procedure, that an application for special leave can come here and contend before this Court that a question of general public importance has been raised simply because a new fact situation has arisen to which a trial judge has been required to apply the principle.

CALLINAN J: Mr Nettle, was it argued in the intermediate court that the claim for - the section 52 claim was not within the rule, that it was not a tort?

MR NETTLE: Yes, everything was argued at the Court of Appeal, your Honour.

CALLINAN J: The trial judge said there was no difference - the word "tort".

MR NETTLE: He said that he was satisfied that the word "tort", when used in rule 7.01(1)(i) was capable of embracing the contradiction of statute.

CALLINAN J: Embracing anything that was not a contract.

MR NETTLE: Yes, but may I say this to your Honour, interesting though it is - - -

McHUGH J: I do not think he said that, did he? He denied that anything that was not a contract was a tort.

MR NETTLE: Yes, he did, but on the other hand he held that - - -

McHUGH J: He held terms, he actually said that in terms.

MR NETTLE: He did indeed say that; pointed out the logical or the non-constant, et cetera.

McHUGH J: Yes.

MR NETTLE: But can I say this to your Honour Justice Callinan. Interesting though that is, it was not the basis of the decision as his Honour below was at pains to point out. He decided this application for service out, in the end, on the basis that there had been service on an agent in Australia. He based that upon a factual finding that the office of Lloyd's, through its subsidiary in New South Wales, was the agent. There is no attack here, of course, on that as there could not be. Everything else which his Honour said, informative though it is, with respect, is dicta.

But what was submitted below and would be submitted to your Honours here now is that clearly he was rights as this Court and courts which preceded it said in *Carnie v ANZ*. The judges are to take, as it were, an expansive view of the power which is afforded to them by rule so as to mould their remedies accordingly. So, just as in *Carnie*, representative proceedings under Part 18 rule 2 was said to embrace what was called a class action, even though at the time, perhaps, that rule was drafted no such thing was contemplated, so too would it be submitted here that 7.01(1)(i) would extend to embrace the developing concept of tort of breach of a statutory provision.

The second authority which is significant, your Honours, is *CSR* because that was a case in which proceedings were on foot in two jurisdictions but where, because of the availability in one of those jurisdictions, namely, in the United States, it was not appropriate to grant an injunction to stay those proceedings. It is, in a sense, the converse of this sort of case. It is the converse because an Australian company was seeking to maintain proceedings in the United States because of the availability of treble damages under the Sherman Act. Nonetheless, the availability of a legitimate juridical advantage was seen as being a weighty consideration, even if not determinative, of the outcome of an application that those proceedings be restrained.

If your Honours please, we simply make these points. The policy of section 52 and of the Prospectus Act provisions is clearly against the use of private engagements to permit the contracting out. To grant a stay in these circumstances would be to do that. The law is clearly decided already that when a judge meets considerations of that kind, it is a powerful consideration against the grant of the stay which would otherwise go. In this case the judge has done no more than rigorously and logically follow those principles and apply them to the facts of the case.

The question for this Court is not whether he was right, with respect, but rather whether the Court of Appeal was wrong in not being satisfied that his decision was so attended by doubt and productive of substantial injustice as to warrant the grant of leave. In the circumstances, it is submitted this Court clearly could not come to such a view. When one adds to that the absence of questions of general public importance, it is submitted it follows ineluctably that the application for leave should be refused.

KIRBY J: The suggestion of public importance is that there are a number of other cases in the wings and - - -

MR NETTLE: It is blithely said without reference to the material, the allegations or the facts. When, and if, your Honour Justice Kirby - - -

KIRBY J: But the inference would be that there would be other such cases - - -

MR NETTLE: It is conceded that there, in all probability, will be other cases and it is submitted that those cases, when and if they arise, will fall to be decided by the same principles as were applied here.

KIRBY J: The practicalities are the likelihood is that they would follow out of comity what the Court of

Appeal of Victoria has ruled is an appropriate approach.

MR NETTLE: The Court of Appeal has ruled nothing other than that it was not satisfied that there was clear doubt and substantial injustice. It is a bit like there is no certiorari denied in this Court, there is no precedent - - -

KIRBY J: No. Just help me, would the point about the exclusive jurisdiction remain to be argued in the trial as a point reserved for the final determination, in other words, an appeal on the merits at the end of the case?

MR NETTLE: Yes, of course it will, and it could find a ground of appeal to this Court, or to the Court of Appeal and, ultimately, to this Court after verdict.

KIRBY J: Yes, thank you.

MR NETTLE: If the Court pleases.

MR MYERS: Your Honours, I wish to say five things. Concerning the United States, just so that the position is clear, the Court of Appeal in seven circuits, federal circuits, have considered this issue and in every case they have decided in favour of Lloyd's. In one case in California, at first, three judges decided against Lloyd's, and that is referred to in the California State case that my friend read part of, but then, en banc, seven justices including the Chief Judge of the Court of Appeal decided to the contrary and, so, one can say that in all of those seven circuits the decision is in favour of Lloyd's. The only incidence of any different position was one taken by an intermediate Californian court in exercising State jurisdiction in between the original decision of the three justices of the Federal Court and the en banc decision.

KIRBY J: But it is said that there is specific federal legislation in the United States that touches on the matter.

MR MYERS: Well, my friend did not refer to it and I cannot on this occasion read to your Honours the decisions, but the decisions simply canvas the general considerations as to comity and what would be in the interests of litigants and the country generally. Certiorari has been denied in six cases by the Supreme Court of the United States in the Lloyd's matters. That is the first point. The second is that my learned friend said that if Mr White is forced to litigate in England only - he is already litigating in England by his own choice - he is deprived of remedies and rights.

In England he can have the agreement set aside and he can get his damages. The truth is that there are different causes of action, but that is always so. It is to overstate the case completely to say that he is denied remedies that he has here. He can achieve the overturning of the agreements and his damages. Next, my friend said that the choice of law clause here is a device. Nothing could be more inaccurate than to describe the choice of law clause as a device or to describe the choice of forum clause as a device. Both are obviously inserted for very good reasons because you have to have one system of law and one

jurisdiction which is regulating an international market.

Next, my friend advanced, as his primary submission as to why his Honour was right, the very error into which his Honour fell. He said that to decide other than the primary judge would be to subvert the clear policy of Commonwealth legislation but that is to say no more than if Commonwealth legislation applies, a choice of forum provision cannot be given effect.

KIRBY J: But there is a specific provision in the *Trade Practices Act* that forbids contracts in breach of - - -

MR MYERS: But just dealing with contracts, your Honour. It does not deal with section 52 and to advance - - -

KIRBY J: But this is a contract to exclude the jurisdiction including section 52.

MR MYERS: No, not so, your Honour. It is limited in its application to a particular division which does not include section 52. It does not include the provisions that are in issue in this case. That is very clear.

CALLINAN J: But it has been held many times, has it not, that you cannot contract out of the operation of section 52?

MR MYERS: Of course one cannot contract out, your Honour. One cannot contract out of Commonwealth legislation, but if that is the end of the matter, then whenever Commonwealth legislation would otherwise apply, you are deciding that a choice of forum clause cannot be given effect to.

McHUGH J: No, that is not what the judge decided, is it? At 114, the judge said it was a countervailing consideration and with him it ultimately - - -

MR MYERS: It is the only countervailing consideration to which he refers.

McHUGH J: I know, but he - - -

MR MYERS: The argument advanced by my learned friend was that is a decisive consideration and that is an error. If your Honours please, that is what I wish to say in reply.

McHUGH J: Yes, thank you very much, Mr Myer. The Court will adjourn for a short while.

AT 9.49 AM SHORT ADJOURNMENT

UPON RESUMING AT 9.50 AM:

McHUGH J: The reasons which I am about to give are those of Justice Kirby and myself.

Many issues have been raised in this application, but in the end its essential character as recognised by the Court of Appeal of Victoria is an attempt to involve appellate courts in a review of an interlocutory order made by a judge in a matter concerning practice and procedure in the Supreme Court of Victoria see *Contender 1 Ltd* v *LEP International Pty Ltd* (1988) 63 ALJR 26, HC.

The Court accepts that the decision in the present case is an important one for the parties. It also accepts that, as in many such orders, there was much to be said for the course which each side urged upon the primary judge. However, once he had made his decision in favour of the course urged by the respondent, the applicant faced an extremely difficult task to secure the intervention of the Court of Appeal. Established authority in this country severely restrains such intervention, for reasons often stated. See, for example, *House v The King* (1936) 55 CLR 499.

In so far as the applicant seeks the intervention of this Court, it has the additional burden of showing that the case is one for the grant of special leave, a burden not made easier by the fact that a number of issues which the applicant seeks to ventilate have recently been considered by this Court in *Akai Pty Ltd v People's Insurance Company* (1996) 188 CLR 418, *CSR v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 and *Henry v Henry* (1996) 185 CLR 571.

The primary judge applied the correct principles and took into account the various objections to this exercise of jurisdiction, including those in relation to the service of process. No proper basis is made out for this Court to become involved. For these reasons, Justice Kirby and I are not persuaded that this Court should grant leave and the application is dismissed.

Justice Callinan would give leave to appeal.

There is nothing you can say on a question of costs, Mr Myers?

MR MYERS: No, your Honour.

McHUGH J: The application must be dismissed with costs.

The Court will now adjourn to reconstitute.

AT 9.53 AM THE MATTER WAS CONCLUDED