Commonwealth Bank v White; ex parte Lloyd's [1999] VSC 262 (29 July 1999)
SUPREME COURT OF VICTORIA
COMMERCIAL LIST

No. 5660 of 1997

F4920
COMMONWEALTH BANK OF AUSTRALIA

(ACN 123 123 124)
Plaintiff

PETER EVERETT WHITE
Defendant

- and -

THE SOCIETY OF LLOYD'S
Third Party

JUDGE:
Byrne J

Melbourne
8, 9, 10, 16 June 1999

DATE OF JUDGMENT:
29 July 1999

CASE MAY BE CITED AS:
Commonwealth Bank v White; ex parte Lloyd's

MEDIA NEUTRAL CITATION:
[1999] VSC 262

Revised para [83] 23 August 1999

PRACTICE AND PROCEDURE - service in Australia of third party process on foreign company - whether a presence within Australia - whether trading in Australia by resident agent. RSC Ch 1 R. 6.04(a). **PRACTICE AND PROCEDURE** - service of third party process out of Victoria - contract made abroad - contract made through agent carrying on business in Victoria - tort committed in Victoria - whether misleading and deceptive conduct is a tort - whether offering an "interest" or a "prescribed interest" contrary to the Companies Act 1961 s. 81 and Companies (Victoria) Code s. 170 is a tort - damage suffered in Victoria and caused by tortious act or omission - necessary or proper party to the proceeding - standard of proof - strong arguable case - discretion - merits of the claim. RSC Ch 1 RR 7.07(2), 7.01(1)(f)(ii), 7.01(1)(i), 7.01(1)(j), 7.01(1)(l), 7.04, 7.07(3) **PRACTICE AND PROCEDURE** - service of third party process out of Victoria - application to set aside - discretion - forum non conveniens - agreement to submit dispute to foreign court only - relief unavailable in foreign court. RSC Ch. 1 R. 7.05(2), 8.01.

APPEARANCES:

Counsel
Solicitors
For the Plaintiff
Mr P.J. Bick QC
Ian Purbrick
For the Defendant
Mr J.W.K. Burnside QC and
Mr M.K. Moshinsky
Foster Hart
For the Third Party
Mr P.J. Jopling QC and

Dr I. Hardingham
Freehill Hollingdale & Page

HIS HONOUR:

1. Between 1 January 1981 and 31 December 1992 the defendant, Peter Everett White, was an underwriting member of the third party, the Society of Lloyd's ("Lloyd's"). As such, he was required to provide security to Lloyd's and for this purpose he obtained accommodation from the plaintiff, Commonwealth Bank of Australia ("the Bank"), in the form of an irrevocable letter of credit in favour of Lloyd's. The terms of this security were varied and the amount increased from time to time so that, by 1992, the total value of the letters of credit was £168,000.

2. The 1980s were not profitable years for the underwriting activities of Mr White and, it would seem, for other members of Lloyd's. In 1995-6 Lloyd's drew down on Mr White's letters of credit to their full extent whereupon the Bank in turn claimed a payment from him. On 11 December 1997 the Bank commenced this proceeding against Mr White seeking the amount then payable for its accommodation. In the statement of claim this amount is said to be $427,994.87 with interest accruing at 11.5% per annum. Mr White is defending the Bank's claims on a number of bases including one based on an implied term of the accommodation agreement that the Bank would not pay in respect of a draw down by Lloyd's if "the Bank knew of clear evidence of fraud or unconscionable conduct by Lloyd's which would release [White] from his underlying obligation to Lloyd's". It is alleged in paragraph 38 of his defence that the Bank had such knowledge at the date of each payment to Lloyd's.

3. On 30 January 1998 Mr White filed a third party notice and statement of claim against Lloyd's. His current statement of claim is an amended pleading filed on 14 December 1998. For some 18 months now Mr White has been endeavouring to serve Lloyd's with these documents. The applications now before the court represent the latest step in this process. Service of the amended third party documents has been achieved as a matter of fact on three persons as follows:

(1) Upon Lloyd's in London on 23 December 1998.

(2) Upon Lloyd's Australia Ltd in Sydney on 5 February 1999.

(3) Upon Ian Hutchinson in Sydney on 5 February 1999.

4. There are four applications before the court:

(a) An application by Lloyd's brought by summons filed on 29 January 1999 seeking an order setting aside service on Lloyd's in England on the grounds that service was not authorised by Rule 7.01, that service was in breach of an agreement between Mr White and Lloyd's that all disputes be referred exclusively to the courts of England; and/or that the Victorian Court is not a convenient forum. Lloyd's also seeks an order that the proceeding be dismissed or forever stayed on the same grounds. Alternatively, it seeks an order that the proceeding be stayed pending the determination of the issues between the parties in Proceeding No. 1996 Folio 2032 in the Commercial Court, Queens Bench Division of the High Court of Justice in England.

(b) An application by Lloyd's brought by summons filed on 10 February 1999 seeking an order that service on it c/o Ian Hutchinson, General Counsel in Australia for Lloyd's, be set aside, alternatively that the proceeding against Lloyd's be dismissed or forever stayed. This relief is sought on the grounds that Lloyd's was not present in the State of New South Wales at the time of service upon Mr Hutchinson; that Mr White and Lloyd's had agreed that all disputes of the kind raised in the proceeding be referred exclusively to the courts of England; and that the circumstances are such that this Court, in the exercise of its discretion, should decline jurisdiction. Lloyd's again seeks in the alternative an order staying the proceeding against it until the determination of the issues in the same English proceeding.

(c) An application by Lloyd's brought by summons filed on 10 February 1999 seeking an order that the service on it care of Lloyd's Australia Ltd in New South Wales be set aside. In other respects the orders sought and the grounds relied on were identical to those in the second summons concerning service on Mr Hutchinson.

(d) An application by Mr White brought by summons filed on 8 February 1999 seeking the following relief:

"1. An order that the Defendant be at liberty to proceed against the Society of Lloyd's in respect of the Amended Third Party Notice, pursuant to r 7.04 of Chapter I of the Rules of the Supreme Court. 2.

Alternatively, an order that service out of Australia of the Amended Third Party Notice be allowed nunc pro tunc (alternatively, be allowed), pursuant to r 7.07(3) of Chapter I of the Rules of the Supreme Court. 3. Alternatively, an order nunc pro tunc (alternatively, an order) that, instead of service on the Society of Lloyd's in the United Kingdom, the Amended Third Party Notice be served on Lloyd's Australia Limited, pursuant to r 6.10 of the Chapter I of the Rules of the Supreme Court. Alternatively, an order nunc pro tunc (alternatively, an order) that, instead of service on the Society of Lloyd's in the United Kingdom, the Amended Third Party Notice be served on Ian Hutchinson, General Counsel in Australia for Lloyd's, pursuant to r 6.10 of Chapter I of the Rules of the Supreme Court."

5. There was, also, a fifth application brought by the Bank by summons filed on 24 March 1998 seeking declarations that its proceeding against Mr White be tried before the third party proceeding. This application was stood over pending the resolution of the four applications concerning service on Lloyd's.

6. The argument in support of service was put on a number of bases. First, it was said that service on Mr Hutchinson or upon Lloyd's Australia was good service upon an agent within Australia. Second, service in England was justified under paragraphs (f), (i), (j) and (l) of Rule 7.01(1). Third, an order allowing service out of Victoria pursuant to Rule 7.07(3) was sought. Lloyd's resisted these contentions and argued that, even if service were found to be good, this Court should decline jurisdiction on the basis that the Supreme Court of Victoria was an inappropriate forum.

THE CLAIMS AGAINST LLOYD'S

7. Mr White's claims against Lloyd's appears in the amended endorsement on his amended thirty party notice filed on 14 December 1998. No pleading in response has been filed, but the areas of dispute are apparent from the affidavits filed on behalf of Lloyd's.

8. The causes of action alleged against Lloyd's are five in number. The first is that it is guilty of misleading and deceptive conduct contrary to the Trade Practices Act 1974 s.52 and the Fair Trading Act 1985 s.11. The conduct relied upon is representations made in April 1980 which are called the "Initial Representations" and representations made in Lloyd's Global Reports and Accounts sent to him in each of the years of his membership. These are called the "Subsequent Representations". He seeks damages pursuant to these statutes and orders that agreements between himself and Lloyd's are void or unenforceable.

9. Second, it is alleged that the Initial Representations and the Subsequent Representations were made negligently and in breach of duty of a common law duty of care and that as a consequence he suffered loss and damage.

10. Third, I group together a number of allegations of breaches of companies legislation. It is said that underwriting membership of Lloyd's is an "interest" within the meaning of s.76 of the Companies Act 1961 and, after 1 July 1982, a "prescribed interest" within the meaning of s.5 of the Companies (Victoria) Code. I shall refer to these two statutes collectively as "the companies legislation". In each case it is alleged that Lloyd's offered the interest or prescribed interest to the public and thereby attracted to itself the disclosure obligations imposed by s.81 of the 1961 Act and later by s.170 of the Code. Lloyd's breached such of these obligations as were in force at different times during Mr White's membership. As a consequence the agreements which he had with Lloyd's are void or unenforceable for illegality and he seeks declarations to that effect and damages.

11. In his fourth claim Mr White attacks a transaction entered into with Lloyd's in August 1986. In that year he was required to execute a new General Undertaking which included in clause 2.2 an agreement to submit disputes exclusively to the jurisdiction of the courts of England. He alleged that this exclusive jurisdiction clause was put forward by Lloyd's for the improper purpose of shielding itself from statutory laws of overseas jurisdictions including those Australian laws relating to misleading and deceptive conduct and the companies legislation with respect to interests and prescribed interests. It is said that, for this reason, the exclusive jurisdiction clause is void and contrary to public policy or unconscionable and should, for that reason, be treated by the court as being of no effect.

12. The fifth claim is conceptually similar to the fourth and it attacks for similar reason one aspect of the Lloyd's Reconstructive and Renewal Plan which was implemented from December 1995 to September 1996, that is after Mr White ceased to be a member of Lloyd's. The aspect of the Reconstruction and Renewal Plan which is attacked is that contained in clause 5.5 of the Reinsurance Contract under which a member was obliged to pay a reinsurance premium to Lloyd's without deduction or set-off for claims which he might have against Lloyd's. This clause 5.5 is likewise said to have been put forward for the same improper purpose as I

have mentioned in the preceding paragraph and the same legal consequence is said to flow. In the course of the hearing counsel for Mr White said that no relief was now sought in respect of this clause 5.5. I shall say nothing further about this claim.

13. There appears to be no dispute that Mr White became an underwriting member of Lloyd's following an introductory meeting in April 1980 with John Donner of Donner Underwriting Agencies Limited (DUAL), a company incorporated in the United Kingdom. Between that initial meeting which was held in Melbourne and October 1980 Mr White had one telephone conversation with one John Stace, who is described as the Australian representative of Mr Donner. In that period Mr White communicated with DUAL by letters passing between it in London and him in Victoria. Before me are DUAL's letters to him dated 20 May 1980 and 14 July 1980 and his letter of 18 August 1980. Enclosed with the DUAL letter of 20 May 1980 was a copy of the Lloyd's brochure for applicants and with its letter of 14 July 1980 DUAL sent an application form for completion and return by him and a specimen of the general undertaking which he would in due course be asked to execute. The letter included other material which is not relevant for my present purpose. He completed and signed the application form in Victoria and returned it to DUAL by his letter of 11 August 1980. The Initial Representations which provide the foundation for part of the misleading and deceptive conduct claim and part of the negligent misrepresentation claim are said to have been made orally by Mr Donner at the April meeting and in writing in the brochure for applicants.

14. On 14 October 1980 Mr White attended a formal Rota meeting at Lloyd's in London where he was interviewed and accepted as a member. He commenced underwriting as a member of Lloyd's in January 1981 with DUAL as his managing agent.

15. In order to become a member, Mr White signed a number of agreements with and undertakings and acknowledgments to Lloyd's and DUAL:

(a) Application for Membership and Certificate of Means dated 11 August 1980;

(b) General Undertaking 1980;

(c) Assignment of Premiums dated 14 October 1980;

(d) various acknowledgments of adherence to agreements in place at Lloyd's;

(e) Underwriting Members' Additional Security Deed undated;

(f) Lloyd's Premium Trust Deed to which DUAL was also a party. Nicholas Paul Demery the Lloyd's solicitor who produced this document, says that it is dated 1 January 1981, but the copy in evidence bears no date;

(g) Agency Agreement with DUAL.

16. Of these agreements, the evidence shows that the Application for Membership and Certificate of Means, the 1980 General Undertaking, the Additional Security Deed and the Agency Agreement were executed in Victoria. The Assignment of Premiums was executed in London. The evidence with respect to the location of the execution of the various acknowledgments is conflicting. It does not appear where Lloyd's Premium Trust Deed was executed. There were, of course, a number of other documents executed in connection with his application for membership, including those with respect to finance, but the evidence does not deal with these. It is clear that Mr White became a member of Lloyd's in or about October 1980 under a contract entered into in London.

17. Mr White remained as an underwriting member of Lloyd's in each of the years 1981 to 1992 both inclusive, receiving each year from Lloyd's an annual report which included a report of the Lloyd's committee and a statement of accounts for the previous calender year. It is alleged that these annual reports contain the Subsequent Representations which are relied upon as constituting further misleading and deceptive conduct and negligent misrepresentation.

18. During the period Mr White was an underwriting member of Lloyd's, DUAL acted as his managing agent. In 1986 DUAL advised him by letter dated 15 August that, as from January 1987, the underwriting affairs of all members were to be conducted under new agreements. Copies of these new agreements, namely an agency agreement, a premium trust deed and a general undertaking were enclosed for his execution and return to DUAL in London. Mr White duly executed these agreements in Victoria and posted them to DUAL at its London address. This 1986 General Undertaking contains an exclusive jurisdiction

agreement and a choice of law agreement which are not found in the 1980 General Undertaking. These agreements are found in clauses 2.1 and 2.2 of the 1986 General Undertaking of which the latter is the subject of Mr White's fourth claim. The clauses are in these terms:

"2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as 'Proceedings') arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction."

19. As I have mentioned, the syndicates of which Mr White was a member suffered massive losses arising from underwritings undertaken in 1982 and thereafter. These losses appeared in the annual statements for 1985 and following. Notwithstanding this, Mr White increased his premium to £300,000 for the year 1985 and again to £600,000 for the year 1988. From that time up to 1992 Mr White says his premium limit was fully applied to various syndicates, many of which provided reinsurance for asbestos claims and which continued to generate losses.

20. It seems that, by the end of the 1980s, losses had also been incurred by a large number of Lloyd's syndicates and by Lloyd's itself. This led Lloyd's in 1995 and 1996 to devise and implement a scheme called the Reconstruction and Renewal Plan. This scheme, or one provision of it, was the subject of the abandoned fifth claim to which I have referred.

SERVICE ON AN AGENT IN AUSTRALIA

21. The first contention put on behalf of Mr White is that Lloyd's was served in Australia on 5 February 1999 when the documents were delivered to Lloyd's Australia Limited or to Mr Hutchison in Sydney. There is no evidence that Lloyd's was ever registered in Australia as a foreign company pursuant to Part 5B.2 Division 2 of the Corporations Law so that this service might have been effected pursuant to s.601CX. The matter must therefore be addressed upon common law principles which permit service of process within the jurisdiction upon a foreign company in accordance with Rule 6.04(a) where the company has a presence in this jurisdiction: National Commercial Bank v Wimborne (1979) 11 NSWLR 156 at 165, per Holland J. See also La Bourgogne [1899] P 1 at 16, per Collins LJ. Argument before me presented by both parties proceeded on the basis that Lloyd's was a trading corporation in the UK and that it was therefore necessary for Mr White to show that it carried on its business in Australia through an agent: BHP Petroleum Pty Ltd v Oil Basins Limited [1985] VR 725. It was submitted on behalf of Mr White that Mr Hutchison or Lloyd's Australia or both of them were such agents.

22. The starting point is to identify the nature of the business conducted by Lloyd's on the date of service. The evidence shows that Lloyd's is a body established under the Lloyd's Acts 1871-1982 (UK) and is charged under those statutes with the power and authority to regulate and direct the business of insurance in the Lloyd's market: Lloyd's Act 1982 s.6(1). Notwithstanding Mr White's suggestion to the contrary I am satisfied that Lloyd's itself does not engage in the business of insuring. This business is engaged in by its underwriting members, or names, who in groups or syndicates of varying sizes accept risks from proposers under policies of insurance issued on their behalf by the managing agent of the syndicate. Each syndicate member underwrites only a portion of the risk assumed by the syndicate, a line, and in the event of claim each member is severally liable for that proportion only.The managing agent also receives premiums on trust for syndicate members and invests them and settles claims. The managing agent which may act for a number of syndicates is paid a fee for these services by the syndicate members. The work performed by the managing agent is, therefore, no part of any business carried on by Lloyd's.

23. A type of underwriting agent, distinct from the managing agent, is the members' agent. The evidence shows that this agent introduces a prospective member to Lloyd's and advises them as to the admission process. After admission to membership, the role of the members' agent is to advise the member as to which syndicates would be appropriate and what proportion of the insured risk should be assumed. The members' agent generally administers the member's underwriting, ensuring that the name complies with Lloyd's

requirements and keeps the member informed about the underwriting market generally. A name normally appoints one members' agent but may appoint more than one.

24. In addition to its statutory function as regulator of the underwriting business conducted in the Lloyd's market, Lloyd's provides ancillary services for its members such as the premises, services and aid necessary for the conduct of their underwriting businesses and for the regulation of operations of the market. I infer too from the terms of reference of its General Counsel in Australia that its services include, too, those of general marketing and promotion of the Lloyd's market, of monitoring local legislation and the compliance with it by Lloyd's and its members, and of representing the Lloyd's market on insurance bodies and government committees and, generally, liaising with the insurance industry regulatory authorities. A further indication of the scope of the services provided by Lloyd's to its members is to be found in the latest annual report which is in evidence, that for the calender year 1997. This shows that the activities of Lloyd's were handled by a number of units. These were the insurance services unit which provided business processing and technical services in support of members' underwriting activities; the business development unit which was concerned with the development and promotion of Lloyd's market activities throughout the world; the North American unit which was concerned with liaising with American regulatory authorities and generally promoting the activities of the members in the United States; the property services unit which managed Lloyd's property portfolio; and the members' services unit which was concerned with dealings between Lloyd's and its members including the collection of debts owed by members to Lloyd's and payment of sums due to them. Furthermore, a number of activities were handled centrally. These activities included strategic planning and finance including fixing members' subscriptions. Finally, in this very brief resume of its activities in England, Lloyd's deals with enquiries from prospective members and processes them as it did with Mr White in 1980. And to meet the cost of providing these services Lloyd's charges its members a fee in the form of an annual subscription.

25. I return now to my starting point. What was the nature of the business conducted by Lloyd's on 5 February 1999, the date on which the process was served in Sydney? Counsel for Lloyd's accepted that their client was carrying on business and that it was the business of "regulating the Lloyd's market in accordance with Lloyd's Acts and by-laws". I have already set out my findings as to the activities of Lloyd's. They include, but are not limited to, this regulatory function. Furthermore, it appears from the material that part of these activities of Lloyd's is conducted outside the UK. By way of example, I instance its marketing activities, its dealings with prospective members, its liaison with local regulatory and other authorities. The 1997 annual report shows that Lloyd's overseas underwriting activities in the US and Canada were subject to particular attention in that year. The chief executive officer reported as follows:

"Considerable work has been undertaken to develop our position in new markets, most notably in Asia, Eastern Europe and Latin America. At the same time the business development unit board has supervised a systematic review of the activities of our existing overseas offices and representatives, both to identify opportunities to reduce the costs associated with transacting overseas business and to improve the quality of services provided to underwriters".

Of this overseas business the Asia Pacific region accounted for 8% of Lloyd's total premium income of £19.75B and, of this, 16% was provided by Australian business, making it Lloyd's eighth largest overseas market.

26. At the same time as the 1997 report was published, Lloyd's, on 6 April 1998, announced that it was opening "a representative office in Australia as part of its plan to reinforce Lloyd's position as the global marketplace for risk". For some 17 years prior to this, Mr Hutchison, a solicitor and partner in Freehill Hollingdale & Page, had acted as Lloyd's legal adviser in Australia. In early 1998 Mr Hutchison became Lloyd's general counsel in Australia, remaining as a consultant with Freehills. His functions as general counsel were to be responsible for the monitoring and ensuring of legal and regulatory compliance in Australia. His responsibilities as they appear in his terms of reference appear to cover a wider field than this but the power conferred upon him to enter into agreements to obtain professional services was expressed to be subject to the prior approval of Lloyd's director of marketing services.

27. The Lloyd's press release of 6 April 1998 announced proudly that Lloyd's representative office in Australia would be managed by "the newly appointed Lloyd's underwriters general representative in Australia, Steve Boucher". Mr Boucher described his role in the same press release as follows:

"My role will be to help facilitate building Lloyd's business in Australia by developing stronger links with the Australian distribution network both brokers and cover holders, and respond to the needs of the market. I cannot write business, but what I can do is keep cover holders and brokers informed of developments at Lloyd's, assist them to place business with underwriters in London, listen to their comments about our

service and secure improvements where necessary and provide marketing support to them as they promote Lloyd's products to the Australian market."

His contact telephone number was given as that of Freehills in Sydney. The corporate vehicle for the new activity was a company called Lloyd's Australia Limited ("Lloyd's Australia"). The ACS records in evidence show that on 2 March 1998 Lloyd's Australia allotted 49,995 shares to an entity called Corporation of Lloyd's. The notification is signed by Mr Hutchison as director. Mr Demery deposed that Lloyd's Australia is a wholly owned subsidiary of Lloyd's. It is, however, in the eye of the law, a legal entity independent of its parent. As at December 1998, the address of Lloyd's Australia and Mr Boucher, Lloyd's general representative, is given on the Lloyd's web-site as 55 Hunter Street Sydney, the address where the court process was served on it on 5 February 1999.

28. I return now to the cases which deal with service upon a foreign trading corporation having a presence in the forum state through an agent. The classic statement of the principle is that of Buckley LJ in Okura & Co Ltd v Forsbacka Jernverks Aktiebolag [1914] 1 KB 715 at 718, a passage which was cited with approval by Murray J in BHP Petroleum Pty Ltd v Oil Basins Limited [1985] VR 725 at 731.

"The question in this case is whether the defendants, who are a foreign corporation, can be served with a writ in this country. The answer to that question depends on whether the defendants can be found 'here' for the purpose of being served. In one sense, of course, the corporation cannot be 'here'. The question really is whether this corporation can be said to be 'here' by a person who represents it in a sense relevant to the question which we have to decide. The point to be considered is, do the facts shew that this corporation is carrying on its business in this country? In determining that question, three matters have to be considered. First, the acts relied on as shewing that the corporation is carrying on business in this country must have continued for a sufficiently substantial period of time. That is the case here. Next, it is essential that these acts should have been done at some fixed place of business ... The third essential, and one which it is always more difficult to satisfy, is that the corporation must be 'here' by a person who carries on business for the corporation in this country. It is not enough to shew that the corporation has an agent here; he must be an agent who does the corporation's business for the corporation in this country. This involves the still more difficult question, what is meant exactly by the expression 'doing business'?"

29. In the Okura case the defendant was a Swedish company carrying on business in Sweden as manufacturer of steel. The writ was served in London on a firm which carried on business as general agents and general merchants in that city and in Stockholm. The firm had since 1899 acted as sole agents in England for the defendant but they acted as agents for other Swedish firms in the steel trade as well and they traded on their own account. The evidence showed that the London firm performed its functions as agent in the following manner. It received from a buyer an order for steel which they transmitted to their head office in Sweden. The head office then made enquiry of steel suppliers including, perhaps, the defendant, as to the terms on which they might meet this order. These terms were then passed to the London agent which offered them to the buyer for acceptance or not. Buckley LJ concluded that service on the London agent was not good service on the Swedish principal on the basis that the agents were not doing the defendant's business in England nor were they competent to bind the defendant in any way. Phillimore LJ agreed, seeing as a critical factor the absence of any authority in the agent to bind the Swedish principal.

30. Nevertheless, the cases on this topic tend to seek an answer to the question whether a company has a presence in the jurisdiction of the forum by examining the totality of the relationship between the principal and the agent in the light of the nature of the company's business and that of the agent: National Commercial Bank v. Wimborne (1979) 11 NSWLR 156 at 165-6, per Holland J; Adams v Cape Industries plc [1990] Ch 433 at 530-1, per Court of Appeal. The evidence of the relationship between the two suggested agents in this case and Lloyd's is scanty so that no confident answer can be given to many of the factors mentioned in those cases as likely to be relevant. I bear in mind that the onus of proof in this case lies on the defendant who asserts service on the third party as a basis for jurisdiction. It does not appear, for example, what is the financial relationship between either Mr Hutchison or Lloyd's Australia and Lloyd's in England.

31. I am nevertheless satisfied that Lloyd's had, on 5 February 1999, through its agent Lloyd's Australia, but not through Mr Hutchison, a sufficient presence in this country to permit it to be served in Sydney by delivery of the process to Lloyd's Australia. I reach this conclusion for a number of reasons.

32. First, Lloyd's had an office in Australia at 55 Hunter Street, Sydney for its Australian representatives, Lloyd's Australia.

33. Second, both Lloyd's and Lloyd's Australia held out Lloyd's Australia as being the representative of Lloyd's in this country with authority including that of handling enquiries relating to and promoting Lloyd's

business in Australia and handling enquiries from present and prospective members whose continuing interest was vital to the business of Lloyd's.

34. Third, there is no evidence that Lloyd's Australia and Mr Boucher were carrying on any business independently of their Lloyd's functions. I infer from the evidence as a whole that they were not. These were facts seen as significant in Dunlop Pneumatic Tyre Co Limited v Actien-gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co [1902] 1 KB 342 at 347, per Collins MR.

35. Fourth, part of the business of Lloyd's involved promoting the Lloyd's insurance market in Australia and representing the interests of that market with local regulatory authorities. These are activities carried out in this country by Lloyd's Australia. Its business is not that of buying or selling and therefore the fact that the agent does not have the power to bind it by contract is of less significance. Nor is it correct to categorise the functions of the agent as merely administrative. Lloyd's Australia was set up as a subsidiary of Lloyd's as part of its worldwide organisation so that the activities of Lloyd's Australia were not carried out for its own benefit or profit but for those of the parent: Amalgamated Wireless (Australasia) Ltd v McDonnell Douglas Corp (1987) 16 FCR 238. Its activities are "of the very essence" of the business of Lloyd's: BHP Petroleum Pty Ltd v Oil Basins Limited [1985] VR 725 at 733 per Murray J.

36. Fifth, Lloyd's has adopted the course of advertising, at least on the Internet, that it has through Lloyd's Australia, established a business presence in this country at a particular address in Sydney. This may be taken as the modern equivalent of placing Lloyd's name on the door of the office of Lloyd's Australia in Sydney as to which, see National Commercial Bank v. Wimborne (1979) 11 NSWLR 156 at 166, per Holland J. In Dunlop Pneumatic Tyre Co Limited v Actien-gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co [1902] 1 KB 342 a German company which manufactured cars was held to have a sufficient presence in England to be amenable to the jurisdiction of the courts of that country by establishing a stand at the Crystal Palace at the National Cycle Show from 22 to 30 November 1901 and by employing a man to look after its goods on exhibition, to answer enquiries and to "push sales" of them. In the present case the role of Lloyd's Australia in Sydney was to perform a comparable function for Lloyd's but on a more permanent basis.

37. Having reached the conclusion that service has been validly effected within Australia, it is not necessary that I make any orders to enable the proceeding to move forward. This is sufficient to dispose of the primary issue before the court, leaving only the secondary matters regarding the appropriateness of this Court as forum. Nevertheless, in deference to the submissions put by counsel and in case this matter may go further, I shall venture my views on the validity of the service of the third party process on Lloyd's in London.

SERVICE IN LONDON UNDER RULE 7.01

38. Rule 7.07(2) provides that a third party notice may be served out of Australia without leave where the claim is of such a kind that, if the claim were by a plaintiff, the originating process might be served out of Australia without leave pursuant to Rule 7.01. Rule 7.01 in turn permits service of originating process out of Australia without leave in a number of circumstances. The question as to service under this rule arises in the applications of Lloyd's which seek to set aside the service pursuant to Rule 7.05(2)(a) and in Mr White's application for leave to proceed pursuant to Rule 7.04(1). Before me, reliance was placed on four circumstances only, paragraphs (f), (i), (j) and (l) as justify service under Rule 7.01(1).

39. It was accepted by both parties that it is for the defendant to establish in each case that there is a strong arguable case that service out of the jurisdiction was justified as falling within one or other of these circumstances: Williams v The Society of Lloyd's [1994] 1 VR 274 at 291-2, per McDonald J. I, therefore, accept this as the basis of my task, without expressing any view whether in an application made under Rule 7.05 the onus lies on the serving party to show that the requirements of Rule 7.01(1) have been met and not on the applicant to demonstrate the contrary. Compare Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538 at 589-90 per Toohey J (dissenting). The difficulty, however, lies in identifying what it is that the serving party must establish. Counsel for Mr White contended that I must be satisfied that there is a strong arguable case for the existence of the jurisdictional facts set out in the relevant paragraphs of Rule 7.01(1). The contrary view, espoused by counsel for Lloyd's, was that I must be so satisfied not only of these facts but as to the validity of the claim itself. This latter view, expounded by the English Court of Appeal in Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391, has been laid to rest in that country by the House of Lords in Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1994] AC 438 and, closer to home, by the decision of the New South Wales Court of Appeal in Hyde v Agar (1999) Aust Torts Reports 65, 536. In a most helpful analysis of the comparable New South Wales rule Spigelman CJ, Mason P and Stein JA, held at 65,548 that it is for the serving party to establish the existence of a good arguable case with

respect to the jurisdictional facts specified in the applicable paragraphs of Rule 7.01(1). This done, the court must then exercise its discretion, whether to permit the serving party to proceed under Rule 7.04 or whether to set aside service or stay the proceeding under Rule 7.05: (1999) Aust Torts Reports 65,536 at 65,546. With respect to the function of the court in this discretionary phase, their Honours said this: "...it is unlikely that questions of the merits of the case will play much role in the exercise of the ultimate discretion": (1999) Aust Torts Reports 65,536 at 65,551, approving the following observation of Lord Goff in Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1994] AC 438 at 456: "I can see no good reason why any particular degree of cogency should be required in relation to the merits of the plaintiff's case" It follows from this that, if I am satisfied to the required degree that a circumstance in Rule 7.01(1) has been made out, I might permit the proceeding to go forward unless there is good reason not to. Such a reason might be that the proceeding is futile. In a case such as this I would then turn to consider any forum arguments.

40. By way of further introductory observation, I will address the evidence and the words of Rule 7.01(1) with no particular disposition adverse to the serving party. There are observations in some of the cases to the effect that the power to assume this jurisdiction where service has been effected under Rule 7.01 should be sparingly exercised or that the rule should be strictly construed. Accepting that service is permitted only where one of the circumstances of the rule has been demonstrated to the appropriate standard to exist, my function is to construe its words without predisposition and to apply them to the facts as I find them: Hyde v Agar (1999) Aust Torts Reports 65,536 at 65,551.

41. These are the principles which I shall apply in the present case. I accept, too, that, where this onus has not been discharged in respect of one or more, but not all, of the claims against the third party, it is for the defendant to elect whether he will pursue the proved claims or have the third party proceeding stayed: Williams v The Society of Lloyd's [1994] 1 VR 274 at 291-2, per McDonald J and the cases there cited. But the hardship which might be imposed by this principle upon a party such as the defendant may be mitigated by the judicious exercise of the power to allow service of third party process out of the jurisdiction pursuant to Rule 7.07(3) to which I shall refer: Australian Mutual Provident Society v G.E.C. Diesels Australia Ltd [1989] VR 407 at 411 (Full Ct).

Service under Rule 7.01(1)(f) - A Victorian Contract

42. The first circumstance relied on is paragraph (f) which is in these terms.

"(f) the proceeding is one brought to enforce, rescind, dissolve, rectify, annul or otherwise affect a contract, or to recover damages or other relief in respect of the breach of a contract, and the contract -

(i) was made within Victoria;

(ii) was made by or through an agent carrying on business or residing within Victoria on behalf of a principal carrying on business or residing out of Victoria; or

(iii) is governed by the law of Victoria."

43. The point of issue here is whether the contract in question was made by or through an agent carrying on business in Victoria. There are six contracts mentioned in the Rule 7.02 endorsement as being those which Mr White seeks to have rescinded, resolved, annulled or otherwise affected. These are:

(1) 1980 General Undertaking executed in or about August 1980

(2) Additional Security Deed executed in or about August 1980

(3) Lloyd's agreement made in October 1980

(4) Security form dated 17 September 1984

(5) 1986 General Undertaking dated 21 October 1986

(6) The Security and Trust Deed dated 29 October 1987

44. It is put that each of these contracts was made in Victoria on the basis that the documents were executed here. Further, it is said that the contract in each case was made through Lloyd's agent DUAL which carried on business in Victoria. Before me the argument based on the contracts having been made in Victoria was not pressed. This leaves three issues with respect to each of these contracts: first, whether the

contract was made through DUAL; second, whether DUAL was at the relevant time the agent of Lloyd's and third, whether at the relevant time DUAL carried on business in Victoria. The relevant time in each case is the time when the contract in question was made: BHP Petroleum Pty Ltd v Oil Basins Limited [1985] VR 725 at 747, per Murray J. In this case no contract with Lloyd's was made by DUAL in this sense.

45. The juxtaposition of the words "by" and "through" in paragraph (f)(ii) shows that the paragraph covers not only cases where the contract is made by an agent who has power to bind the overseas principal, but also those cases where the contract is made by the principal through the efforts and intervention of the local agent: National Mortgage and Agency Company of New Zealand Limited v Gosselin (1922) 38 TLR 832 (CA); BHP Petroleum Pty Ltd v Oil Basins Limited [1985] VR 725 at 746-7, per Murray J.

46. As to the various contracts mentioned in the Rule 7.02 endorsement, the forms of 1980 General Undertaking and the Additional Security Deed were received by Mr White from DUAL and executed in 1980 in Victoria. The Lloyd's agreement as pleaded is not a written document. It was entered into, as I have mentioned, in London when Mr White was accepted as a member of Lloyd's. The evidence shows that DUAL was the medium through which he was introduced in a formal way to Lloyd's. This is sufficient to support the finding which I make that there is a strong arguable case that the first three agreements made in 1980 were made with Lloyd's through DUAL.

47. In 1984 Mr White increased his premium limit to £300,000. He said that this was done on the encouragement of Mr Donner. To give effect to this it was necessary for Mr White to complete and lodge an application form with Lloyd's including a security form. It does not appear who provided him with the forms which he completed and dated 17 September 1984 and submitted to Lloyd's in London. In due course his application was accepted. I am unable to conclude that there is a strong arguable case that this, the fourth agreement, was made through DUAL.

48. The fifth agreement, the 1986 General Undertaking, was one of the three documents which DUAL told Mr White in August 1986 that he was required to execute following Lloyd's implementation of the recommendations of a report referred to as the Fisher Report. He signed the documents and returned them to DUAL in London in the expectation that DUAL would pass them to Lloyd's. This is apparently what happened. I conclude that there is a strong arguable case that this agreement was made with Lloyd's through the intervention of DUAL.

49. The sixth agreement, the Security and Trust Deed in favour of Lloyd's is dated 29 October 1987. In the statement of claim it is said that it was executed by Mr White at the time he increased his premium limit to £600,000. It is possible that the deed was one of the documents which were referred to in the DUAL letter to him of 23 October 1987. I am, however, unable to conclude on the evidence that there is a strong arguable case that DUAL had any involvement in the making of this agreement.

50. I find therefore that there is a strong arguable case that the following agreements only were made by Mr White with Lloyd's through DUAL.

(1)

1980 General Undertaking executed in or about August 1980

(2)

Additional Security Deed executed in or about August 1980

(3)

Lloyd's agreement made in October 1980

(5)

1986 General Undertaking dated 21 October 1986

51. The second issue is whether, at the time that the agreements were made DUAL was the agent of Lloyd's in acting as it did. The submission advanced on behalf of Lloyd's was that a members' agent and a managing agent were agents, not of Lloyd's, but of the member. I will approach this question as things stood in the months of 1980 before Mr White became a member, and then in the period after that date.

52. Mr White's pre-membership period ended in October 1980 when he attended the Rota meeting and was accepted as a member of Lloyd's. Reliance was placed by Lloyd's upon the documents then in existence as showing the non-existence of any agency in DUAL. In his enquiry form for membership Mr White described DUAL as "co-ordinating agent". DUAL signed Mr White's application form of August 1980 in the same capacity. The evidence of Mr Demery shows that Lloyd's does not appoint agents such as DUAL to recruit new members and does not pay them anything for their efforts. I assume that this was the position in 1980. Doubtless it was in Lloyd's interests that such recruitment should take place and doubtless it therefore approved DUAL's so acting. This explains why it appears to have provided DUAL with the necessary documentation. I was told that a company such as DUAL undertook this activity without immediate reward but in the expectation that the recruited member would engage it as its members' agent or managing agent and that it would earn remuneration in due course as such. See DUAL letter 14 July 1980. Such evidence as was given by Mr White of his dealings with DUAL in this first period does not take things very much further. There is no sufficient evidence that Lloyd's held DUAL or Mr Donner out as its agent for the purpose of introducing new members to take me to the conclusion that there exists a strong arguable case that DUAL acted as it did during this period as agent for Lloyd's.

53. The relationship between DUAL and Lloyd's and between DUAL and Mr White in the period of Mr White's membership of Lloyd's is covered by the agency agreement between DUAL and Mr White which is Exhibit PEW19. This was executed by Mr White when he first commenced underwriting, presumably in January 1981. Under this agreement Mr White appointed DUAL as his agent for the purpose of conducting his underwriting activities. I infer that, under this document, DUAL became Mr White's members' agent. Although the agency agreement appears to contain no such obligation, it is likely that DUAL saw as one of its proper functions under the agreement that of reporting to its principal from time to time and of providing him with such information and assistance as was necessary to promote their mutual interests. A new managing agreement was entered into in 1986 but there is no copy of it in evidence. In December 1988 the relationship between Mr White and DUAL became affected by the Lloyd's Agency Agreements By-law (No. 8 of 1988), but this was after the relevant dates for my present purposes. The fourth, fifth and sixth agreements were entered into between Mr White and Lloyd's in September 1984, October 1986 and October 1987 respectively. Having regard to the existence of the Agency Agreements of 1981 and to DUAL's functions under it, I am unable to conclude that there is a strong arguable case that such involvement as DUAL had in their making was as agent for Lloyd's. Indeed, the probability is that its involvement was as members' agent for Mr White.

54. The third issue is whether, at each of the relevant times, DUAL was carrying on business in Victoria. The evidence shows that throughout the period in question, from 1980 to 1987, DUAL had an office in London and none in Victoria. Between 1981 and 1985 Mr Donner and Mr Stace visited Melbourne from time to time. In 1985 two new managers of DUAL were introduced by letter from Mr Donner. Each of them was a resident of London. In November 1985 the activities of DUAL, insofar as they concerned the management of its Australian clients' underwriting activities were entrusted to Tim Holbech who seems to be also a resident in England. These managers continued to visit Australia from time to time maintaining contact by correspondence from London in the meantime. In these circumstances I do not conclude that it is strongly arguable that at any time between 1980 and the making of the sixth agreement in 1997 DUAL carried on business in Australia.

55. It follows that Mr White has demonstrated no right to serve out of the jurisdiction under Rule 7.01(f).

Service under Rule 7.01(i) - A Victorian Tort

56. The second circumstance relied upon as justifying service out of the jurisdiction is paragraph (i) which is in these terms:

"The proceeding is founded on a tort committed within Victoria."

57. The relevant causes of action relied upon in the Rule 7.02 endorsement are negligent misrepresentation, misleading and deceptive conduct and breaches of the companies' legislation relating to interests. In order to found jurisdiction under this paragraph Mr White must establish a strong arguable case that these wrongs have been committed in Victoria and that they constitute torts.

58. I shall consider first the last point which is a question of law. For this purpose I shall assume that the evidence shows to the required standard that the acts alleged to constitute the torts were committed in Victoria. The claims relied upon as falling within this paragraph include negligent misrepresentation which is clearly a tort. Those based on misleading and deceptive conduct and on breach of corporations legislation were said not to fall within that description. The difficulty which this submission highlights is that the word

"tort" may be incapable of satisfactory or, indeed, any definition: Prosser and Keeton on Torts (5th ed 1984) 1. This is, however, a refuge which is not available to me. It does, however, appear that the word takes on a different meaning depending upon its context. Tortious liability, according to Professor Winfield, "arises from a breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages": Winfield and Jolowicz on Tort (14th ed 1994) at p. 4. Where the word is used to describe a cause of action, as for example in the expression "an action of contract or of tort", it means a proceeding "in which the remedy is a common law cause of action although the right being enforced in the action may be a right created by either the common law or statute": Philip Morris Ltd v Ainley [1975] VR 345 at 349, per Menhennitt J. See too Spotless Group Ltd v Proplast Pty Ltd (unreported, King J, 9 September 1987) at p.4. His Honour in the Philip Morris case concluded that, where a person who was paid workers' compensation claims a statutory indemnity against the person liable for the worker's loss, this claim is not an action of tort. This was because the existence of the statutory right to claim presupposed the non-existence of a common law remedy. On the other hand, in Wilson Electric Transformer Company Pty Ltd v. Electricity Commission of New South Wales [1968] VR 330 at 332, Adam J was of opinion that the "substantial character" of such claim is that of an action in tort.

59. The precise point presently under consideration was not dealt with in Williams v The Society of Lloyd's [1994] 1 VR 274, a case which in many respects resembles the present proceeding. In that case, at 310, McDonald J rejected paragraph (i) as a basis for service out of the jurisdiction on the ground that the acts relied on as constituting the tort, namely the negligent misrepresentation of the Lloyd's members' agent was not the act of any agent of Lloyd's. For reasons for which I have already set out, I reach the same conclusion on the evidence in the present case. I am not satisfied that there is a strong arguable case that the representations made by Mr Donner or DUAL in the April 1980 meeting were made by him or it as agent of Lloyd's. The claims against Lloyd's based on these representations, whether in negligence or for misleading and deceptive conduct therefore do not fall within paragraph (i). I shall return later to his Honour's findings with respect to paragraph (j). This conclusion, however, does not touch the claims for misleading deceptive conduct, based on the content of Lloyd's own publications or the causes of action based on breaches of corporations legislation.

60. The conduct proscribed by s. 52 of the Trade Practices Act and s. 11 of the Fair Trading Act bears many of the hallmarks of a tort. It is a wrong in the sense that it is conduct which commercial community morality rejects; its very description, deceptive and misleading conduct, has pejorative overtones. It is a wrong for which an available remedy, perhaps the most common remedy, is damages. The social policy underlying the statutes is that of enforcing commercial morality. The jurisdiction to provide a remedy is entrusted to common law courts as well as the federal court. The statutes do not interfere with familiar common law procedures. Indeed, claims based on this conduct are frequently made side by side with more traditional common law claims. The present third party claim provides a typical instance. Mr J.C. Campbell QC in his article, "Contribution, Contributory Negligenceand Section 52 of the Trade Practices Act" (1993) 67 ALJ 87, 177 presents a compelling argument in support of the conclusion that these claims should be treated for other procedural purposes as torts.

61. In my opinion, the observation of King J in the Spotless case that "a tort is a civil wrong, whether it arises at common law or under statute", does not carry with it the converse proposition that "any civil wrong whether it arises at common law or under a statute is a tort". The discussion by Professor Fleming in the first chapter of his The Law of Torts (9th ed 1998) demonstrates this. Nevertheless, Fox J in Brown v Jam Factory Pty Ltd (1981) 35 ALR 79 at 86 referred to misleading and deceptive conduct as torts. In Gates v The City Mutual Life Assurance Society Limited (1981) 160 CLR 1 at 6, Gibbs CJ said that actions based on such conduct are "analogous to actions in tort" and Mason, Wilson, Dawson JJ at 14 said of such conduct that it is "similar both in character and effect to tortious conduct, particular fraudulent misrepresentation and negligent misstatement."

62. There is nothing in the history of Rule 7.01(1) to suggest that the word "tort" should be given a meaning limited to one group of the traditional common law causes of action. A convenient starting point is the Supreme Court of Judicature Act 1873 (Eng) which in its schedule, Rule 6, authorised the court to permit service out of England where the cause of action arose within the jurisdiction. Two years later schedule 1 to the Supreme Court of Judicature Act 1875 (Eng) contained rules of procedure which are evidently the precursors of the rules of court in this State prior to 1986. Order XI Rule 1 enables the court to permit service out of the jurisdiction of process including a variety of circumstances including that "whenever any act or thing ... for which damages are sought to be recovered, was .... done.... within the jurisdiction". This is the terminology which was adopted in Order XI Rule 1 of the Rules which were enacted as the Second Schedule to the Victorian Supreme Court Act 1883, by a strange coincidence, the same year that it was deleted from the English rules. In the 1922 Victorian Rules of Court, Order XI Rule 1(e), service out of the jurisdiction for a claim founded on a Victorian tort was omitted, again, by coincidence two years after it had been restored in

England in a new paragraph (ee) to Order XI Rule 1. After six years' absence, paragraph (e) was reintroduced in Victoria as Rule 1(e) in the Fifth Schedule to the Supreme Court Act 1928 and from then it passed into the pre-1986 Rules of Court in Order XI Rule 1(e), and thence to the present Rule 7.01(1)(i). This shows that the word "tort" in the present context has been in the English Rules since 1922 and in Victoria since 1928, but that a qualified entitlement had existed for half a century, in this jurisdiction at least, to serve a foreigner abroad where there was a local cause of action of whatever kind.

63. In my opinion, the answer to the question presently under consideration is to be found by considering the words of Rule 7.01(1)(i) as part of a regulation concerning civil procedure which is addressed to legal practitioners. The juxtaposition of paragraphs (f)(g) and (h) with paragraphs (i) and (j) suggests that the distinction is between contract claims on the one hand and tort claims on the other. With the solitary exception of paragraph (n) relating to Commonwealth Civil Aviation (Carriers Liability) Act, no mention is made of the juridical bases of the rights to be enforced, whether it be a common law obligation or one created by statute. Accepting, as I do, that a claim in tort may arise under statute as well as at common law, there is no reason in verbiage or policy to exclude one and not the other from the list of Rule 7.01(1) proceedings. I conclude that the wrong of misleading and deceptive conduct is a tort within the meaning of paragraph (i) of Rule 7.01(1).

64. I have set out at greater length than might otherwise be the case the basis for this conclusion because I am conscious that it carries with it the consequence that "tortious act or omission" in paragraph (j) must likewise comprehend misleading and deceptive conduct in contravention of the Trade Practices Act and the Fair Trading Act. In this I had the misfortune to differ from the conclusion as to paragraph (j) arrived at in 1992 by McDonald J in Williams v The Society of Lloyd's [1994] 1 VR 274 at 311-2. It would be presumptuous if not impertinent of me to attempt to explain this regrettable difference of opinion between two trial judges of this Court. All I can say in my defence is that I have had the benefit of a series of important decisions in this area which were not available to his Honour nearly seven years ago.

65. Finally, there remains the alleged wrong constituted by the breaches of the companies legislation. In paragraphs 32 and 41 Mr White alleges that by reason of the breaches he has been made liable to the Bank and has otherwise suffered loss and damage. In his prayer for relief, paragraph E, he seeks simply declarations that the agreements and undertakings are void or unenforceable for breach of the companies legislation and in paragraph B a general claim for damages. Counsel for Lloyd's did not for a moment accept that these breaches amounted to torts. They submitted that, on a proper analysis of the cause of action, the relief available to Mr White was a declaration that the transactions entered into by him as a consequence of the breaches were void and unenforceable: Hurst v Vestcorp Limited (1988) 12 NSWLR 394; O'Brien v Melbank Corp Limited (1991) 7 ACSR 19 (FC Vic); Australian Breeders Co-operative Society Limited v Jones (1997) 150 ALR 488 (Full Fed Ct). As a consequence, Mr White might seek monetary relief in the form of restitution to the extent that Lloyd's had been unjustly enriched as a result of the void contract, in accordance with the principles expounded by the High Court in Pavey and Matthews Pty Ltd v Paul (1987) 162 CLR 221 and David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353. So much was not, I think, challenged by counsel for Mr White. Lloyd's argument moved from this position to the conclusion that the availability of restitution as the appropriate relief for the wronged investor shows that the breach of statute which gave rise to it is not a tort: Fleming, The Law of Torts (9th ed, 1998 at p.5). I am not at all confident that this conclusion necessarily follows. In Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391 at 479-80 the English Court of Appeal was prepared to accept the possibility that a claim may be founded on a tort irrespective of the relief or remedy sought, whether this be damages at common law or some equitable relief. In any event, the relief sought in this case is not restitution but damages. The validity of service in respect of the claim presently under consideration must be determined on its terms as pleaded, not on some other basis: Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391 at 436.

66. What is put on behalf of Mr White is that Lloyd's breaches of the companies legislation constitute the tort of breach of statutory duty for which the remedy is damages. Such a cause of action arises "where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of the obligation causes injury or damage of a kind against which the statute was designed to afford protection": Byrne v Australian Airlines Ltd (1995) 131 ALR 422 at 429, per Brennan CJ, Dawson, Toohey JJ and at 456, per McHugh, Gummow JJ; Sovar v Henry Lane Pty Ltd (1967) 116 CLR 397 at 404-5. On that basis, I must determine whether the cause of action is a tort. I think it is. It is customarily dealt with in the standard texts on tort: Halsbury's Law of England (4th ed. Vol. 45, para. 1279; Fleming, The Law of Torts (9th ed. 1998 at p.207; Winfield and Jolowicz on Tort (14th ed, 1994) at p.191. See, too, Buckley, "Liability in Tort for Breach of Statutory Duty" (1984) 100 LQR 204. It satisfies the definition of Professor Winfield which I have quoted in

paragraph [58]. It is a cause of action whose role is to provide compensation to a person who has suffered loss by a wrongful act of another.

67. Next I consider the question whether the wrongs, assuming them to have been committed by Lloyd's, were committed in Victoria. For this purpose I look for the place where the substance of the act or omission occurred: Distillers Co (Bio-Chemicals) Ltd v Thompson [1971] AC 458 at 468 (PC); Buttigeig v Universal Terminal and Stevedoring Corporation [1972] VR 626 at 629, per Crockett J; Macgregor v Application des Gaz [1976] Qd R 175 at 176, per Matthews J. In the case of misrepresentation the location of the tort is the place where the communication was received and acted upon: Diamond v Bank of London & Montreal Ltd [1979] QB 333. I apply the same principle to the wrong of deceptive and misleading conduct. Where, as is the case here, the claims are based upon the failure of Lloyd's to warn or to disclose the full facts, the emphasis shifts to the place of the acts of Mr White done in reliance upon the conduct: Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538 at 567, per Mason CJ, Deane, Dawson, Gaudron JJ. With respect to the Initial Representations and the Subsequent Representations it is clear that they were communicated to Mr White in Victoria and that he acted upon them there in making investment decisions which were implemented in London. It is not to the point that he performed other acts in reliance upon them in England or even that he suffered consequential loss in that country: Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538 at 567, per Mason, Deane, Dawson, Gaudron JJ. Likewise, the breaches of statutory duties must have been committed in Victoria where the interest or prescribed interest was offered to Mr White and others.

68. I turn now to the question of discretion. As mentioned in Hyde v Agar (1999) Aust Torts Reports 65,536 at 66,551, there is little scope for discretion once I am satisfied to the appropriate degree that the third party claims fall within one of the paragraphs in Rule 7.01(1). Nevertheless, the exercise of power under Rule 7.04(1) or Rule 7.05 is expressed to be discretionary. The reason for the exercise of this discretion adversely to Mr White may be that his claims are plainly futile. For this purpose the strength of the evidence needed to establish the existence of the cause of action or, in the circumstance presently under consideration, the tort, "should not be regarded as much, if anything, more than is required to survive a strike out application in accordance with the well known principles applicable in this Court": Hyde v Agar (1999) Aust Torts Reports 65,536 at 65,551. Under Part 15 Rule 26(2) of the New South Wales Rules, evidence is admissible on a strike out application. Compare RSC (Vic) Rules 23.02, 23.04(2). The cases referred to in Ritchie's Supreme Court Procedure - New South Wales para [15.26.1B], however, show that evidence has a very restricted role in such an application, usually to demonstrate the uncontrovertible falsity of a pleaded allegation.

69. In this case, however, evidence was led by each party to show that Mr White had or had not a good cause of action. In case I should be not correct in following the approach of the Court of Appeal in New South Wales, I shall briefly set out my views as to its effect.

70. The evidence of Lloyd's was contained in Mr Demery's affidavits and the exhibits to them. It is necessary to observe that this deponent is a solicitor in the employ of Lloyd's and has been so since only 1983. Most of the matters deposed to by and on behalf of Mr White occurred, therefore, before Mr Demery came to Lloyd's. He addressed many of the allegations made in Mr White's affidavits with the response simply that Lloyd's denies them. I do not treat such a denial as evidence contradicting the oath of Mr White or his witnesses. I take Mr Demery to be saying only that Lloyd's intends to join issue with the fact alleged and may in due course lead evidence to the contrary.

71. The first claims are those based on the Initial Representations and the Subsequent Representations. These representations as alleged in paragraphs 8, 9 and 13 of the third party statement of claim are said to have been made in the April 1980 meeting with Mr Donner, the brochure for prospective applicants received by Mr White in 1980 and in the annual reports and accounts published in 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991 and 1992, dealing, in each case, with the activities of Lloyd's in the preceding calendar year. In argument before me no detailed analysis of these documents was undertaken to demonstrate that the individual representations were or were not made. I shall approach this aspect of the case in the same way.

72. The making of the representations by Mr Donner at the April 1980 meeting in terms of the allegations in paragraph 8 of the third party statement of claim was sworn to by Mr White in his affidavit of 19 June 1988. It was not contradicted. I have concluded in paragraph [52] above that there is not a strong arguable case, however, that at this meeting Mr Donner or DUAL acted as agent for Lloyd's. I conclude therefore it has not been shown that Lloyd's made the representations referred to in paragraph 8 of the third party statement of claim.

73. The representations contained in paragraph 9 of the third party statement of claim are said to have been made in the Lloyd's brochure for applicants for underwriting membership. The document in evidence, which is said to be to the same effect as that given to Mr White in 1980, has, on its facesheet, "issued by the Committee of Lloyd's". I am satisfied that the six representations set out in paragraph 9 are either expressed in or are to be implied from this document.

74. The six representations contained in paragraph 13 of the third party statement of claim were said to be contained in the annual reports and accounts for each of the trading years from 1980 to 1991. These are publications of Lloyd's. In each case there is evidence that the representations were made and that they were made by Lloyd's.

75. The allegations of falsity are contained in the seven sub-paragraphs of paragraph 16 of the third party statement of claim. They are particularised in schedule 6 to the pleading which comprises 47 paragraphs over 16 pages. In essence, what is alleged is that from 1977 or thereabouts Lloyd's underwriters had a substantial exposure to accident, third party liability, employer's liability and product liability risks emanating from the United States. At this time it became apparent to Lloyd's that there was every prospect of enormous claims under these policies arising out of the use of asbestos. The evidence of this before me, although sparse, was uncontradicted. Having regard to the terms of the policies and the accounting practices of Lloyds these claims would fall some time in the future upon syndicates who accepted reinsurance of these "long tail risks". These matters were not mentioned in the annual reports or accounts published by Lloyd's so that underwriting members and members of the public contemplating whether they should become underwriting members, were unaware of them. They, including Mr White, were unable to direct their underwriting activities away from these reinsurance policies. Mr White says that in 1988 to 1992 inclusive many of the syndicates of which he was a member provided reinsurance to asbestos claims and, as a consequence, they and he suffered losses. He mentioned in particular the Warrilow Syndicate 553 as having accepted these risks in 1984, the year in which he was a member. He says, not surprisingly, that, had he known the true position he would not have participated in these syndicates and as a result he would not have incurred the losses.

76. His claims based on breaches of the companies legislation were also said to be futile. For this purpose, counsel for Lloyd's drew my attention to passages in Williams v The Society of Lloyd's [1994] 1 VR 274 at 314-5 where McDonald J concluded that no strong arguable case had been shown to sustain this cause of action. His Honour arrived at this conclusion from an examination of the statutory definition of "interest" and "prescribed interest" in the light of the evidence before him. The evidence before me shows that it is at least arguable that Lloyd's promoted to the public a scheme in which Mr White as investor became a name and thereby acquired the right to participate in a common enterprise in relation to which he was led to expect profits from the efforts of Lloyd's or a third party, the members' agent. This is a matter which will be debated fully at trial. For my purpose, it is not so apparent that the contention is without foundation that I should in the exercise of my discretion refuse to permit it to go forward.

77. I conclude, therefore, that all of the causes of action mentioned in the Rule 7.02 endorsement, except those based on misrepresentations made by Mr Donner and DUAL at the April 1980 meeting, fall within the circumstance described in paragraph (i). These causes of action are not futile. Service out of Victoria with respect to them has been justified.

Service under Rule 7.01(1)(j) - Victorian Damages by Tortious Act

78. The third circumstances relied upon as justifying service out of the jurisdiction is paragraph (j) which is in these terms:

"The proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring."

79. I have concluded that Mr White has established a strong arguable case that the making by Lloyd's of the Initial Representations and the Subsequent Representations, whether they be made in breach of a duty of care or in contravention of the Trade Practices Act or the Fair Trading Act, amount to tortious conduct as are its breaches of the statutory duties imposed by the companies legislation. The remaining question under the paragraph (j) is the location of the damage suffered by Mr White as a consequence.

80. The evidence shows that Mr White's profits and losses were accounted for in London. The letter of credit, too, was paid there. It was put, then, on behalf of Lloyd's that his damage was suffered wholly out of Victoria. I do not agree. The damage in question includes all the adverse consequences of Lloyd's tortious conduct. These are particularised in paragraph 19 of the third party statement of claim. They include the

sums which Mr White was called upon to pay to Lloyd's and the prospect that he may be called upon to pay the claim of the Bank in this proceeding. For a resident of Victoria these damages were and may be suffered within the jurisdiction of this Court.

81. I conclude, therefore, that the third party may be served out of Victoria under paragraph (j) to the same extent as it is permissible under paragraph (i). All claims in the third party claim other than those based on the representations made by Mr Donner and DUAL at the April 1980 meeting fall within paragraph (j).

Service under Rule 7.01(1)(l) - Necessary or Proper Party

82. The fourth circumstance relied upon as justifying service out of the jurisdiction is paragraph (l) which is in these terms:

"The proceeding is properly brought against a person duly served within or out of Victoria and another person out of Australia is a necessary or proper party to the proceeding."

83. It will be recalled that there is before the court an application by the Bank to sever its claim against Mr White from his claim against Lloyd's. This was stood over without argument to abide the fate of the service and stay applications. Mr White's application for leave to proceed based on service out of the jurisdiction under paragraph (l) was not pressed and I shall say nothing further about it.

Rule 7.07(3) - Service Allowed by Order

84. Under Rule 7.07(2) a third party notice may be served out of Victoria without leave where the claim made in it is of such a kind that, had it been made by writ, that process might have been served out of the jurisdiction without leave pursuant to Rule 7.01. Rule 7.07(3) is in these terms:

"When paragraph 2 does not apply, the court may by order allow service out of Victoria of a .... third party notice."

Mr White in his application seeks such an order nunc pro tunc to validate the service in London. The power conferred by Rule 7.07(3) is one which should be exercised sparingly and not so as to set at naught the particular requirements of Rule 7.01(1): Melban Pty Ltd v Eu Chin Nominees Pty Ltd (unreported, Ormiston J, 16 March 1992). I would not allow service where the whole or a substantial part of the claim did not fall within one or more of the paragraphs of Rule 7.01(1). In this case I have concluded that all of the claims other than those based on the representations made by Mr Donner and DUAL at the April 1980 meeting are covered by Rule 7.01(1). I will not, however, allow service of process in respect of these excepted claims because of the want of any evidence that the representations were made by an agent of Lloyd's.

Rule 6.10 - Substituted Service

85. In the final alternative, counsel for Mr White argued that I should order substituted service of the third party process nunc pro tunc so as to validate service on Lloyd's Australia or on Mr Hutchison in Sydney. If this were the only basis for service I would not make such an order. It would be an inappropriate use of this power to enable a party to sue a non-resident in respect of causes of action which by reason of their non-conformity with Rule 7.01(1) have no sufficient nexus with the State of Victoria.

FORUM ISSUES

86. It was submitted by counsel on behalf of Lloyd's that, even if service on their client had been effected I should, in the exercise of my discretion, stay or dismiss the third party proceeding on the basis that the litigation is inappropriately conducted in this jurisdiction. I will address this submission on the basis that service on Lloyd's Australia in Sydney was valid service within the jurisdiction. This carries with it the consequence that all causes of action alleged in the third party statement of claim are properly before the court.

The Exclusive Jurisdiction Agreement

87. At the forefront of Lloyd's submission was the existence of the choice of law agreement and the choice of jurisdiction agreements contained in cll. 2.1 and 2.2 respectively of the 1986 General Undertaking which I have set out above in paragraph [18]. The choice of jurisdiction agreement imposes on the parties the obligation to resort to the English courts only; it is an exclusive jurisdiction clause. I am satisfied, too, that

the proper law of the contract between Lloyd's and Mr White is the law of England, for the contractual relationship between them has its closest and most real connection with the law of that country. It follows from this that, while I retain a discretion to refuse a stay, I should not exercise it in favour of Mr White unless strong cause is shown for so doing: The Eleftheria [1970] P 94 at 99, per Brandon J; Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197 at 230-1, per Brennan J; Akai Pty Ltd v The People's Insurance Company Ltd (1996) 188 CLR 418 at 428-9, per Dawson, McHugh JJ.

88. If Mr White's only cause of action was that of negligent misrepresentation, this authority would, I think, be fatal to his contentions as to forum for the reasons set out in Williams v The Society of Lloyd's [1994] 1 VR 274. It is true that a claim based on such a cause of action is not available to him in the English courts having regard to s. 14(2) of the Lloyd's Act 1982. This statute, however, is part of the English law which he has accepted and the right of a contracting party to abandon such a cause of action does not offend public policy in this jurisdiction.

89. Countervailing jurisdictions include the non-availability in the selected forum of the relief sought in this Court based on misleading and deceptive conduct and on breaches of the companies legislation. It is undesirable that parties should, by entering into an exclusive jurisdiction agreement, be able to circumvent a legislative scheme established by Parliament to protect investors purchasing interests or prescribed interests. Put more positively, the statutes creating these standards of commercial behaviour for persons doing business in this jurisdiction do not exempt foreign corporations. Moreover, the policy behind them would not be served if exemption might be achieved by inserting stipulations as to foreign law or forum. Furthermore, in this proceeding, the very validity of the exclusive jurisdiction agreement is in issue on the basis of Lloyd's alleged improper conduct. If Mr White's challenge to it is successful, the agreement as a ground for a stay disappears.

90. I am mindful too of a substantial and unanimous line of authority in the United States Federal Courts which has given effect to this same exclusive jurisdiction agreement: Riley v Kingsley Underwriting Agencies Ltd 969 F 2d 953 (1992); Roby v Corporation of Lloyd's 996 F 2d 1353 (1993); Bonny v Society of Lloyd's 3 F 3d 156 (1993); Shell v R.W. Sturge Ltd 55 F 3d 1227 (1995); Allen v Lloyd's of London 94 F 3d 923 (1996); Haynsworth v Corporation of Lloyd's 121 F 3d 956 (1997); Richards v Lloyd's of London 135 F 3d 1289 (1998).

These cases apply the principle that an exclusive jurisdiction agreement will be given effect to, absent evidence clearly showing that the agreement is unreasonable or that it has been procured by fraud or overreacting. While these decisions are not binding on me, they represent a strong tide of judicial opinion which I do not ignore. There is much to be said for consistency in approach between their common law system and ours.

91. That said, it is a hard thing to turn away a litigant who has properly invoked the jurisdiction of this Court, particularly where the consequence of this must be that the litigant is precluded from enforcing rights which he enjoys as a person engaging in commerce in Victoria by virtue of legislation in force in this jurisdiction. Moreover, an issue which Mr White would litigate here is Lloyd's impropriety in introducing the exclusive jurisdiction agreement. I conclude that good reason has been shown not to hold Mr White to the exclusive jurisdiction agreement.

Forum non conveniens

92. Counsel for Lloyd's submitted that the litigation had a substantial connection with England where Mr White is presently engaged in similar litigation against Lloyd's. The evidence, especially that for and against the falsity of the misrepresentations and negligence of Lloyd's, is situated in England. This evidence includes a substantial number of documents which have been marshalled in England. The witnesses, both lay and expert, who may be called as to the practices of Lloyd's and the knowledge available to it are likewise likely to be from England. It must be observed, however, that these factors bear on the question whether London is a more convenient forum rather than the question before me, which is whether Victoria is clearly an inappropriate forum: Rocklea Spinning Mills Pty Ltd v Consolidated Trading Corporation [1995] 2 VR 181.

93. A good deal of the argument on the forum non conveniens issue centred around the proceeding 1996 Folio 2032 in the Commercial Court in London, the Jaffray proceeding. The evidence shows that a number of Lloyd's names including Sir William Otho Jaffray were sued by Lloyd's for unpaid premiums. Their defences based on Lloyd's insufficient information were unsuccessful because no set off was permitted under the Reconstruction and Renewal plan. Their complaints therefore moved forward to trial as counterclaims only. The Jaffray proceeding is to be tried later this year on the basis that it raises the complaints common to a large number of former names including Mr White. He will, therefore, be bound by the findings of fact and

law in that trial. In this sense he is a counterclaimant in the English proceeding. What was then put on behalf of Lloyd's is that it would be vexatious and oppressive if Mr White were permitted to litigate at the same time in London and in Melbourne the same issues and to seek much the same relief. This, it was said, is to be contrasted with the modest inconvenience to him of pursuing Lloyd's only in London.

94. This submission is flawed at a number of levels. First and foremost, the mere pendency of similar litigation in London does not of itself render litigation in this Court inappropriate: Rocklea Spinning Mills Pty Ltd v Consolidated Trading Corporation [1995] 2 VR 181. Second, notwithstanding the common factual substratum, the causes of action in the Jaffray proceeding are fundamentally different from those in the present case which I have summarised in paragraphs [8] to [12] above. In the Jaffray proceeding it is not open for the claimant to seek damages for negligent misrepresentation having regard to s. 14(3) of the Lloyd's Act 1982. What is alleged in that proceeding is that Lloyd's recklessly and or deliberately misrepresented or concealed the true position from its members or acted fraudulently. Alternative claims are based on the English Misrepresentation Act 1967 ss. 2(1) and 2(2) and on breach of duty of care prior to the commencement of the Lloyd's Act 1982. The allegations of bad faith against Lloyd mean that the issues in the Jaffray proceeding differ from those based on the Initial Representations and the Subsequent Representations in the proceeding in this Court. The claims of Mr White based on misleading and deceptive conduct and breaches of the companies legislation have no counterparts in the London litigation. Given that there is probably little dispute between the parties about the making of the statements said to constitute the representations, this means that the evidence in the Jaffray proceeding will be very different from that in this proceeding. Furthermore, the existence of these differences means that the question as to forum becomes "whether, having regard to the controversy as a whole, the Australian proceedings are vexatious or oppressive in the Voth sense of those terms, namely, that they are `productive of serious and unjustified trouble and harassment' or `seriously and unfairly burdensome, prejudicial or damaging'": CSR Ltd v Cigna Insurance Australia Ltd (1997) 189 CLR 345 at 400-1, per Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ.

95. I am not satisfied that the bringing or continuance of this proceeding is vexatious or oppressive in that sense. The relief which Mr White seeks in this Court, whether it be for damages for negligent misrepresentation or for misleading and deceptive conduct or for breaches of the companies legislation is not available in the London Commercial Court. Accepting that there will inevitably be trouble and expense for Lloyd's to conduct both proceedings, it can hardly be said that it is unjustified for Mr White to bring a claim in a jurisdiction in which this is permitted rather than in one where it is not.

96. Counsel for Mr White submitted that, properly understood, the prospect of vexation and oppression in the Voth sense disappears. It is true that Lloyd's must conduct complex and expensive litigation in London, but this it must do whether Mr White was a participant in that litigation or not. The focus, therefore, returns to the fundamental question whether this forum is clearly inappropriate for the resolution of the issues in this proceeding.

97. To my mind the submissions put on behalf of Lloyd's amount to no more than that the continuance of this proceeding would be less convenient to it than would be the case if it were to litigate solely in London. It has not been shown that, as a forum for this litigation, this Court is clearly inappropriate. The applications based on forum non conveniens are refused.

ORDERS

98. I propose, therefore, the following orders:

1. Declare that service on Lloyd's Australia Ltd in Sydney on 5 February 1999 is good service on the third party.

2. The applications of the third party by summonses filed on 29 January 1999 and 10 February 1999 seeking orders that the third party proceeding be dismissed or stayed be dismissed.

3. The application of the defendant by summons filed on 8 February 1999 be dismissed.

4. The third party pay the costs of the defendant of these applications.

99. I will hear counsel further as to the precise terms of the orders which should be made to give effect to my conclusions.