WILLIAMS v THE SOCIETY OF LLOYD's and Others
SUPREME COURT OF VICTORIA
1992 VIC LEXIS 465; [1994] 1 VR 274
11-13, 17-20, 24-28 August 1992, 19 November 1992, heard
19 November 1992, delivered

CATCHWORDS: [*1] Practice and procedure - Service of originating process out of Victoria - Application to set aside - Onus and standard of proof - Contract made within Victoria - Postal acceptance rule - Contract made by or through an agent Carrying on business or residing within Victoria - Agency - Ostensible authority - Tort committed within Victoria - Damages caused by tortious act or omission - Whether breach of statutory provision a tortious act or omission - Necessary or proper party to the proceeding - Supreme Court Rules, Ch 1, R7.01, R7.02, R7.04, R7.05, and 8.09 - Trade Practices Act 1974 (Cth), s52, s82, and s87 - Fair Trading Act 1985 (No 10201), s11, s36, and s41. Practice and procedure - Service of originating process out of Victoria - Application to set aside - Discretion - Submission to jurisdiction of foreign courts - Practices and procedures of foreign court - Inappropriate forum - Arbitration - Supreme Court Rules, Ch 1, R7.01, R7.02, R7.05, and R8.09 - International Arbitration Act 1974 (Cth), s7. Companies - Membership of Lloyd's insurance market - Whether a "prescribed interest" - Companies (Victoria) Code, s5, s169, and s171.

JUDGES: MCDONALD J

JUDGMENTS: McDonald J: The plaintiff who was born in England migrated to Australia in 1977. He is by profession an anaesthetist and he has carried on practice and resided in Victoria since 1978. On 16 October 1984 the plaintiff was elected as and became an underwriting member [*15] of the first defendant, Lloyd's. He commenced underwriting in the Lloyd's market at the commencement of the year 1985. The plaintiff continued to be a member of Lloyd's until 31 December 1990 when his resignation became effective.

On 6 March 1992 the plaintiff commenced the present proceedings by writ against the five defendants. The first defendant, Lloyd's, was incorporated pursuant to the Lloyd's Act 1871 (34 Vict. C XXI). The second defendant is a company incorporated under the Companies Acts of UK and it is an underwriting agent at Lloyd's and as such manages the underwriting business and affairs of a number of underwriting members of Lloyd's. The third defendant (Lord Zouche) is a commission agent of the second defendant, Fenchurch. The fourth defendant (Keeling) was the managing director of and is now the chairman of Fenchurch. The fifth defendant bank is a company incorporated in Victoria. It has a branch in London.

The writ in these proceedings was served out of Victoria and in England on the first four defendants. It was endorsed pursuant to R7.02(1) with a statement of fact and the particular paragraphs of R7.01 on which the plaintiff relied in order to serve the [*16] writ out of Victoria. The fifth defendant bank was served in Victoria and entered an appearance in the proceedings on 10 March 1992. The first four defendants have not entered an appearance in the proceedings, conditional or otherwise.

On 20 March 1992 Lloyd's filed a summons with this court pursuant to the procedure provided by R8.09 of the Rules of Court seeking an order that service of the writ or that the writ be set aside or, in the alternative, that the proceedings be dismissed or forever stayed.

R8.09 provides: "Notwithstanding R8.08 the Court may exercise its jurisdiction to (a) set aside a writ or originating motion or its service; (b) make an order under R46.08; (c) stay a proceeding on application made by the defendant before filing an appearance, whether conditional or not."

R8.08 provides for the filing of a conditional appearance. R46.08 as referred to in subpara(b) is a reference to the court's power to set aside an order made on notice when the person affected does not attend or when an order was made not on notice to the person affected, for example, an order for service out of the jurisdiction under R7.06.

R8.09 corresponds to the former O.12 R17. Williams [*17] in Civil Procedure - Victoria, para[18.09.1], states that the rule "establishes an alternative procedure to that of conditional appearance under R8.08 in the case of challenge to the jurisdiction of the court or to the validity of originating process or its service or of application to the court to stay a proceeding."

It is further provided by R7.05: "(1) The Court may make an order of a kind referred to in R8.09 on application by a party served with originating process out of Victoria.

"(2) Without limiting para(1), the Court may make an order under this Rule on the ground (a) that service out of Victoria is not authorised by these Rules; or (b) that Victoria is not a convenient forum for the trial of the proceeding. "(3) ..."

The grounds relied on by Lloyd's for the orders sought by it, as appears by its summons as amended, were that the court has no jurisdiction in the proceedings as service out of Victoria was not authorised by R7.01(1) of the Rules of Court, alternatively, that the plaintiff and Lloyd's had agreed that an disputes between the parties of the kind raised in the proceedings would be referred exclusively to the courts of England and, in the further alternative, [*18] that Victoria was not a convenient forum for the trial of the proceedings. On 13 May 1992, Fenchurch, Lord Zouche and Keeling also issued a summons in the proceedings seeking the same orders in respect of the plaintiff's proceedings against them as is sought by Lloyd's by its summons. Those defendants relied on the same grounds in support of the orders sought as that relied on by Lloyd's in its summons.

It is these two summonses that are presently returnable before the court.

By his statement of claim endorsed on the writ the plaintiff has alleged that at an material times Fenchurch acted on behalf of Lloyd's in seeking new non working underwriting members of Lloyd's including himself. He alleges that on being elected to be a member of Lloyd's there was constituted an agreement between himself and Lloyd's pursuant to which he was obliged to provide Lloyd's with certain securities for the payment of calls to meet his underwriting liabilities and he was permitted to underwrite insurance business "through Lloyd's" as a member of syndicates of Lloyd's members. He further alleges that by member's agency agreements made during the period from 1 January 1985 to or about 1989 between [*19] himself and Fenchurch he appointed Fenchurch to act as his underwriting agent at Lloyd's in respect of underwriting business written "through Lloyd's". The written agreements as identified by the plaintiff are three agreements dated 1 January 1985 in respect of syndicates 216 and 270, syndicate 206 and syndicate 255, an agreement dated 1 January 1987 in respect of some 14 identified syndicates and an agreement dated 6 October 1989. The plaintiff alleges that pursuant to the member's agency agreements he became a member of syndicates of underwriters and undertook insurance business at Lloyd's initially to a premium level limited to 200,000 Pounds, which limit was later increased to 250,000 Pounds, and again on and after 1 January 1985 the premium limit was increased to 500,000 Pounds.

The plaintiff alleges that pursuant to the agreement with Lloyd's he provided securities to Lloyd's in the form of three bank guarantees furnished by the fifth defendant bank which were guarantees dated 1 January 1985 for 70,000 Pounds, 1 January 1986 for 17,500 Pounds and 1 January 1988 for 52,500 Pounds. The additional guarantees after the first guarantee were reflective of the increases in the amount [*20] of the limit of premiums able to be underwritten by the plaintiff during this period.

The plaintiff alleges that by security trust deeds dated 1 January 1985, 1 January 1986 and 1 January 1988 he entered into Lloyd's underwriting members security and trust deeds with Lloyd's pursuant to which he agreed to pay Lloyd's within 30 days of being required to do so by written notice, the sums demanded not exceeding the sum specified in the identified bank guarantee. The plaintiff further alleges that he entered into premium trust deeds with Lloyd's and Fenchurch pursuant to which there was constituted a trust comprising premiums and other moneys payable to the plaintiff in connection with his underwriting business at Lloyd's and which was held on trust to pay claims, losses and other specified sums with respect to risks underwritten by him. The plaintiff has alleged that before he entered into the member's agency agreements, the security trust deeds and premium trust deeds and before he gave the securities referred to and in order to induce him to enter those deeds and give the securities, Lloyd's, Fenchurch Zouche and Keeling made representations to him. Alternatively he alleges that, [*21] in consideration of him entering the agreements, deeds and giving the securities Lloyd's, Fenchurch Zouche and Keeling entered agreements with him collateral to the first referred to agreements and deeds. He has alleged that the representations and collateral agreements entered into in the case of Lloyd's and Fenchurch were, inter alia, that: * "Lloyd's properly and efficiently controlled, supervised, governed and administered the underwriting of insurance including re insurance by members of Lloyd's and would continue to do so." * "Lloyd's strictly controlled the business conducted by Lloyd's members so as to protect the interest of members and the integrity of Lloyd's underwriting business." * "That the underwriting business was and would continue to be profitable." * "That all the underwriting risks of the plaintiff would be properly and effectively re insured by other underwriters." * "That the plaintiff would be provided with proper and effective stop loss insurance." The plaintiff has alleged that in the case of Fenchurch the representations made and the collateral agreements entered into were, inter alia: * "That the average profit the plaintiff would earn on his underwriting [*22] business would be 10 per cent per annum." * "That Fenchurch would at all times act on behalf of the

plaintiff in the best interests of the plaintiff." * "That the underwriting business of the plaintiff would be spread widely by Fenchurch to minimise the plaintiff's exposure to extreme or unusual losses."

The plaintiff has alleged that the representations relied on by him were made, in so far as they were in writing, by a document on the letterhead of Fenchurch headed "Underwriting membership of Lloyd's of London for overseas candidates" signed by Keeling on behalf of Fenchurch and Lloyd's dated December 1983 and Fenchurch's notes for prospective underwriting members of Lloyd's. He has alleged that in so far as the representations were oral they comprised of conversations had between himself and Zouche and Keeling on behalf of themselves and on behalf of Lloyd's and Fenchurch which conversations took place at the plaintiff's home and at the office of his accountant during June and July 1984 in Victoria and at the premises of Lloyd's and Fenchurch in London in or about October 1984. In so far as he alleges that the same were to be implied he claims that the same are to be implied [*23] from the Lloyd's Acts 1871 to 1982 and the by laws of Lloyd's made thereunder, from the role of Lloyd's in the underwriting of insurance by members of Lloyd's and from the relationship of Lloyd's to its underwriting members.

The collateral agreements alleged are alleged to be constituted by the aforesaid conversations and the written documents that I have referred to.

The plaintiff has alleged that acting on the faith and truth of the representations and the said collateral agreements he was induced to and did enter into the Lloyd's agreement, the member's agency agreements, the security trust deeds and the premium trust deeds and that he gave the securities referred to. He has alleged that the representations made were false and untrue and the collateral agreements were breached. He has alleged, inter alia, that: * "Lloyd's did not at any material time properly or efficiently control, supervise, govern or administer the underwriting of insurance including re insurance by members of Lloyd's." * "Lloyd's did not at any material time control strictly or otherwise properly or at all the business conducted by Lloyd's members so as to protect the interests of members and the integrity [*24] of the Lloyd's under writing business." * "The under writing business was neither safe nor profitable." * "The plaintiff did not make any profit on his underwriting business and in fact suffered disastrous losses in respect thereof." * "Fenchurch did not and did not intend to carry out the instructions of the plaintiff." * "Fenchurch did not act on behalf of the plaintiff in the best interests of the plaintiff but rather acted on behalf of the plaintiff in the manner which best suited the interests of Fenchurch and Lloyd's." * "The underwriting risks of the plaintiff were not properly or effectively re insured with other underwriters and by reason of practices referred to neither Lloyd's nor Fenchurch ever intended that they should be." * "The underwriting business of the plaintiff was not spread widely by Fenchurch by reason of which the plaintiff was exposed to extreme and unusual losses." In particularising those false representations and breaches of collateral agreements the plaintiff has alleged that Lloyd's caused, encouraged or permitted practices * of improper and ineffective re insurance of syndicates by means of a system known as the "LMX Spiral"; * of members' agents [*25] placing non working members of Lloyd's in high risk syndicates to the disadvantage and loss of such non working members including the plaintiff; * of non working members underwriting less profitable and greater risk business compared to working members.

The plaintiff further alleged that Fenchurch placed non working members including himself in syndicates underwriting low profit and high risk insurance, that it did not provide him with any proper or effective re insurance other than providing him with the illusory re insurance through the "LMX Spiral" and that with the knowledge and approval of Lloyd's it placed him and other non working members of Lloyd's in syndicates that re insured to dose out high and extreme risk insurance policies that should not have been re insured to close out.

In addition to alleging that the representations were made by Lloyd's and Fenchurch fraudulently the plaintiff further alleged that Lloyd's and Fenchurch made the same in bad faith.

In respect of this allegation it is to be noted that by s14 of Lloyd's Act 1982 (UK) it is provided that Lloyd's shall not be liable for damages whether for negligence or other tort, breach of duty or otherwise [*26] as provided by that section unless the act or omission complained of "was done or omitted to be done in bad faith". Relying on such allegations the plaintiff has claimed that he is entitled to rescind the Lloyd's agreement, the member's agency agreements, the security trust deeds and the premium trust deeds and to have the securities returned.

In addition the plaintiff has alleged that in making the representations and warranties Lloyd's owed him a duty of care which duty it breached by making the representations and warranties negligently.

The plaintiff has alleged that in consequence of the aforesaid matters he has suffered loss and damage. In particularising such loss and damage in his statement of claim he has alleged such loss and damage to be "(a) Loss of profit 20,000 Pounds for 1985 and 25,000 Pounds per annum for the years 1986 to 1990. "(b) Further or alternatively loss of funds held pursuant to the premium trust deeds - 42,000 Pounds and interest thereon. "(c) Further or alternatively under writing losses 58,114.05 Pounds and continuing."

In addition to alleging that false and fraudulent representations were made on behalf of Lloyd's which induced him to enter [*27] the Lloyd's agreement, the plaintiff has alleged that such agreement contained terms of a like nature to a number of the representations alleged. He has alleged that the same were breached by Lloyd's in repudiation of the agreement and that he accepted that repudiation and brought the agreement to an end. Again he alleges that in consequence he suffered the same loss and damage.

Similarly, he alleges that representations and warranties made by Fenchurch, of the nature alleged, comprised terms of the Fenchurch agreement which were broken by it causing him to suffer the same loss and damage.

In addition to those causes of action the plaintiff has alleged that the making of the false and fraudulent representations and the breaches by Lloyd's of the Lloyd's agreement and by Fenchurch of the member's agency agreement as referred to, constituted conduct by Lloyd's and Fenchurch in trade or commerce that was in contravention of s52 of the Trade Practices Act 1974 (Cth) and s11 of the Fair Trading Act 1985 (Vic) in that such conduct was misleading or deceptive or was likely to mislead or deceive. The plaintiff has alleged that by reason of such matters he is entitled to and claims pursuant [*28] to s87 of the Trade Practices Act 1974 and s41 of the Fair Trading Act orders setting aside and/or rescinding the Lloyd's agreement, the member's agency agreement, the security trust deeds, the premium trust deeds and an order providing for return to the plaintiff of the securities. He has also alleged that by reason of such conduct he has suffered the aforesaid loss and damage.

Further, and against Zouche and Keeling, the plaintiff has alleged that by reason of their respective involvement in making the representations he is entitled, by virtue of the provisions of s82 of the Trade Practices Act, to recover loss and damage from such defendants.

The plaintiff has alleged further that membership of Lloyd's to underwrite insurance business constituted a "prescribed interest" within the meaning of s5 of the Companies (Victoria) Code 1981 and that in contravention of s169 and s171 of the Code the first four defendants offered to the public, including the plaintiff, for subscription or purchase or invited the public, including the plaintiff, to subscribe for or purchase the prescribed interest and that the plaintiff purchased such prescribed interest being membership of Lloyd's. [*29] He has alleged that by reason of those matters the agreements, trust deeds and securities are void for illegality. Finally, the plaintiff alleges that Lloyd's and/or Fenchurch materially altered the bank guarantees by completing the date of the security and trust deed referred to therein and by reason thereof the securities were invalid and void.

The plaintiff by his statement of claim has pleaded that Lloyd's had threatened and intended, unless restrained, to call upon the securities or, alternatively, the bank guarantee in the sum of 70,000 Pounds and dated 1 January 1985 and that the fifth defendant threatened or intended, unless restrained, to honour the security and pay to Lloyd's the face value of the security on the demand made by Lloyd's.

By his prayers for relief the plaintiff sought injunctive orders against Lloyd's restraining it from calling up or enforcing and/or receiving the proceeds of the bank guarantee and sought an order restraining the fifth defendant bank from paying to Lloyd's any sum under the bank guarantee.

In addition the plaintiff has sought declarations that the Lloyd's agreement, the member's agency agreements, the security trust deeds and the [*30] premium trust deeds have been rescinded by the plaintiff or, alternatively, that the same be rescinded and a declaration that such agreements, deeds and bank guarantees are invalid or void. In the alternative the plaintiff has sought an order that such agreements, deeds and securities be set aside and/or cancelled. In addition or, alternatively, the plaintiff has claimed damages.

On 20 March 1992, Hampel J in this court ordered, upon the plaintiff giving to the court an undertaking in respect of damages, that the fifth defendant bank be restrained until the hearing and determination of Lloyd's' present summons before the court, from paying to Lloyd's any sum under or in respect of the bank guarantees.

On 9 July 1992 I ordered that the summons of the plaintiff filed 7 July 1992 whereby he sought an interlocutory order that Lloyd's be restrained from calling up, enforcing, taking or receiving the proceeds of such bank guarantees, be dismissed.

In support of the plaintiff's primary submission that this court has jurisdiction over these proceedings against the first four defendants who were served out of Victoria and who have not entered an appearance, counsel for the plaintiff [*31] relied on four subparagraphs of R7.01(1) as the basis for the plaintiff's entitlement to serve the writ on such four defendants in England. Service out of Victoria under the Rules of the Court is governed by the provisions of R7. That rule replaced O.11 of the former rules.

The new rule makes a number of changes to the practice as previously existing for service out of the State. R7, which provides by subR(1) the grounds on which an originating process may be served out of Victoria, abolished the requirement that the plaintiff must first obtain leave before serving such process out of the jurisdiction, which leave was to be not granted "unless it shall be made sufficiently to appear to the Court . . . that the case is a proper case for service out of the jurisdiction" under O.11. Further, the new rule also provided a wider provision for service out in tort claims and claims against multiple defendants. It also abolished the requirement that when service was effected out of Australia the defendant must be served with a notice of the originating process rather than the originating process itself. R7.01 and the sub clauses so relied on on behalf of the plaintiff as entitling the [*32] plaintiff to serve the court's process out of Victoria enabling the court to exercise its jurisdiction in the proceedings against them provide as follows: "7.01(1) Originating process may be served out of Victoria without order of the Court where ... (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; ... (i) the proceeding is founded on a tort committed within Victoria; (j) the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring; ... (l) the proceeding is properly brought against a person duly served within or out of Victoria and another person out of Victoria is a necessary or proper party proceeding;"

It is convenient to deal at the outset with a number of issues raised during the course of the hearing of [*33] the applications before dealing with the substantive issues.

It was submitted on behalf of the first four defendant applicants that on this application the plaintiff bore the onus of establishing on all the evidence that there existed a strong arguable case that in respect of each of the causes of action relied on by him by his statement of claim, authority existed to serve the proceedings out of the jurisdiction under one or other of the sub rules of R7 as relied on. On behalf of the plaintiff it was submitted that in consequence of the amendments to the rules and by reason of the provision of R7, on an application such as the present, a more flexible approach should be taken by the court than it took under the former rules. It was submitted that the plaintiff should be entitled to succeed and the application of the defendants to set aside the writ, or service of it, or to have the proceedings stayed, should fail where the plaintiff establishes a prima facie case on the evidence that service out of the jurisdiction was authorised by the rules and where the court, in the exercise of its discretion, determines that the proceedings should go forward to trial in the court where final [*34] determination of the issues will decide whether one or other of the paragraphs of R7.01 have been satisfied. In Carroll v Laurie [1959] VR 275, Dean J had before him an application by a defendant served out of the jurisdiction pursuant to leave granted under the rules on an ex parte application to serve the writ out, to discharge that order and to set aside the writ and the service of the same. On dealing with the question of the onus of proof and whether the question of the Court's jurisdiction could be left ultimately to be determined at trial, his Honour said, at 277: "The next problem is as to the degree of proof required to establish the matters enumerated in R1. Obviously it is not possible to undertake a full inquiry such as would be made at the trial, and some less degree of proof is necessary. This difficulty has sometimes led the courts to make orders which had the effect of postponing the determination of the sufficiency until the trial - see Thomas v Duchess Dowager of Hamilton (1886), 17 QBD 592; Friedman v Kemp's Nurseries Ltd, [1954] VLR 336. But in [Vitkovice Horni a Hutni Tezirstvo v Korner [1951] AC 869], the House of Lords expressed [*35] the view that such an order was undesirable. The problem of proof for the purposes of O.11 was discussed at some length by the House of Lords. Lord Simonds said it could 'sufficiently appear' that the necessary facts were established while the proof fell short of that required at the trial. Lord Radcliffe considered that a 'prima facie case' put the standard of proof 'somewhat too low', and that the requirement that the Court should be 'satisfied' placed it 'somewhat too high'. His Lordship preferred the test of 'a strong case for argument'. He said further 'I do not myself think that [the language of the Order] presents any great difficulty so long as it is approached with two main considerations in mind. The first is that authority to sanction the issue of a writ outside the jurisdiction is not lightly to be assumed. The second is that both the nature of the case and wording of R4 [our R2] show that the existence of the conditions that govern the authority cannot be ascertained with the same finality as would be appropriate at a trial, in which evidence and argument could be exhaustively deployed'.

"The solution which I should adopt is stated by Lord Radcliffe at 883. His Lordship [*36] said: 'It must sufficiently appear to him that it is a proper case. The phrase is a composite one and it is not elucidated by taking it to pieces; but it seems to me clear that the use of the word 'sufficiently' in this context shows that it is not necessary that the judge should be satisfied beyond reasonable doubt as to the existence of the qualifying conditions. Further, a case does not appear to be a proper case for the purposes of this Order unless on consideration of all admissible material there remains a strong argument for the opinion that the qualifying conditions are indeed satisfied'."

In WA Dewhurst and Co Pty Ltd v Cawrse [1960] VR 278, Dean J again had to consider the same matter where a service had been effected out of the jurisdiction pursuant to the provisions of the Service and Execution of Process Act 1901 (Cth). Pursuant to the provisions of that Act, although no leave to serve out of the State was necessary before service was effected. if no appearance was filed by a defendant served in another part of the Commonwealth pursuant to the Act, the plaintiff could not take any further step in the proceeding before leave to proceed was given pursuant to s11 of the [*37] Act. That section required that it be "made to appear to the Court" that the proceeding fell within a paragraph providing the jurisdiction of the court. At 280 and 281, Dean J said: "The question of jurisdiction and the proof of the necessary facts to establish jurisdiction may arise at any one or more of three stages - (a) when plaintiff seeks liberty to proceed against a defendant who has not appeared; (b) when, as here, defendant moves for a stay of proceedings; (c) when defendant applies under s11(2) to rescind, set aside or amend the order giving leave to proceed. It seems to me that the onus of proof rests upon plaintiff in each case to make it appear that the facts necessary to jurisdiction exist. He has plainly this burden when he seeks liberty to proceed. When defendant moves to rescind an order giving liberty to proceed, he is really saying that on the evidence plaintiff has not brought his case within s11(1). A similar view has been acted upon by the Court of Appeal under O.11 of the Rules of the Supreme Court ... The same view was taken by the Full Court of New South Wales in Ex parte Walker; Re Caldwell's Wines Ltd ... In whichever way the matter comes before the Court, [*38] I think plaintiff must make the necessary facts appear." As to the degree of proof required, his Honour, at 281 and 282, said: "S11 uses the expression 'if it is made to appear to the Court' that one of the matters referred to in the following paragraphs of the section exists. This follows the language of the English Rules of the Supreme Court, O.11, R1, except that s11 omits the word 'sufficiently' which appears to add nothing. But in the English Rules, as in the Rules of the Supreme Court in Victoria, it is provided: '. . . no such leave shall be granted unless it shall be made sufficiently to appear to the Court or judge that the case is a proper one for service out of the jurisdiction under this Order.' No such language is used in s11 although it may be that the use of the word 'may' in the section confers a like discretion, a question I am for the present leaving to one side. But the language which I have quoted from the English O.11 has greatly influenced the decisions upon the effect of the Rules; see, particularly, the Korner Case, supra. In Hemelryck v William Lyell Shipbuilding Co Ltd, [1921] 1 AC 698, at 701, in the judgment of the Privy Council it is said that for the [*39] purpose of enabling the discretion conferred by the Rules to be exercised it is sufficient if there appears reasonable evidence that a contract had been made unless the defendant was able to satisfy the court otherwise. When the Korner Case came before Slade, J, his Lordship, founding himself upon what was said by Lord Goddard, CJ, in Malik's Case, supra, considered that it was sufficient for plaintiff to show a prima facie case of the existence of a contract and its breach, but that the question where the breach occurred, a question which would not arise at the trial as an issue should be decided in the same way as any other issue in dispute at a trial and the judge must be satisfied that the breach took place within the jurisdiction. The idea that there were two different kinds of onus of proof was rejected by the majority of the Court of Appeal ([1950] 2 KB 128; [1950] 1 All ER 558), and by the House of Lords. Lord Simonds considered that plaintiff must establish a 'good arguable case'; Lord Radcliffe, that he must show 'a strong argument'; Lord Tucker, that the words 'made sufficiently to appear' meant 'satisfied'. but not [*40] that the ground relied on must be proved as an issue required to be proved at trial.

"The result appears to be that when defendant moves to stay proceedings or to set aside an order, the court must, upon the whole of the material, be satisfied that plaintiff has a strong arguable case that the ground relied upon is made out, but he does not have to prove it as fully as a disputed issue would have to be established at a trial." Under the present rules of this court and pursuant to R7.04(1) the court is required to be "satisfied that the subject matter of the proceeding so far as it concerns (the party served) is within R7.01", before it may make an order that the plaintiff shall be at liberty to proceed where the party has not filed an appearance. On such an application it is for the plaintiff to "satisfy" the court, that the proceedings are of a kind within the categories under O.7.01 just as the plaintiff is required under the provisions of the Service and Execution of Process Act to make the similar matter "appear to the Court".

In Deer Park Engineering Pty Ltd v Townsville Harrow Board (1974) 5 ALR 131, Gillard J held that on a motion to set aside [*41] service of a writ which had been served pursuant to the provisions of the Service and Execution of Process Act (Cth), the plaintiff bore the onus to establish "a good arguable case". Likewise in McFee Engineering Pty Ltd (in liq) v CBS - Constructions Pty Ltd (1980) 28 ALR 339, Yeldham J held that where a defendant challenged the jurisdiction of a court to hear proceedings in which the plaintiff relied on s11 of the Service and Execution of Process Act, in order to establish jurisdiction the onus rested on the plaintiff to prove "that there was a good arguable case to show' facts the existence of which would establish the court's jurisdiction. In Victorian Broadcasting Network Ltd v Whitlam (1980) 31 ALR 184 proceedings had been commenced by the respondent, plaintiff, in the Supreme Court of the Australian Capital Territory and served on the appellant, a defendant, in Victoria under the provisions of the Service and Execution of Process Act 1901 (Cth). No appearance conditional or otherwise was filed by the appellant, nor had the respondent made application for liberty to proceed. The appellant however had proceeded by motion to [*42] set aside the writ in so far as it applied to it and service of the same on it. In their judgment, Blackburn, Franki and Keely JJ, comprising the Full Federal Court, followed Dean J in Dewhurst, holding that on the application the onus lay upon the plaintiff to satisfy the court on the whole of the material that it had a strong arguable case that the ground relied on under s11(1) of the Act was made out. In Melban Pty Ltd v Eu Chin Nominees Pty Ltd (unreported, 16 March 1992), Ormiston J, on an application by a third party to set aside a third party notice, or service of the notice, or for an order to stay such proceedings on the grounds that they were not authorised by R7.01 of the Rules of Court, held that the "third party claimant" defendant, "must show a strong arguable case" that the provisions of R7.01 relied on and endorsed on the notice was made out.

In support of his submissions counsel for the plaintiff relied upon two decisions of the Supreme Court of New South Wales. In Pendal Nominees Pty Ltd v M and A Investments Pty Ltd (1989) 18 NSWLR 383, Rogers CJ Comm D considered a notice of motion on behalf of the first defendant seeking an order that the originating summons [*43] served on it in Singapore be set aside. He considered the provision of amendments to the rules of that court made in 1988. Pt10 R6A, which is very similar in terms to R7.05 of the Rules of this Court, provided: "(1) The Court may make an order of a kind referred to in Pt11 R8 (which relates to setting aside etc of originating process) on application by a person on whom an originating process is served outside Australia. "(2) Without limiting subR(1) the Court may make an order under this rule on the ground (a) that the service of the originating process is not authorised by these rules; or (b) that this Court is an inappropriate forum for the trial of the proceedings." R8 of Pt11 provides: "8.(1) The Court may, on application made by a defendant to any originating process on notice of motion filed within the time fixed by subR(2), by order (a) set aside the originating process; (b) set aside the service of the originating process on the defendant; (c) declare that the originating process has not been duly served on the defendant; (d) discharge any order giving leave to serve the originating process outside the State or confirming service of the originating process outside the State; [*44] (e) ... (f) ... (g) ... (h) decline in its discretion to exercise its jurisdiction in the proceedings; (j) grant such other relief as it thinks appropriate."

At 394 of his judgment, Rogers CJ Comm D said: "The self evident intention of the amendments to the Rules, made in 1988, was to liberalise the Rules as to exercise of jurisdiction and enlarge the scope for exercise of discretion in accordance with the developing conflicts of law rules. I am inclined to the view that, if indeed, the former rules made applicable the approach enshrined in the English authorities, the amendment to the rules did effect a change. The new rule no longer requires the court to be 'satisfied', whether service is authorised by one, or other, of the nexus provisions. Nonetheless, evidence of the nexus remains a matter of considerable importance. It seems to me that it is not appropriate to attempt to lay down any general rule of what is required in order to make out a case for service outside the jurisdiction. No single test will meet all the circumstances. Thus, where the apparently qualifying condition for service is an issue that will not thereafter be reagitated, one may well look for a greater degree [*45] of assurance than in a case, such as the present, where the question will not only be argued at the hearing but will be the ultimate issue. As well, the very nature of the dispute seems to me to be of importance, not necessarily just in relation to the question of discretion."

After making reference to the decision of Brennan J in Contender 1 Ltd v LEP International Pty Ltd (1988) 63 ALJR 26; 82 ALR 394 and after referring to the fact that the dispute before him had "everything to do with New South Wales", his Honour further said, at 394 and 395: " ... it does seem to me to be less offensive to notions of comity to require a foreigner to come to New South Wales in such circumstances than might be the case in some others. In such circumstances, requiring a foreigner to submit to a determination in a New South Wales court is not 'lightly' subjecting him to a foreign jurisdiction. In the present circumstances, in my view, so long as there is a prima facie case made out that the service was authorised, it falls largely to the exercise of discretion whether service outside Australia should be permitted to stand" In Esanda Finance [*46] Corporation Ltd v Wordplex Information Systems Ltd (1990) 19 NSWLR 146, Giles J had before him a motion pursuant to Pt10 R6A brought

by the defendant to have a summons served on it in England set aside and for a declaration that the court had no jurisdiction over it in respect of the subject matter of the proceedings.

After reviewing a number of decisions including Dewhurst, his Honour, at 154 and 155, said: "The relevant rules prior to the amendments in 1988 required that the court 'be satisfied' that the proceedings were proceedings to which Pt10, R1 applied and that the plaintiff had a prima facie case for the relief sought. The parallel with s11 of the Service and Execution of Process Act (Cth) is obvious. That requirement conditioned the grant of leave to serve the originating process out of Australia, or the confirmation of service. The scheme introduced by the amendments to the Rules in 1988 did away with leave to serve the originating process out of Australia. Instead Pt10, R2, now provides that the plaintiff shall not proceed against a defendant who does not appear except with the leave of the court. There is no requirement stated that anything be made to appear to the [*47] court, or that the court be satisfied as to anything.

"That points to a more flexible approach to the assumption of jurisdiction over a foreign defendant. The starting point is still one or more of the paragraphs in Pt10, R1, but there is greater flexibility in the determination of whether the proceedings fall within one of the paragraphs and whether the proceedings should otherwise continue in this Court. There being no criteria specified in Pt10, R2, all the circumstances of the case must be taken into account. The same flexibility can be seen in relation to any application by the foreign defendant pursuant to Pt10, R6A. That rule provides that the court may make an order of the kind referred to in Pt11, R8 incorporating a wide variety of possible orders whereby the applicant might not be not subjected to the court's jurisdiction, including to 'decline in its discretion to exercise its jurisdiction in the proceedings'. The rule goes on to provide that without limiting that power the court may make an order that the service was not authorised by the rules or that 'this Court is an inappropriate forum for the trial of the proceedings'. Again, no criteria are specified, so that [*48] all the circumstances of the case must be taken into account.

"The relatively limited propositions for which Ex parte Walker; Re Caldwell's Wines Ltd and WA Dewhurst and Co Pty Ltd v Cawrse, stood has been overtaken by these changes. That does not mean that it is unnecessary to consider whether one of the paragraphs in Pt10, R1, is applicable, or that there is no need at all for a plaintiff to address that matter. In many, if not most, cases a plaintiff who failed to bring evidence demonstrating that the service overseas was authorised would not be given leave to proceed, or would fail in resisting an application to have the originating process and its service set aside; and in some cases the weight of competing evidence on that question would fall for recognition. The flexibility to which I have referred means that it is open in appropriate circumstances to give leave to proceed, or dismiss an application to have the originating process and its service set aside, with the issue on which the authorisation of service overseas turns left for the hearing. In particular, where there is some evidence, and the contest is whether on the facts or as a matter of law one of the. paragraphs [*49] has been satisfied, Pt10, R2, enables the grant of leave with the result that the contest is determined at the hearing: there is a discretion to be exercised having regard to all the circumstances. Conversely, Pt10, R6A enables refusal of the defendant's application with the same result." The foundation of the judgments of both Rogers CJ Comm D and Giles J was that the amendment to the rules of the Court of New South Wales in 1988 removed the requirement that the court be "satisfied" that service out was authorised by the rules. The amendment to those rules as in the case of the Rules of General Procedure in Civil Proceedings 1986 in this court made it no longer necessary to obtain leave to serve the originating process out of the court. However whereas under Pt10 R2 of the Supreme Court Rules of New South Wales provides that a plaintiff is not able to proceed against a defendant who does not enter an appearance "except with leave of the Court", the like rule of this court requires the court to be "satisfied" that the subject matter of the proceeding is within R7.01 before liberty to proceed may be granted. R7.04(1) provides: "(1) Where no appearance is filed by a party served with [*50] originating process out of Victoria, the Court, if satisfied that the subject matter of the proceeding so far as it concerns that party is within R7.01 and that the originating process was dub served on that party, may order that the plaintiff shall be at liberty to proceed."

That such requirement has been retained by virtue of R7.04(1) of the rules of this court leads to the conclusion in my view that the propositions for which Carroll v Laurie and Dewhurst stand have not been overtaken by changes for the purpose of the rules of this court. Also of significance is the difference between R8.09 of this court and Pt11 R8 of the Rules of the Supreme Court of New South Wales. Under the latter as pointed out by Giles J in Esanda Finance there is a very wide discretion vested in the court of that State by virtue of the provisions of that rule which is not given to this court by virtue of the provisions of R8.09 of this court. In my view the test enunciated by Dean J in Carroll v Laurie and Dewhurst and by Ormiston J in Melban is the correct test to be applied on an application such as is presently before the court. It is for the plaintiff to establish on consideration of all the admissible [*51] material that there is a strong argument for the opinion that the conditions provided by R7.01 or such of them as may be relied upon have been satisfied. If such was not the case

then a different standard and test would be applicable when leave to proceed was sought pursuant to R7.04. For the same reasons it is not appropriate in such an application as the present, where the same or similar issues will by necessity be conclusively decided at trial as are under consideration in this application, to postpone the determination of the sufficiency of the satisfaction of the requirements of R7.01 to the trial of the proceeding.

On these applications it is for the plaintiff to persuade the court that in respect of each cause of action on which he relies against the first four defendants there is a strong arguable case that service out of the jurisdiction of that claim is justifiable under one or other of the sub rules of R7.01 as is relied on: Siskina (Owners of Cargo Lately Laden on Board) v Distos Compania Naviera SA [1979] AC 210, per Lord Diplock, at 255. If at the end of the day the plaintiff has been successful in discharging the onus in respect of some of the claims made, but not [*52] others, it is for him to elect whether he will proceed only with those claims in respect of which he has established that R7.01 authorising him to serve the proceeding out of the jurisdiction or have the whole proceedings stayed on the basis that the statement of claim contains a cause or causes of action in respect of which the defendants could not be served out of the jurisdiction. Such claims cannot be tacked on to the claims which the plaintiff is justified in serving out of the jurisdiction: Gosman v Ockerby [1908] VLR 298 (which was referred to but not specifically disapproved by the Full Court - Australian Mutual Provident Society v GEC Diesels Australia Ltd [1989] VR 407); National Semiconductor Corporation v Nilsen Industrial Electronics Pty Ltd (unreported, 27 February 1992); Earthworks and Quarries Ltd v FT Eastment and Sons Pty Ltd [1966] VR 24, at 30; Melban Pty Ltd v Eu Chin Nominees Pty Ltd; Australian Iron and Steel Pty Ltd v Jumbo Scheepvaart Maatschappij (Curacao) NV (1988) 14 NSWLR 507, at 517. Next the plaintiff contends that Lloyd's has waived its entitlement or right to object to the jurisdiction of the court in these proceedings. On the plaintiff's behalf [*53] it was put that Lloyd's by its solicitors has sought further and better particulars of the plaintiff's statement of claim and by doing so it has submitted to the jurisdiction of the court in these proceedings. It is submitted that in the circumstances Lloyd's are no longer able to object to the service of the writ on it out of the jurisdiction, or to the jurisdiction of the court to hear and determine these proceedings.

Subsequent to Lloyd's issuing its summons on 20 March 1992 and subsequent to Ormiston J on 27 March 1992 making orders and giving directions for the hearing of that summons, which was initially fixed for hearing on I June 1992, Lloyd's, by its solicitors, on 14 May 1992 served on the plaintiff's solicitors a request for further and better particulars of the plaintiff's statement of claim. The request was made by a formal document entitled as a document in the proceedings. Although by the document it stated that it was "filed on behalf of the first defendant" it was not in fact filed with the court in the proceedings. By this request Lloyd's sought further and better particulars of nine paragraphs of the plaintiff's statement of claim and required that the particulars [*54] be furnished within 7 days. On 27 May 1992 Lloyd's' solicitors wrote a letter to the plaintiff's solicitors noting that the particulars as requested had not been provided and stating that unless they received a written assurance that the particulars would be provided forthwith that they "may be compelled to seek orders compelling provision of the particulars". On that same day Ormiston J adjourned the hearing of Lloyd's' summons to 10 August to be heard at the same time as the summons of the 2nd to 4th defendants. On 1 June 1992 the solicitors for Lloyd's served on the plaintiff's solicitors a further request for further and better particulars of the plaintiff's statement of claim directed to the allegations of damages made in four paragraphs of the same. Again the request was made in a formal document entitled as a document in the proceedings. Again, although the document stated that the request was filed with the court, it was in fact not filed with the court in the proceedings. At no time did Lloyd's seek an order in the proceedings that the plaintiff furnish the particulars and at no time did the plaintiff furnish particulars of his statement of claim in response to the requests [*55] of Lloyd's. In Lindgran v Lindgran [1956] VLR 215, Smith J considered the question whether a magistrate was bound to hold that a defendant to a complaint and summons under the Maintenance Act 1928 had waived the right to contend that the absence of an endorsement on the summons under the provisions of the Service and Execution of Process Act (Cth) rendered service of the summons ineffective. At 220, he said: "... the weight of authority appears to me to support the view that, in order to constitute a waiver in a case such as this, there must at least be words or conduct of such a nature that an inference can properly be drawn there from that the party alleged to have waived the objection does not intend to rely upon it: ..."

In Laurie v Carroll (1958) 98 CLR 310 the defendant against whom an order for substituted service had been made, ex parte, and who had not entered an appearance to the proceeding, conditional or otherwise, served a notice of motion for an order to discharge the initial order and service thereunder. He also sought the discharge of another order restraining him and a co defendant from receiving, and for other parties from paying, [*56] certain moneys and appointing a receiver of such moneys. It was held that his endeavours to set aside the order in so far as it affected the co defendant coupled with an objection to jurisdiction and an application to be absolved from the court's processes could not be construed as a waiver of the objections to the court's jurisdiction upon which he was insisting.

In Zwillinger v Schulof [1963] VR 407, Gowans J held that the respondent who had been served out of the jurisdiction and who had appeared under protest, but who had carried his objection to what had been done in the proceedings further than was open to him, had not waived his protest to the jurisdiction as he had made it clear from the outset that he was not intending to do so, nor could his actions be construed to be inconsistent with the maintenance of the objection. Similarly in Sykes v Povey Corporation (unreported, 8 April 1988), Tadgell J held that he was unable to conclude that the defendant had waived his right to rely upon a foreign jurisdiction clause in a deed in circumstances where he had entered an unconditional appearance but when serving the notice of appearance on the plaintiff the same had been accompanied [*57] by a letter taking the point that the foreign jurisdiction clause was contained in the deed and thereby evincing an intention to rely upon it. Each of these cases was determined on consideration of the question whether the respondent or defendant had evinced an intention by their words or conduct to not rely upon the right that they asserted.

In Rein v Stein (1892) 66 LT 469, Cave J sitting as a member of the Divisional Court, (the decision of which was upheld by the Court of Appeal), at 471, held that in order to establish a waiver of the right to object to the issuing of a writ out of the jurisdiction it must be shown "that the party alleged to have waived his objection has taken some step which is only necessary or only useful if the objection has been actually waived or if the objection has never been entertained at all".

In National Commercial Bank v Wimborne (1979) 11 NSWLR 156, Holland J expressed the view that to constitute a waiver of the right to object to the jurisdiction of a court - "The facts must show a voluntary act unequivocally evincing an intention to abandon or not to assert a right and such intention may be express or its existence [*58] imputed from conduct." By issuing its summons, presently returnable before the court, on 20 March 1992 and by continuing to prosecute the same at direction hearings before the court, Lloyd's clearly evinced an intention to object to the jurisdiction of this court in these proceedings.

The fact that during the period between the issue of that summons and its hearing Lloyd's solicitors served on the solicitors for the plaintiff two formal requests for further and better particulars of the plaintiff's statement of claim which requests were not filed with the court nor in respect of which were any formal orders sought pursuant to R13.11 to compel the plaintiff to furnish the particulars requested, does not give rise to the inference that Lloyd's had waived or abandoned its objection to the court's jurisdiction. Again, to my mind, the threat made to seek an order in the proceeding, which threat was never carried out, did not evince an intention to waive objection to the jurisdiction of the court. Without dealing with each of the particulars sought by the requests, when the waive are had regard to, together with the plaintiff's statement of claim, it cannot be properly said that the [*59] action taken of seeking further and better particulars of the plaintiff's statement of claim was only useful to Lloyd's in circumstances where it had waived its objection to the jurisdiction to the court. The endeavour of Lloyd's before the hearing of the summons to ascertain further particulars of the case pleaded by the plaintiff against it does not demonstrate that Lloyd's intended to abandon or waive its objection to the jurisdiction of the court. Accordingly it is competent for Lloyd's to pursue its present application before the court.

It is next appropriate to have regard to the evidence and material before the court as to the history of Lloyd's and the role and function that it performs in the insurance market in London which bears its name. It is in the light of such evidence that much of the other evidence before the court on this application, the plaintiff's allegations in his statement of claim and submissions made are to be considered.

In the introduction to the document bearing the first defendant's name and being entitled "Notes for prospective underwriting members of Lloyd's", which the plaintiff has sworn was provided to him by Zouche in Australia in 1984, there [*60] is set out the historical background and present day function of Lloyd's. It states: "In the latter part of the 17th century Edward Lloyd kept a coffee house in the City of London: being close to the River Thames and the docks, it was frequented by seafaring men who met to exchange information. Merchants and traders also visited the premises and began to accept the risks of insurance each for their own account and without limit of liability. They became known as underwriters and Lloyd's Coffee House became a place of marine information and insurance. With the passage of time other forms of insurance have been devised and written so the business has expanded considerably and the modem Lloyd's, housed close to its original counterpart, still carries on this same function as the greatest insurance market in the world. "Today Lloyd's is a society incorporated by an Act of Parliament and does not itself accept insurance nor does it assume liability for the business transacted by its members. It does, however, lay down, through a Council, strict financial and other regulations regarding membership and the conduct of business to protect its reputation as a market it also provides the facilities [*61] and premises where all forms of insurance may be effected by its members.

"Individuals, who arc called Underwriting Members or 'names' must join through an approved Lloyd's Underwriting Agency and are grouped together in Syndicates to transact insurance for their own account and risk. Each Syndicate appoints an Underwriter and Underwriting Staff to underwrite insurance on behalf of its members.

"All Syndicates are managed by Underwriting Agencies and there are some 460 Syndicates.

"The class and type of business varies between Syndicates, but the four main classes of business are Marine, Aviation, Motor and Non Marine."

In his affidavit sworn 24 March 1992 Lloyd's deputy solicitor Richard Byrnell Leathes Prior has further expanded on the present structure and function of Lloyd's. He has deposed to the following facts: "Names are individuals and do not, as Lloyd's is presently constituted, take part in the underwriting of insurance at Lloyd's through a vehicle such as a corporation or trust.

"The way in which a name puts his wealth at risk at Lloyd's in providing insurance cover is as follows. He has to demonstrate that he possesses sufficient capital (some of which must [*62] be deposited at Lloyd's) appropriately invested. These investments constitute, in effect, reserve capital which is called upon only if, as a result of the underwriting carried out on his behalf, the premiums received from the assured (and any amounts derived from the reinsurance of risks underwritten) do not cover claims bought from policy holders. In the event of underwriting losses the name's liability is unlimited; he is liable, if necessary, to sacrifice his entire personal fortune to pay valid claims, although Lloyd's does give relief against serious financial hardship.

"This is one of two fundamental principles of membership of Lloyd's. The other is that names underwrite on the basis of 'each . . . for his own part and not one for another': s8(1) of the Lloyd's Act 1982. If a name suffers a loss he cannot call on other members to share it, nor can they call on him to share theirs. Likewise he is not called upon to share his profits. He also cannot trade in his membership or participations or encumber them.

"The collective aspect of the activity arises because, although names are sole traders, the effective operation of the market demands that they underwrite in groups, [*63] or syndicates, of varying sizes. Syndicates, of which there are over 300, underwrite business in four main markets (marine, non marine, aviation and motor), and enable members to co operate in underwriting risks, or proportions of risks, which would be too large for an individual to cover; they permit most of the participants to leave the actual business of underwriting to one or more working members acting on behalf of the whole syndicate. Syndicates themselves have no separate corporate or legal status. Each member contracts directly or indirectly with his underwriting agent that he will be responsible for only a certain percentage of the syndicate's underwriting business, known as his 'line'.

"There are two distinct types of underwriting agent .. . The organiser and manager of one or more syndicates is known as a managing agent. The day to day management of each syndicate is carried out by a main (or active) underwriter who is an employee (and normally a director or partner) of the agency. It is the active underwriter and his team who accept risks on behalf of syndicate members, receive premium income and settle claims. The managing agent is also responsible for the investment [*64] of syndicate funds. "The managing agent does not generally deal with syndicate members directly. That is the function of another type of agent, the members' agent, who introduces prospective names to Lloyd's, advises them on syndicate membership and acts as an intermediary between names, and managing agents. The latter agree with members' agents that they will make available specified amounts of syndicate capacity which those members' agents can allocate to individual names. There are agents who act as both members and managing agents.

"A distinction should be drawn between membership of the Society of Lloyd's (incorporated by the Lloyd's Act of 1871) and membership of syndicates. Each individual who wishes to underwrite insurance at Lloyd's must become a member of the Society of Lloyd's. However membership of the society will not of itself enable the name to underwrite. The name must join a syndicate in order to do this. Membership of the Society of Lloyd's is, however, a prerequisite so membership of a syndicate and this prerequisite is in effect, laid down by ... the Insurance Companies Act 1982 [UK] ...

"The Lloyd's Acts 1887 to 1982 ... established and enhanced the self [*65] regulatory structure of Lloyd's. All Lloyd's internal regulatory powers stem from the Acts. The Council of Lloyd's is a body constituted by the Act (see s3, s4, s6) and the membership includes 12 'working members' elected from working members of Lloyd's and eight 'external members' elected from non working members of Lloyd's. There are also eight 'nominated members' of the council who are approved by the Governor of the Bank of England having been appointed by

the council by special resolution. The chief executive who is employed by Lloyd's to be responsible for its executive functions is a nominated member of the council.

"The council is the overall managing body of Lloyd's ... The main function of the council is to manage and superintend the affairs of the society and to regulate the conduct of the business of insurance, usually by the passing of by laws.

"There is also a committee of Lloyd's which comprises the working members of the council and is attended by the chief executive. The committee elects a chairman and two deputy chairmen of the council annually who are working members of the committee and the council.

"While some members' agents act for certain names living [*66] in Australia, the only role and function which Lloyd's has in relation to such activities of such members' agents is to undertake in London the overall regulation of members' agents activities and to receive in London applications from members' agents on behalf of candidates for admission as names (or members) of Lloyd's.

"An essential part of the handling by Lloyd's of an application made on behalf of a candidate is for the candidate personally to attend a rota committee interview at Lloyd's in London ... The matters which are discussed in detail with the prospective name are set out in a verification form which the candidate is required to sign after the rota interview to signify that he has understood and accepted the matters explained to him at the interview. "A member of the council or a representative of the council usually chairs the rota interview ..."

In a further affidavit sworn by Prior on 2 August 1992 he has further deposed: "Lloyd's itself is primarily a regulatory body which oversees the operations of the Lloyd's insurance market. Lloyd's act's pursuant to Acts of the Parliament of the United Kingdom and by laws and regulations made thereunder . . . Members' [*67] agents recruit individuals to become underwriting members of Lloyd's. The relationship between underwriting members and members' agents and the management of those members' affairs by the members' agents is subject to a direct contractual relationship between a members' agent and an underwriting member....Members' agents are not authorised to act on behalf of Lloyd's in any capacity whatsoever. Lloyd's does not pay any commission or other consideration to a members' agent in the event that a members' agent introduces a person who ultimately becomes an underwriting member. A members' agent receives a fee from his name and commission on the underwriting profit made by them. Lloyd's does not provide, and has never provided, members' agents with any documentation indicating in any way that any members' agents, managing agents or officers or employees of such agents are appointed and authorised to act in the capacity of an agent of Lloyd's. . . It is the members' agents' responsibility to the underwriting member to ensure that all the requirements of Lloyd's relating to his prospective membership of Lloyd's are met and satisfied. Pursuant to Lloyd's by laws and regulations, Lloyd's controls [*68] and regulates the activities of members' agents, managing agents, underwriters or other persons active in Lloyd's insurance markets. However, this function is one [of] overall regulation and control only and is directed to the proper functioning of the Lloyd's market and of the entities which operate within this market."

Some further facts relevant to the function of Lloyd's, the manner in which a person becomes a name at Lloyd's and the regulation of underwriting agents appears by the letter of Lloyd's solicitors dated 13 December 1991 addressed to the Chairman of the Australian Securities Commission pursuant to which Lloyd's applied under s1084(2) of the Corporations Law for an exemption for the Society of Lloyd's and members' agents and managing agents from Divs 2 and 5 of Pt7.12 of Ch 7 of the Corporations Law. The letter is exhibited to the affidavit of the plaintiff's solicitor, Fleiter, sworn 4 May 1992. Those additional facts are: * The regulation of underwriting agents is achieved in a number of areas under the provisions of the Lloyd's Act 1982 and the by laws made thereunder. Nobody may act as an underwriting agent at Lloyd's unless permitted by the Council of Lloyd's [*69] to do so. Such permission is evidenced by the entry of the agent's name in a register maintained in accordance with the Underwriting Agents by law. The register specifies whether the underwriting agent is permitted to act as a managing agent, a members' agent or as a combined managing/members' agent and in the case of a managing agent specifies the syndicates which the managing agent is permitted to manage. The power to register an underwriting agent also includes the power to review, renew or withdraw such registration. Registration or renewal of registration may be subject to conditions.

* The current standard agency agreements which took effect from the 1990 year of account were introduced as a result of an intensive review and extensive revision of the previous agency agreements in the light of recommendations by the Committee of Enquiry into Regulatory Arrangements at Lloyd's chaired by Sir Patrick Neill QC, delivered to the UK Parliament in January 1987. Hitherto the name had entered into an agency

agreement with his members' agent and the members' agent entered into a sub agency agreement with managing agents. The name thus had no contractual relationship with his managing [*70] agents. The current contractual mechanism ensures that the name has a direct contractual relationship with the managing agents who underwrite on his behalf. The evidence before the court on the hearing of these applications comprised affidavits sworn by the plaintiff and a number of other persons and a large number of documents exhibited to such affidavits.

The plaintiff has deposed that early in the year 1980 his accountant introduced him to Zouche, who advised the plaintiff in relation to property investments. The plaintiff met with Zouche either in his awn home in Melbourne or he visited Zouche at the office maintained by him in South Melbourne. Zouche introduced the plaintiff to the notion of investing through the Lloyd's insurance market in London. The plaintiff has sworn that Zouche informed him that "investing in Lloyd's" was rather like being a banker in a casino, that the odds were always in Lloyd's favour and that the banker never lost and further that investing in Lloyd's could not result in a loss unless there was a world wide catastrophe. The plaintiff has sworn that he learnt that an underwriting member of Lloyd's was exposed to unlimited liability, however he has [*71] said that Zouche told him that investing as an insurance underwriter at Lloyd's through Fenchurch was a good, secure, conservative business where a secure income could be derived for many years with minimal risk. The plaintiff has said that Zouche informed him that to become a name at Lloyd's one had to find a members' agent willing to become his agent. Zouche recommended Fenchurch and said that Fenchurch could arrange for him to become a name at Lloyd's. The plaintiff has deposed that Zouche told him that any risk associated with becoming a name was offset by reinsurance. The plaintiff has said that he accepted Zouche's recommendations that he become a name at Lloyd's and asked Zouche to make arrangements for Fenchurch to become his members' agent. He has sworn further that in mid 1984 he also met Keeling. He has said that he was introduced to him by Zouche who brought him to his home in Melbourne.

The plaintiff has further sworn that in 1984 Zouche and his wife were residents at St Vincents Place, Albert Park, Melbourne. He has also sworn that in 1984, and in following years, Keeling visited Australia on behalf of Fenchurch to recruit underwriting members of Lloyd's and to make [*72] contact with existing Australian underwriting members of Lloyd's. In an affidavit sworn by Belinda Schofield on 13 July 1992 she has deposed that she is a member of the firm of solicitors in London instructed in relation to these proceedings on behalf of Fenchurch. She has sworn that Fenchurch is and was at all material times a company incorporated in the United Kingdom and a Lloyd's members' agent. She has sworn that in the course of carrying out its business Fenchurch seeks new underwriting members. Further, Belinda Schofield has deposed that she has been informed by Zouche and believes that during the period from 1972 until September 1984 Zouche resided in Melbourne. Further, she has sworn that from some time in 1983 until he left Australia, Zouche acted on behalf of Fenchurch as an introducing agent, that is, on behalf of Fenchurch, he sought new clients who wished to become underwriting members of Lloyd's through Fenchurch. She has further deposed to the fact that during the relevant period Keeling, in his capacity as managing director of Fenchurch, visited Australia each year for some four lo five weeks. The plaintiff has further sworn that Zouche made available to him in [*73] 1984 two documents on the letterhead of Fenchurch, the first of which was entitled "Underwriting Membership of Lloyd's for Overseas Candidates" which was signed by Keeling and dated December 1983. The second was a document entitled "Notes for Prospective Underwriting Members of Lloyd's". After receiving these documents and after requesting Zouche to make the necessary arrangements for Fenchurch to become his members' agent, he has said that in late June or early July 1984 he received a letter from Fenchurch signed by Keeling enclosing a number of documents. These documents included an underwriting membership application form and a statement of means. The letter also included a bank guarantee to secure the plaintiff's obligation to Lloyd's under the terms of a trust deed for sums not to exceed, in the aggregate, the sum of 70,000 Pounds. There was further enclosed a "Lloyd's Premiums Trust Deed" pursuant to which the plaintiff as "the name" agreed with Fenchurch and with Lloyd's that all premiums and other moneys payable to the name in connection with his underwriting business at Lloyd's should be held and stand upon trust to be exclusively available for payments of losses, claims, [*74] returns of premiums, reinsurance premiums and other outgoings payable in connection with the name's business. The letter also enclosed a general undertaking to be executed by the plaintiff as part of the application for admission as an underwriting member of Lloyd's. Such latter general undertaking included an undertaking in the following terms: "For as long as I am a member of Lloyd's and thereafter until all the accounts of any underwriting business entered into by me or on my behalf shall have been fully wound up to the satisfaction of the council and all claims and liabilities by or against me of whatever nature arising out of or in connection with such membership or underwriting shall have been discharged or provided for to the satisfaction of the council: (a) ... (b) Should any dispute arise between me and any other member of Lloyd's or any underwriting agent at, or insurance brokerage firm or company subscribing to, or any other subscriber to, Lloyd's out of or in connection with or in relation to any such underwriting business, and whether or not such dispute shall involve allegations or charges of any nature whatsoever or shall involve or may give rise to a claim or claims [*75] by or against

any other person who is not a party to any agreement with me referring such claims to arbitration, I will use my best endeavours to procure, and will concur in, the reference of any such dispute or claim to the arbitrament in London of a sole arbitrator to be appointed in the absence of agreement between the parties by the chairman or a deputy chairman of Lloyd's for the time being."

The plaintiff has deposed that to the best of his recollection he signed the above referred to documents in the presence of Zouche in Melbourne on 26 July 1984. The plaintiff has deposed that it was at or about this time that he met Keeling in Melbourne and that during their discussions Keeling made statements to him that every risk was reinsured, that Fenchurch would look after everything on his behalf for which he would pay Fenchurch a commission and that he could not lose. In October 1984 the plaintiff travelled to London for the purpose of attending the "rota meeting" which he attended on 16 October. Before the meeting he met Keeling at his London office following which he was taken to and attended the meeting. He has sworn that at this meeting he was given a number of documents [*76] which he signed.

In an affidavit sworn by Richard Prior on 24 March 1992 he has produced and exhibited a "verification form" addressed to the Council of Lloyd's dated 16 October 1984 and executed by the plaintiff. Pursuant to that document the plaintiff has acknowledged that he understood a number of matters which had been explained to him by his underwriting agent including: "(a) The underwriting of insurance is a high risk business and profits are not guaranteed. "(b) As an underwriting member of Lloyd's my liability is unlimited and in the event of my death my estate will inherit my unlimited liability in respect of business underwritten by me during my membership. "(h) The control of my underwriting will be delegated to my under writing agent and I may take no active role in the conduct of the insurance business underwritten on my behalf. My agent is authorised to delegate authority, including underwriting authority."

The plaintiff has further deposed that during his visit to London at this time he attended the offices of Fenchurch and executed a number of other documents. These included an underwriting members security trust deed which bears the date 1 January 1985 referring [*77] to the bank guarantee in the sum of 70,000 Pounds and agreements appointing Fenchurch as his underwriting agent in respect of identified and nominated syndicates. Pursuant to such agreements Fenchurch was empowered to appoint or employ any person, firm or body corporate to manage the underwriting business of the plaintiff including the power to enter into agreements on behalf of the plaintiff, to collect premiums and other moneys due to him as a name, and to accept risks and settle claims. Pursuant to the underwriting agreements entered into between the plaintiff and Fenchurch with respect to the various syndicates and dated 1 January 1985 there was contained agreements as to arbitration and the law by which the same were to be construed.

Each of the agreements contained the common clause: "This agreement shall be read and construed and take effect in all respects in accordance with English law."

With respect to arbitration there were two forms of clause. The first was: "(a) Any dispute or difference whatsoever arising . . . at any time out of or in connection with or in relation to this agreement between the parties hereto or their respective executors, administrators, successors [*78] or assigns and notwithstanding that such dispute or difference (i) arises after the termination of this agreement; (ii) involves allegations or charges of any nature or; (iii) involves or may give rise to a claim by or against any person not a party to this agreement or to any other agreement binding on both the parties hereto and referring such claims to arbitration in the manner provided by this agreement shall be referred to arbitration in London in accordance with this clause. "(b) A sole arbitrator shaD be mutually agreed upon but if the parties cannot agree upon the arbitrator he shaD be appointed at the instance of any party by the Chairman or (him failing) a Deputy Chairman of Lloyd's for the time being. "(c) The award of the arbitrator shall be final and binding and he shall have power to obtain, call for, receive and act upon any such oral or documentary evidence or information (whether the same be strictly admissible as evidence or not) as he may think fit and in conducting the arbitration and making the award he shall not be bound by the strict rules of procedure or evidence. And save as aforesaid the statutory provision as to arbitration for the time being in force in [*79] England shall apply." The second form of arbitration clause contained in some agreements was in a more simple form. By its terms it was agreed that any difference between the parties should be referred to arbitration in London, it provided for the appointment of the arbitrator and further that the award of the arbitrator should be final and binding.

The plaintiff has deposed that the fifth defendant provided on his behalf a bank guarantee in the sum of 70,000 Pounds and he commenced to be an underwriting member at Lloyd's on 1 January 1985 in the syndicates in which he was placed by Fenchurch. He has deposed that in 1985 and 1987, after speaking with Keeling and

Zouche, he increased his underwriting premium level first to 250,000 Pounds and then to 500,000 Pounds and provided additional bank guarantees accordingly.

The plaintiff has further deposed that he signed members' agents agreements with Fenchurch in respect of each of the syndicates in which he was placed by Fenchurch in each of the years 1986 to 1989. He has sworn that be signed these agreements and all other agreements between himself and Fenchurch in Australia after they were sent to him by Fenchurch and that at [*80] the time that he received the same they had been previously executed by Fenchurch. He has deposed that he would receive a covering letter requesting him to sign two copies of each agreement and to return one signed copy to Fenchurch which he did, retaining the other copy completed by his execution of the same.

One such agreement entered into with Fenchurch was the agency agreement dated 1 January 1987. The form of the agency agreement was prescribed and made as the mandatory form of underwriting agreement as from 31 December 1986 by Lloyd's by law no 133 (No 1 of 1985, 11 March 1985). Pursuant to that agreement there was clearly distinguished the role between the members' agent as was the role of Fenchurch and the managing agent of the various syndicates. There was attached to the agency agreement entered into between the plaintiff and Fenchurch and dated I January 1987 various managing agent agreements with respect to the various syndicates identified. Without dealing in detail with the terms of the agreement entered into with Fenchurch and dated 1 January 1987 it is to be observed that it was agreed pursuant to CL9 thereof: "(a) The name shall keep the agent at all times in [*81] funds available for the payment of the liabilities, expenses and outgoings of the underwriting business ... "(b) The name shall pay any funds required by the agent under subCL(a) of this clause free from and clear of any set off, counterclaim or other deduction on any account whatsoever and promptly within such period for payment as the agent may in its discretion specify in its requirement; and in respect of such payment time shall be of the essence. The name hereby agrees that no such set off, counterclaim or deduction shall be a defence to any proceeding instituted by the agent to enforce a requirement, and the name waives stay of execution and consents to the immediate enforcement of any judgment obtained in such proceedings. "(c) It shall be a condition precedent to the issue of proceedings or the making of any reference to arbitration by the name in respect of any matter arising out of or in any way connected with either the making of such requirement by the agent or the subject matter thereof . . ., that the name shall have duly complied with any such requirement made or purported to be made by the agent, and no cause of action in respect of any such matter shall arise or accrue [*82] in favour of the name until such requirement shall have in all respects been duly complied with. At no time shall the name seek injunctive or any other relief for the purpose (or which has the result) of preventing the agent from making or enforcing any such requirement or of preventing the agent or any sub agent from applying any money or assets for the time being held by them respectively on behalf of the name in or towards the discharge of the liabilities, expenses and outgoings of the underwriting business."

By the agreement it was also agreed that the name should be treated as agreeing to enter into a binding syndicate and arbitration agreement in the form annexed. The agreement also contained an arbitration clause by which it was agreed that any dispute, difference, question or claim between the agent and the name "shall be referred to arbitration in London by a sole arbitrator". Of further significance is the fact that the 1987 agreement provided: "23. ENGLISH LAW. This agreement shall be read and construed and take effect in all respects in accordance with English law. "24. ENGLISH JURISDICTION. Subject to CL22 [the arbitration clause] hereof the parties hereto irrevocably [*83] and unconditionally submit for all purposes of and in connection with this agreement to the exclusive jurisdiction of the English Courts."

The plaintiff has also produced the members' agent's agreement entered into between himself and Fenchurch and dated 6 October 1989. That agreement contains a clause by which the parties agreed, subject to its conditions, to refer any dispute, difference, question or claim relating to the agreement to arbitration by a sole arbitrator in London. lt also provided by CL18: "18. Governing law and jurisdiction "18.1 This agreement is governed by, and shall be construed in accordance with, the laws of England. "18.2 Each of the parties hereby irrevocably submits for all purposes of and in connection with this agreement to the exclusive jurisdiction of the Courts of England." Produced by the deponent Prior and exhibited to his affidavit sworn 24 March 1992 is a further significant document being a general undertaking dated 1 January 1987 between Lloyd's and the plaintiff.

Pursuant to Lloyd's Act 1982 (UK) there was established by s3 thereof, a "Council of Lloyd's" with power to make by laws. The undertaking executed by the plaintiff and dated 1 [*84] January 1987 was an undertaking 10 purported to be prescribed and required by membership by law (No 9 of 1984) made 12 November 1984.

Pursuant to the terms of that general undertaking, it was provided, Inter alia "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 of England.

"2.2 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 CL2 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 [*85] is referred to in this CL2 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."

The plaintiff has sworn that he has no independent recollection of executing the general undertaking dated 1 January 1987 although he does not dispute that he did so. He has further sworn that at no time prior to executing the undertaking, or at any other time, was it drawn to his attention that any claim that he might have against Lloyd's had necessarily to be tried in an English Court.

The plaintiff has sworn that in 1988 he was paid approximately 7000 Pounds as profit for the writing in the year 1985. This amount he has sworn was deposited in a bank account established on his behalf with the Leopold Joseph and Sons Bank in the Channel Islands. The plaintiff has further deposed that late in the year 1988 he learned that he had derived a profit from underwriting carried out on his behalf in the year 1986 by Fenchurch in the sum of approximately 23,000 Pounds which [*86] was also banked by Fenchurch at the aforesaid bank in the Channel Islands. He has further sworn that in or about 1990 the profit from - underwriting in the year 1987 amounted to approximately 15,000 Pounds which was again deposited in his bank account in the Channel Islands. The plaintiff retained a cheque book.and authority to draw on the funds of this account.

However, any financial success that the plaintiff had enjoyed from being an underwriting member of Lloyd's did not continue. He has sworn that of the syndicates that Fenchurch placed him in, he has suffered extreme losses in respect of at least Syndicate 255, a marine syndicate, the under writer of which was NJ Bullen, Syndicate 216, a non marine syndicate, the underwriter of which was CH Bohling, and Syndicate 602, a non marine syndicate. The plaintiff has deposed that Lloyd's is presently conducting its own loss review enquiries in relation to the extreme losses suffered by Syndicates 255 and 216 together with some six other syndicates. The plaintiff has sworn that the first indication of the fact that a syndicate in which Fenchurch had placed him had suffered a loss was when he received a letter from Fenchurch in June [*87] 1989 informing him that the conduct of the audit of Syndicate 255 had cause to be declared an audit deficiency on its 1988 account equivalent to 129 per cent of capacity. In May 1990 the plaintiff received a letter from Fenchurch dated 18 May 1990 advising him that he would incur an overall loss on the 1987 account as a result of the cash call on Syndicate 255 and that the loss was estimated to be 12,960 Pounds.

The consolidated underwriting statement of account as at 31 December 1990 furnished by Fenchurch to the plaintiff in respect of the 1988 year of underwriting disclosed a net loss to the plaintiff of 79,316.73 Pounds. The majority of that loss was in respect of the loss suffered by Syndicate 255. The plaintiff has deposed to the fact that he has made three cash payments to Fenchurch in response to calls made on him in respect of Syndicates 216, 255 and 602. These payments were made in July 1990 and February and May 1991.

By letter dated 11 February 1992 Fenchurch sent to the plaintiff notice from Lloyd's concerning Syndicates 216, 255 and 602 informing him that Lloyd's had received notification from Fenchurch that there were insufficient funds to the value of 72,468.01 [*88] Pounds available in the premiums trust fund relating to such syndicates to meet the plaintiff's underwriting liabilities on those syndicates. By that notice Lloyd's made demand on the plaintiff to pay the sum of 58,114.05 Pounds to Lloyd's within 30 days advising that if such sum was not forthcoming necessary steps would be taken to realise that sum under the bank guarantee dated 1 January 1985 and issued by the fifth defendant. Subsequently demand was made on the bank pursuant to the bank guarantee.

The plaintiff's solicitor Fleiter has sworn that at the trial of the proceedings it is anticipated that there will be called as witnesses in addition to the plaintiff, his accountant and four or five witnesses who attended at a meeting conducted by his accountant and which was addressed by Zouche in mid 1984, the plaintiff's wife

relevant to conversations which occurred at or about this time and some 10 or so other persons from Australia who were recruited in Australia by Fenchurch, and others not connected with it, to be underwriting members of Lloyd's. In respect of these latter witnesses it is put forward by the plaintiff's solicitors that their evidence will be in the nature of [*89] "similar fact evidence" being of relevance to the plaintiff's allegations that the offering of membership of Lloyd's was in breach of the "prescribed interest" provisions of the Companies (Victoria) Code. Further the plaintiff's solicitor has sworn that it is the plaintiff's intention to call "several expert witnesses probably from the United Kingdom to give evidence about the operation and practice of the Lloyd's insurance market and those involved in it." The plaintiff has sworn that if the present proceedings were stayed and he was required to litigate his present claims against the defendants in England, he would suffer prejudice. He has sworn that he has severely drained the financial resources immediately available to him to conduct present litigation and that he is concerned that he would not be able to afford to take witnesses to London and maintain them during the trial. Further, his absence from Australia would be "extremely burdensome in relation to" his medical practice.

The solicitor representing Lloyd's, Prior, has deposed to the view that 10 apart from the plaintiff and his accountant virtually all other potential witnesses in fact are likely to reside in the United [*90] Kingdom or outside Australia. He has expressed the view that having regard to the nature of Lloyd's and the Lloyd's market any expert witnesses which are likely to be called are likely to reside in London or at least outside Australia. He has further expressed the view that, other than the documents in the possession of the plaintiff, all, or virtually all, of the documentary evidence potentially relevant to the issues raised by the plaintiff in his statement of claim are likely to be in England and further that it may be necessary to subpoena documents from persons who are not parties to the proceeding but who reside in the United Kingdom. Again he has sworn that in proceedings such as the present it may be necessary or appropriate to protect the interests of Lloyd's by instituting proceedings for contribution or indemnity against persons who are likely to reside in the United Kingdom or otherwise outside Australia. In addition he has sworn that in relation to the loss suffered by syndicates 216 and 255 there is already litigation in the High Court of England brought by members of those syndicates. Further, he has sworn that there are some approximately 750 names who have issued [*91] individual writs out of the High Court of England against their respective members' agents and Lloyd's in respect of claims arising from losses suffered in the Lloyd's market. These proceedings are being managed in the Commercial Court by Saville J. On 18 March 1992 Evans J, a Judge of the Commercial Court in London, announced in open court arrangements for the management of proceedings involving Lloyd's underwriting members, members and underwriting agents and brokers. In addition to stating that the same would be conducted by Saville J in conjunction with Gatehouse J, he said: "It is hoped that this will help to avoid any unnecessary duplication in proceedings and ensure that individual cases are dealt with as economically and conveniently as possible".

The solicitor Prior has further sworn in substance that other than the witnesses relevant to oral communications which were had in Australia with the plaintiff, all other evidence of fact, documentary evidence and evidence of an expert nature are likely to come from outside Australia. He has sworn that this will include expert accounting evidence dealing with the loss suffered and the allegations relating to the matters of reinsurance [*92] and as to the question relating to the "LMX spiral". He has also sworn that it is likely that there Will be witnesses called at trial who were formerly, but who are no longer, employees of Lloyd's.

The solicitor for Fenchurch, Keeling and Zouche, Belinda Schofield, has sworn that subject to further particularisation and clarification of the plaintiff's claim her clients would need to call witnesses of fact in relation to the dealings between the defendants and the plaintiff in Australia, discussions between those defendants and the plaintiff in England at the time of signing the underwriting agreements by the plaintiff and discussions that occurred on the day that the plaintiff attended the "rota" meeting. She has deposed that in addition evidence will be called relating to the management of Fenchurch, the plaintiff's underwriting business and affairs at Lloyd's and the management functions performed by the managing agents of the syndicates in which the plaintiff participated. She has sworn that all witnesses that would be called in respect of these matters reside in England. In addition she has sworn that it would be necessary for those defendants to call expert witnesses in relation [*93] to the matters of proper and appropriate reinsurance cover of syndicate business, and as to allegations concerning the "LMX spiral", allegations of discrimination against external/overseas members of Lloyd's and allegations relating to the practice and duty of a members' agent to an underwriting member of Lloyd's. She has expressed the view that witnesses as to such matters are unlikely to be found outside England. She has sworn that she knows of no such witness resident in Australia. In addition, Belinda Schofield has sworn that all the documents relating to the plaintiff's membership of Lloyd's and as other documents which are relevant to the plaintiff's underwriting business and affairs at Lloyd's are in the possession of the defendants or Lloyd's in England. Further, she has sworn that the documents involved, whether held by the parties or obtained by subpoena, will be voluminous. Finally, she has deposed that it may be that Fenchurch would wish to join

managing agents as parties to the proceedings which agents would be United Kingdom businesses or companies registered in the United Kingdom and subject to the by laws and regulations made under the Lloyd's Act 1982. Belinda Schofield [*94] has further sworn that she has been instructed that in order to avoid duplication of proceedings Fenchurch wishes to have the plaintiff's claim against it heard together with those against the other defendants heard in an action tried in an English Court and that consequently in the event of this court granting the defendants' application for a stay of proceedings Fenchurch will waive its right to arbitration pursuant to the agreements referred to aforesaid in order that the proceedings may be so tried. She has deposed that her instructions are that in the event of the defendants' application being not granted, rather than litigate in Victoria, Fenchurch relying upon the arbitration agreements between it and the plaintiff, will make application for a mandatory stay of proceedings against it pursuant to the provisions of s7 of the International Arbitration Act 1974 (Cth).

I turn first to consider the provisions of R7.01(1) as relied on by the plaintiff as justifying service of the proceedings out of the jurisdiction on Lloyd's. The first sub rule relied on is subR(f).

Lloyd's does not dispute that there was a contract entered into between it and the plaintiff. It was submitted [*95] on its behalf that such agreement on the evidence was not made in Victoria, but in London. It was conceded, correctly in my view, by counsel for the plaintiff that the agreement entered into between the plaintiff and Lloyd's on the plaintiff being elected as a member of Lloyd's, following the rota meeting, was in all probability made in London. The general undertaking subsequently executed by the plaintiff and dated 1 January 1987 was executed in consideration of the plaintiff continuing to be an underwriting member of Lloyd's. It is not an agreement separately relied on by the plaintiff in his statement of claim From the material presently before the court it appears that such undertaking, as required by the previously referred to membership by law, formed part of, and became part of the agreement that existed between the plaintiff and the first defendant. In so far as the plaintiff alleges that Lloyd's entered into an agreement with him collateral to the aforesaid agreement, it is alleged that that was comprised of representations made and promises given by Zouche and Keeling in Australia and in England when the plaintiff attended at England in October 1984 and also by documents [*96] provided to the plaintiff by Fenchurch which he received in Australia. It is also alleged that the representations were made at the premises of Lloyd's in October 1984. In so far as any representation or promise was made in England thereby constituting an agreement collateral to the primary agreement with Lloyd's, it was clearly not made within Victoria. In so far as the collateral agreement was constituted by representations or promises made by Zouche and/or Keeling in Victoria it is a necessary step in the argument of the plaintiff that that agreement was made in Victoria to establish that such representations or promises given in Victoria were made and/or given by Zouche and/or Keeling as agents for Lloyd's. For the reasons hereafter expressed I am not persuaded on the material before me that the plaintiff has established a necessary case that this was so.

On the evidence at the relevant time Zouche resided in Victoria and carried on business in Victoria. The fact that Keeling each year visited Victoria for the purpose of recruiting members for whom Fenchurch would act as a members' agent at Lloyd's in London, where the business of Fenchurch was conducted, does not give rise [*97] to the conclusion that Fenchurch and/or Keeling carried on business in Victoria. Nor does the fact that Zouche acted as a commission agent for Fenchurch give rise to the conclusion that it carried on business in Victoria. On the evidence the general business of Fenchurch was conducted and carried on by it in London. It is to that place that the plaintiff went to when he went to the office of Fenchurch in 1984. It is from that place that Fenchurch wrote to the plaintiff and sent statements of accounts and documents to him. The fact that in relation to that business Keeling and Zouche recruited in Victoria persons for whom Fenchurch would act as names at Lloyd's and from time to time visited those persons in Victoria does not mean that Fenchurch carried on business in Victoria: Brown v London and North Western Railway Co (1863) 32 LJQB 318. The expression, "by or through an agent" in R7.01(1)(f)(ii) "contemplates cases in which, although the agent did not make the contract, nevertheless the contract when made could be said to have been made through the efforts and intervention of the agent": BHP Petroleum Pty Ltd v Oil Basins Ltd [1985] VR 725, Murray J, at [*98] 746 and 747. However, for that particular sub paragraph to justify service out of proceedings within the nature identified by subR(1) it is necessary for the person whose efforts brought about the concluded contract to be at the time the agent of the contracting parties. Although on the evidence it 50 may be concluded that the intervention of Fenchurch by its commission agent Zouche and employee Keeling brought about the contract which was entered into between the plaintiff and Lloyd's, for the reasons subsequently expressed, I am not satisfied that at the relevant time Fenchurch was the agent of Lloyd's. In determining whether a contract "is governed by the law of Victoria" within that expression in R7.01(1)(f)(iii) the court is to be guided by the real or presumed intention of the parties. However where the parties have expressed no intention then it is for the court to select the proper law for them being the law of the place with which the contract has the most real connection. In determining this it is appropriate to have regard to the terms of the contract, the situation of the parties, and all surrounding

circumstances: Weckstrom v Hyson [1966] VR 277, at 282. The plaintiff's [*99] contract with Lloyd's was made in England and was to be performed in England. The terms of the "general undertaking" executed by the plaintiff and dated 1 January 1987 specifically provided that the rights and obligations of the plaintiff and Lloyd's arising out of or relating to the plaintiff's membership of and/or underwriting insurance at Lloyd's was to be governed by and construed in accordance with the law of England. This undertaking, on being given by the plaintiff, formed part of the contract that thereafter existed between the plaintiff and Lloyd's. Such an expression of intention of the parties as contained within the contract is relevant for the court to take into account and have regard to. Vita Food Products Inc v Unus Shipping Co Ltd (In liq) [1939] AC 277. The fact that the plaintiff has sworn that he was unaware of the terms of the undertaking does not in my view affect that result. He has not suggested that there is any other fact or matter which should result in it being concluded that it was not his agreement. Although it was not specifically submitted by the plaintiff's counsel that the plaintiff's contract with Lloyd's was governed by the law of Victoria, on the [*100] material before the court I am satisfied that it was not, but rather both before and after the contract was varied by the general undertaking given by the plaintiff the contract that existed between the plaintiff and Lloyd's was governed by the law of England.

The question as to whether on the evidence, the plaintiff has established a strong arguable case that Fenchurch, Keeling and/or Zouche was at the material time the agent of Lloyd's is not only relevant to the question as to where any collateral agreement between the plaintiff and Lloyd's was made and whether the contract was made "through" such an agent, but it is also relevant to the causes of action relied on by the plaintiff against Lloyd's in deceit, negligent misrepresentation and in respect of the claims made by the plaintiff pursuant to the provisions of the Trade Practices Act (Cth) and the Fair Trading Act (Vic.). In this respect the plaintiff's case against Lloyd's must be that Fenchurch and its agents Keeling and Zouche had authority of Lloyd's to recruit the plaintiff to become a member of Lloyd's. It is the defendants' case, on the evidence and particularly that of the solicitor Prior, that Fenchurch by its said [*101] agents was acting as principal on its own behalf in recruiting the plaintiff to be a member of Lloyd's whom it would represent in the Lloyd's insurance market at London. It was the evidence of Prior, as referred to, that Fenchurch, Keeling and/or Zouche had no authority to act on behalf of Lloyd's as claimed. This evidence was not challenged by direct evidence, nor was the deponent Prior cross examined. Accordingly the question to be determined on this matter is whether Fenchurch, Keeling and/or Zouche had ostensible or apparent authority of Lloyd's to act on its behalf to recruit the plaintiff and to have him enter an agreement with it. In Freeman and Lockyer (A firm) v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480, Diplock LJ, at 503 and 504, said: "An 'apparent' or 'ostensible' authority . . . is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal [*102] liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

"The representation which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually 'actual' authority to enter into."

The relevant issue as to this matter is whether there was [*103] any representation of Lloyd's, whether by conduct or otherwise, that such 30 persons were its agents. Any representation by conduct or otherwise by Fenchurch, Keeling and/or Zouche that they were the agent of Lloyd's in recruiting the plaintiff to become a member of Lloyd's is not able to be relied upon: Crabtree Vickers Pty Ltd v Australian Direct Mail Advertising and Addressing Co Pty Ltd (1975) 133 CLR 72. The evidence establishes that for a person to become a member of Lloyd's it was necessary in addition to attending a rota meeting in London for him to execute a number of "Lloyd's" documents. These documents were made available to Fenchurch who in turn provided them to the plaintiff in order that he may execute the same along with the written application for membership. The documents in this case were made available to the plaintiff by Fenchurch with its letter to the plaintiff of 22 June 1984. They included, for example, "Lloyd's premiums trust deed". The relevant question on this issue is whether, by making such documents available to Fenchurch in order that it by its agents Keeling and Zouche may have the plaintiff execute the same as part of the [*104] process of the plaintiff applying to Lloyd's to

become a member, such actions constituted a representation that Fenchurch by its agents was authorised by Lloyd's to recruit potential members including the plaintiff. It was also the evidence of the solicitor Prior that a person could only become a member of Lloyd's by being introduced by a members' agent whose responsibility to the underwriting member was to ensure that all requirements relating to his membership were met and satisfied. In such circumstances I am not persuaded that the plaintiff has established a strong arguable case that the acts of Lloyd's in making the relevant documents available to Fenchurch in order that a candidate for membership may execute the same does constitute a representation by Lloyd's that such members' agent is its agent for the purpose of recruiting a candidate for membership and having that person execute the documents necessary for such membership. Nor does the fact that a person could only become a member of Lloyd's by being introduced by a members' agent result in that members' agent being the agent for Lloyd's to recruit members. Rather that members' agent is the agent of the person seeking [*105] membership.

Accordingly, I am not satisfied that the plaintiff has made out a case on the evidence presently before the court justifying service of the proceedings out of the jurisdiction on Lloyd's by reason of the provisions of R7.01(1)(f) in respect of any cause of action pleaded by the statement of claim against Lloyd's to "rescind, dissolve . . . annul or otherwise affect, the plaintiff's contract or alleged collateral contract with Lloyd's" or to "recover damages or other relief in respect of a breach" of one or other of such contracts. This includes any cause of action for any such relief as first referred to and as claimed by the plaintiff pursuant to s87 of the made Practices Act (Cth) relating to the plaintiff's contract or alleged collateral contract with Lloyd's by reason of any breach of s52 of that Act.

In so far as the plaintiff relied on R7.01(1)(i) as justifying the service of proceedings in England on Lloyd's the causes of action relied on by the plaintiff are those of fraudulent misrepresentation and/or negligent misrepresentation consequent upon the alleged misrepresentations of fact made by Zouche and/or Keeling in Victoria in 1984. For the reasons expressed [*106] I am not satisfied that it has been sufficiently established that there is a strong arguable case that either was the agent of Lloyd's for the purpose of recruiting the plaintiff and having him enter into a contractual relationship with Lloyd's. Accordingly, this clause is unable to be relied on by the plaintiff as justifying service of the process on Lloyd's with respect to those causes of action.

It was submitted on behalf of the plaintiff that subCL(j) of R7.01(1) justified the plaintiff serving Lloyd's out of the jurisdiction with respect to the causes of action relied on by him for damages for deceit, negligent misrepresentation and breaches of the provisions of the Trade Practices Act (Cth) and the Fair Trading Act (Vic.). To the extent that such causes of action of the plaintiff against Lloyd's are reliant on acts, omissions and conduct of Zouche, Keeling or Fenchurch as its agents, for the reasons expressed this sub clause cannot be availed of by the plaintiff to serve the process out of the jurisdiction on Lloyd's. However, by his statement of claim the plaintiff alleges that Lloyd's misrepresented facts to him in London in October 1984 falsely and in bad faith and also [*107] that it was negligent in representing and warranting certain facts and matters to him. Further, the plaintiff alleges that acts and omission of Lloyd's amounted to contraventions of s52 of the Trade Practices Act (Cth) and s11 of the Fair Trading Act (Vic).

The claim for damages within the plaintiff's statement of claim includes a claim for loss of profit and underwriting losses. It was the submission made on behalf of the plaintiff that the damages suffered by the plaintiff would be suffered partly, at least, by him in Victoria as such damages would deplete any assets or property that he holds in Victoria and he could suffer financial detriment in Victoria where he continues to carry on practice as a medical anaesthetist. In so far as the plaintiff relies upon the provisions of the Fair Trading Act and, in particular, s11 and s36 thereof in order to found a cause of action in damages against Lloyd's for the alleged misleading or deceptive conduct before April 1986 that Act cannot be relied upon by the plaintiff as the relevant provisions of the Act came into operation and force on 1 April 1986. However to the extent that the provisions of that Act are relevant the views expressed [*108] by me hereafter with respect to the provisions of the Trade Practices Act apply to the provisions of that Act which are similar to the Trade Practices Act. It establishes and lays down "a norm of conduct, failure to observe which has consequence elsewhere in the same statute": Brown v Jam Factory Pty Ltd (1981) 53 FLR 340, at 348. In that case Fox J analysed the provisions of s52(1) of the Trade Practices Act and although accepting that the concepts of the torts of deceit and passing off may be helpful in deciding cases under that section he distinguished the provisions of that section from the concept of a tort. In Gates v City Mutual Life Assurance Society Ltd (1986) 160 CLR 1, Gibbs CJ, when dealing with the provisions of the Trade Practices Act, said, at 6 and 7: "Actions based on s52 and s53 are analogous to actions in tort and the remedy in damages provided by s82(1) appears to adopt the measure of damages applicable in an action in tort. That sub section refers to loss or damage by the conduct of another that contravened a provision of Pt4 or Pt5; it therefore looks to the loss or damage flowing from the offending act of [*109] the other person. The acts referred to in s52 and s53 do not include the breach of a contract, and in

awarding damages under s82 for a breach of either of those sections, no question can arise of damages for loss of a bargain. The contractual measure of damages is therefore inappropriate in such a case. It has been held in the Federal Court in a number of cases that the measure of damages in tort, and not that for breach of contract, will apply in the assessment of damages under s82 where there has been a contravention of s52 or s53: See Brown v Jam Factory Pty Ltd (1981) 53 FLR 340, at 351; 35 ALR 79, at 88; Mister Figgins v Centrepoint Freeholds Pty Ltd (1981) 36 ALR 23, at 59; and Brown v Southport Motors Pty Ltd (1982) 43 ALR 183, at 186. This view is plainly correct."

Although the measure of damages for breach of the provisions of s52 are that appropriate to damages in tort it does not follow that such breach constitutes a "tortious act or omission".

In Philip Morris v Ltd v Ainley and Incorporated Nominal Defendant [1975] VR 345, at 348 and 349, Menhennitt J had [*110] before him an action brought pursuant to s62(1)(b) of the Workers' Compensation Act 1958 wherein indemnity was claimed in respect of compensation paid. On the question of costs the question arose whether such action was an action of tort under O.65 R12. At 349, after reviewing a number of authorities, he said: "The effect of the foregoing appears to me to be that an action of tort is one 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." Menhennitt J. cited with apparent approval the statement in Clerk and Lindsell on Torts, 13th ed, at 1 where it was stated: "Many attempts to define a tort have been made, but none seems entirely satisfactory. We prefer the definition given by Sir Percy Winfield: 'Tortious liability arises from the breach of a duty primarily fixed by law, such duty is towards persons generally and its breach is redressible by an action for unliquidated damages; Winfield, Province of the Law of Tort at 32." The remedy provided by s82 of the Trade Practices Act for breaches of s52 of that Act although it rests in damages is a statutory remedy. Applying the [*111] reasoning of Menhennitt J, I am of the view that a breach of the provisions of that section do not constitute a "tortious" act or omission. Accordingly, the provisions of R7.01(1)(j) do not provide authority for service out of the jurisdiction of this court of its process in respect of an action claiming damages for breach of the provisions of s52 of the Trade Practices Act (Cth) or s11 of the Fair Trading Act (Vic) as the damages sought to be recovered are not caused by a "tortious" act or omission.

In Flaherty v Girgis (1985) 4 NSWLR 248, McHugh JA considered the construction of R1(1)(e) of Pt10 of the New South Wales Supreme Court Rules 1970. The provision is similar to but not precisely the same as R7.01(1)(i). The matter considered by him was where the damage had occurred and whether it was in the same State as that where the physical injury had been inflicted on the plaintiff. At 266, his Honour said: "In Crofter Handwoven Harris Tweed Co Ltd v Veitch [1942] AC 435 at 442 Viscount Simon LC pointed out that '"injury" is limited to actionable wrong, while "damage", in contrast with injury, means loss or harm occurring in fact, whether actionable as an injury or not'. Damage, [*112] therefore, is to be contrasted with the element necessary to complete a cause of action; it includes all the detriment, physical, financial and social which the plaintiff suffers as the result of the tortious conduct of the defendant." See also Darrell Lea Chocolate Shops Pty Ltd v Spanish Polish Shipping Co Inc (1990) 25 NSWLR 568.

Although by the Lloyd's premiums trust deed executed by the plaintiff premiums received from underwriting and profits were held to meet claims and expenses, and although as is deposed to by Prior that any profits earned by the plaintiff are accounted for in England in pounds sterling and losses are also calculated in London in pounds sterling, nevertheless by becoming a member at Lloyd's and engaging in underwriting activities in that market in England the whole of the plaintiff's fortune is put at risk. As part of the damage claimed by the plaintiff he has claimed underwriting losses. The plaintiff continues to reside in Victoria and carry on his specialist medical practice in Victoria and in consequence the damage suffered by him although able to be calculated in England, will no doubt include financial detriment and loss to him in Victoria. However [*113] that does not conclude the matter of the availability of R7.01(1)(j). Although there is evidence that the plaintiff has suffered loss in consequence of underwriting at Lloyd's, for that sub clause to justify a plaintiff being able to serve out of the jurisdiction, the court must be satisfied to the required degree that a tortious act or omission occurred and that the damage alleged to have been suffered was caused by the same. Having regard to my conclusions on the matter of agency, the plaintiff's causes of action relevant to this consideration are those in deceit and negligent misrepresentation which are limited by para14 of the statement of claim to representations made at the premises at Lloyd's in London in October 1984. The verification form executed by the plaintiff on 16 October 1984 containing inter alia the acknowledgment by the plaintiff as to matters explained to him are inconsistent with the allegations pleaded as to the fraudulent and negligent misrepresentations of fact made by Lloyd's. Further there is no evidence before the court to support the allegations of falsity of the representations alleged to be made or that loss and damage was suffered to the plaintiff thereby. [*114] In consequence I am not satisfied that there exists a strong arguable case for the plaintiff being able to serve out of the jurisdiction the

limited causes of action for damages against Lloyd's for deceit and negligent misrepresentation pursuant to R7.01(1)(i) based on any representation alleged to have been made by Lloyd's in London in October 1984. In so far as the plaintiff's claim for relief under the provisions of the Trade Practices Act are claims to "rescind dissolve ... annul or otherwise affect" the contract entered into with Lloyd's, in my view, if one or other of the provisions of subCL(i), subCL(ii) or subCL(iii) of R7.01(1)(f) is satisfied with respect to the contract, such rule would provide authority to serve the proceedings in respect of such a cause of action out of the jurisdiction. However, having regard to the conclusions reached by me with respect to those sub clauses in the circumstances of the plaintiff's case against Lloyd's in respect of the contract with Lloyd's, those sub clauses do not provide authority for the plaintiff to serve Lloyd's out of the jurisdiction with proceedings claiming relief under s87(1A) and s87(2) of the Trade Practices Act, reliant [*115] on alleged breaches of that Act.

In those circumstances it is not necessary for me to consider and determine the argument put on behalf of Lloyd's that any cause of action against it pursuant to the provisions of the Trade Practices Act was statute barred by reason of s82(2) and s87(1CA)(b) of the Act.

The plaintiff's further claim is that the agreement he entered into with Lloyd's, the members' agency agreements, the security trust deeds, the premium trust deeds and securities given by him are void for illegality. He alleges that membership of Lloyd's to underwrite insurance business constituted a "prescribed interest" within the meaning of s5 of the Company (Victoria) Code 1981 and that the offer to him to subscribe to the same was in contravention of s169 and s171 of the Code and that therefore such agreements entered into in consequence of him becoming a member of Lloyd's were void.

The prohibition contained in these sections is against issuing to the public, offering to the public for subscription or purchase or inviting the public to subscribe for or purchase any "prescribed interest" unless there is in force in relation to the interest an approved deed. These allegations [*116] are dependent upon the contention that membership of Lloyd's was a "prescribed interest" within the meaning of that expression as defined in s5 of the Code and that the same was offered to the public for subscription in breach of the provisions of s169 and s171 of the Code. The plaintiff seeks relief in the form of a declaration against Lloyd's that his agreement with it was void. To serve proceedings out of the jurisdiction for such cause of action it would be necessary for the plaintiff to establish that the contract was a contract which came within the provisions of R7.01(1)(f). For the reasons previously stated I am not satisfied that the plaintiff has, to the required degree, established that as a fact. Accordingly, for that reason no authority exists for the plaintiff to serve out the proceedings relying upon this cause of action for the relief claimed. It is the plaintiff's evidence that it was in mid 1984 that he was first addressed by Zouche as to the benefit of becoming a member of Lloyd's subsequent to which he received the letter of 22 June 1984 from Fenchurch containing the various documents and applications for him to sign. By s4(a) of Act No 13 of 1984 as from 28 [*117] May 1984 "prescribed interest" within the Code was defined to mean: "(a) Any right to participate in a tune sharing scheme; (b) Any other right to participate or any interest whether enforceable or not and whether actual prospective or contingent (i) In any profits assets or realisation of any financial or business undertaking or scheme whether in the State or elsewhere; (ii) In any common enterprise whether in the state or elsewhere in relation to which the holder of the right or interest is led to expect profits rent or interest from the efforts of the promoter of the enterprise or a third party, (iii) Any investment contract Whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset ..."

The definition goes on to exclude a number of matters which are not relevant for this purpose.

On the evidence before the court and previously referred to with respect to the function, role and activity of Lloyd's, I am not persuaded that there exists a strong arguable case on behalf of the plaintiff that membership of Lloyd's was a "prescribed interest".

In Australian Softwood Forests Pty Ltd v Attorney General [*118] for NSW; Ex rel Corporate Affairs Commission (1981) 148 CLR 121, Mason J drew attention to the general nature and width of expression in the definition of "interest" within s76(1)(a) of the Companies Act (NSW) which is similar to the definition of "prescribed interest" under consideration. He expressed the view that "the definition is so general and all embracing that it is impossible to say that it necessarily excludes particular transactions which appear to be covered by the general words".

On the evidence before the court, Lloyd's is an incorporated body governed by specific rules and regulations. It manages, controls and regulates the Lloyd's market. It does not itself engage in the business of underwriting insurance. From the evidence it does not appear that Lloyd's itself makes profits or if it did that by being a

member of Lloyd's the plaintiff had the right to participate in the same. In my view the evidence as to the activities and role of Lloyd's does not permit of the description that it is a "financial or business undertaking" nor that its activities are of the description that it carries on "itself a financial or business undertaking or scheme". [*119] Its role and function is to control and regulate the market and those who trade in it by underwriting insurance and the agents of such underwriters. Membership of Lloyd's does not of itself involve the plaintiff underwriting insurance. Membership alone gave the plaintiff an entitlement by means of the facilities of an agent and through a syndicate to underwrite insurance but that is done by him as a sole trader at his own risk and for his own profit or at his loss. In Australian Softwood Forests, Mason J, at 133, when dealing with that which constitutes a "common enterprise", said. "An enterprise may be described as common if it consists of two or more closely connected operations on the footing that one part is to be carried out by A and the other by B, each deriving a separate profit from what he does, even though there is no pooling or sharing of receipts of profits. It will be enough that the two operations constituting the enterprise contribute to the overall purpose that unites them." The fact that Lloyd's regulates and controls the market in which the plaintiff trades as a sole trader does not in my view lead to the conclusion that it is engaged in a common enterprise with [*120] underwriters including the plaintiff nr that by being a member of Lloyd's he has a right to participate or an interest in a common enterprise. Accordingly, on the evidence I am not persuaded that there has been established a strong arguable case to sustain this cause of action even if my conclusions relevant to the application of R7.01(1)(f), were different.

Accordingly, for these reasons, I consider that the provisions of R7.01(1)(f), R7.01(1)(i) and R7.01(1)(j) do not give authority to the plaintiff to serve these proceedings out of the jurisdiction and on Lloyd's. I put to one side for the present consideration of the provisions of subCL(1) of that rule.

The plaintiff's statement of claim makes allegations against Fenchurch alleging causes of action in deceit and for breach of an alleged collateral agreement which are said to arise out of representations made orally and further by implication. The evidence before the court is that the representations relied on by the plaintiff were made by Zouche and Keeling in Australia during mid 1984 and in England in October that year. It is further alleged against Fenchurch that it was in breach of the "members' agency agreements" it [*121] entered into with the plaintiff dated 1 January 1985, 1 January 1987 and 6 October 1988. In addition it is alleged that Fenchurch by its conduct acted in breach of the provisions of the Trade Practices Act (Cth) and the Fair Trading Act (Vic). Further, it is alleged against Fenchurch that the agreements that the plaintiff entered into with it were struck down as void agreements by reason of breaches of s169 and s171 of the Companies (Victoria) Code.

The claim for damages against Zouche and Keeling is in deceit arising out of the alleged misrepresentations made by them. It is further alleged that by reason of their personal involvement in making the representations and giving the warranties relied on by the plaintiff he is entitled pursuant to s75B of the Trade Practicing Act (Cth) to recover damages against them.

The evidence before the court concerning the agreements entered into by the plaintiff with Fenchurch as previously referred to is that while the plaintiff was in London in October 1984 he signed members' agent's agreements with respect to syndicates 216, 270 and 602, however, after returning to Australia he received a letter from Fenchurch enclosing agreements appointing [*122] it as his agent with respect to other syndicates including syndicate No 255. That letter requested that the plaintiff execute the agreements and return one part of each to Fenchurch. The plaintiff has sworn that when he received the documents he executed them and posted them back to Fenchurch in England. As stated he has sworn that the members' agent's agreements entered into by him with Fenchurch for the years 1986 to and including the agreement executed in September 1989 were likewise sent to him in Australia by Fenchurch already executed by it and that on receipt of the same he executed at least one part of each and returned an executed part to Fenchurch in England. In Entores Ltd v Miles Far East Corporation [1955] 2 QB 327 the Court of Appeal held that although in the case of instantaneous communications, such as by telex, the contract is complete when and at the place where the offeror receives acceptance from the offeree, nevertheless when a contract is made by post the contract is made when and at the place that the acceptance of the offeror's offer is placed in the mail box by the offeree - see also Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft [*123] mbH [1983] 2 AC 34 and WA Dewhurst and Co Pty Ltd v Cawrse. On the evidence before the court in this case there is provided grounds for a strong arguable case that other than the contracts entered into between the plaintiff and Fenchurch while he was in London in 1984 and the agreement collateral to that agreement, the other contracts, the subject of the plaintiff's causes of action against Fenchurch, were made in Australia when the plaintiff posted executed parts of the same to Fenchurch by making them in Australia. The parts forwarded by Fenchurch to the plaintiff and executed by it comprised offers by Fenchurch which were accepted when executed and mailed in Australia to Fenchurch in England. In such circumstances there is established in my view a strong arguable case that the majority of the contracts being the

subject of the plaintiff's causes of action against Fenchurch and including that relating to syndicate 255 and those which came into operation on 1 January 1987 and thereafter, were contracts which were made in Victoria. In respect of these contracts the plaintiff has established a sufficient factual basis for it to be concluded, at this stage, that the causes of action [*124] against Fenchurch for orders for rescission of such agreements or for damages for breach of the same or for similar relief under the provisions of the Trade Practices Act (Cth) or the Fair Trading Act (Vic) were in respect to contracts made in Victoria and, accordingly, the proceedings, in so far as they rely on such causes of action, was able to be served out of the State and on Fenchurch in England pursuant to R7.01(1)(f)(i). In respect of the collateral agreements said to arise out of and by reason of representations made or warranties given by Zouche, there exists on the evidence a sufficient case that such agreements were made "through an agent" of Fenchurch "carrying on business or residing within Victoria". Similarly, those members' agent's agreements as were entered into by the plaintiff in England, following the plaintiff having been recruited in Australia by Zouche, and in consequence of representations said to have been made by him, were agreements in respect of which it is able, on the evidence, to be strongly argued that they were made "through" the agent of Fenchurch who was at the relevant time residing within Victoria.

The cause of action alleged against Fenchurch [*125] in deceit is dependent in part on representations said to have been made by Zouche and Keeling to the plaintiff at least in part in Victoria in early 1984. To the extent that such cause of action arises out of such representations there is established on the evidence a sufficient basis that the cause of action is founded on a tort committed within Victoria by the agents of Fenchurch and in respect of which it is vicariously responsible. This establishes, in respect of such cause of action against Fenchurch, a basis for the proceedings in respect of the same to be served out of the jurisdiction of this court pursuant to R7.01(1)(i). To the extent that the plaintiff's cause of action against Fenchurch in deceit is based on misrepresentations made by Keeling in London although the tort was committed out of this State, on the facts before the court at present, there appears a sufficient basis to enable the plaintiff to serve proceedings, relying on such cause of action, on Fenchurch by reason of R7.01(1)(1): Flaherty v Girgis; Crofter Hand Woven Harris Tweed Co Ltd v Veitch; Darrell Lea Chocolate Shops Pty Ltd v Spanish Polish Shipping Co Inc. The same conclusions as referred to apply [*126] with respect to the claim in damages made by the plaintiff against each of Keeling and Zouche in deceit and founded on fraudulent misrepresentations alleged to have been made by them to the plaintiff in Victoria in 1984. The same reasoning as referred to with respect to the plaintiff's claim against Fenchurch for damages partly suffered in Victoria for deceit committed in England enabling the proceedings in respect of that cause of action to be served out is applicable to the claim made against Keeling for deceit arising from representations made by him in England.

However, in so far as the plaintiff has claimed damages or other relief against each of Zouche and Keeling pursuant to the provisions of the Trade Practices Act (Cth) by reason of their involvement in the misleading and/or deceptive conduct alleged, for the reasons previously expressed by me it is not a proceeding founded on a tort committed in Victoria. Further, such a claim in damages is not in respect of an act or omission of the nature as identified in R7.01(1)(i). Accordingly, in respect of such causes of action against Keeling and Zouche and dependent upon the provisions of the Trade Practices Act (Cth) there is [*127] no authority to serve the same out of Victoria and on Keeling and Zouche in England. The causes of action alleged by the plaintiff as against Keeling and Zouche which are able to be served out of this State and on them in England in these proceedings is limited to the cause of action for deceit founded on representations made by them in Victoria in early 1984.

As previously expressed I am not persuaded that there exists a strong arguable case that membership of Lloyd's is a "prescribed interest" within the meaning of the Companies (Victoria) Code and that in inviting the public, including the plaintiff, to become a member of Lloyd's there was a breach of s169 and s171 of the Code resulting in the Lloyd's agreements being void for illegality. Even if my conclusion in respect of that matter is in error it does not follow in my view that the members' agent's agreements entered into by the plaintiff with Fenchurch were void for illegality. To be able to underwrite at Lloyd's it was necessary for the plaintiff to be a member of Lloyd's and also to enter into a members' agent's agreement with an agent such as Fenchurch. It does not follow that if the former was void for illegality so [*128] was also the other separate and independent agreement. In my view the claim made against Fenchurch alleging that the members' agent's agreements were void for illegality by reason of the fact that the Lloyd's agreement was void for illegality are unable to be sustained and, accordingly, the proceedings in respect of the same are unable to be served out of the jurisdiction notwithstanding that it may otherwise be said to be a proceeding to "otherwise affect a contract" made within Victoria or made through an agent carrying on business or residing within Victoria R7.01(1)(f). Although I have concluded that it has not been established on the material before the court that pursuant to R7.01(1)(f), R7.01(1)(i) and R7.01(1)(j) that there exists authority to serve the proceedings out of the jurisdiction on Lloyd's or to serve the proceedings on Fenchurch, Zouche and Keeling with respect to a number of causes of action relied on by the plaintiff, while concluding that with respect to the last three mentioned defendants there are

grounds to serve the proceedings on them in England in respect of other causes of action, it is not appropriate in the circumstances to require the plaintiff to [*129] make an election as to whether he seeks to pursue causes of action in the proceedings against defendants in respect of which he has established that the proceedings were served out of the jurisdiction with the authority of the rules. I do not require the plaintiff to elect as it would be to no point having regard to the conclusions that I have reached and hereafter expressed.

I am also of the view that having reached the conclusions as hereafter expressed it is not necessary to engage in a further analysis of the facts and the causes of action in the proceedings properly brought against a party served out of Victoria in order to determine whether another party served out of Victoria is a "necessary or proper party" to such cause of action within the proceedings, thereby enabling the plaintiff in respect of the same to serve that other party out of Victoria pursuant to R7.01(1)(l).

I do however consider the claim by the plaintiff that Lloyd's and Fenchurch, who were served out of the jurisdiction, were necessary and proper parties to his claim against the fifth named defendant bank. The plaintiff's claim against the bank concerns the guarantees given by it to Lloyd's. In addition [*130] to the injunctive relief sought against Lloyd's for an order that it be restrained from calling up or enforcing or receiving the proceeds of such guarantees and as against the bank from paying Lloyd's under the bank guarantees, the plaintiff by his prayers for relief has sought a declaration that the said securities were void or invalid, an order for rescission of the same or alternatively an order that they be set aside and cancelled and that they be returned to the plaintiff.

In addition to the matters pleaded against Lloyd's as previously referred to and as alleged to provide grounds for the relief sought against it with respect to the guarantees, the plaintiff has further alleged that the said securities were void for uncertainty and further that Lloyd's and/or Fenchurch materially altered the same after they were executed and delivered by the fifth defendant. It is alleged that the material alteration comprised completing the same by inserting a date in such securities.

The plaintiff's claim against Lloyd's is that by reason of the alleged misrepresentations and its breaches of agreement including any collateral agreement, the agreement between him and Lloyd's has been [*131] struck down and/or he is entitled to rescission of the same and further he is entitled to have the securities set aside or rescinded or alternatively a declaration that the securities are invalid and/or void. The pleadings contain no allegation as such against the bank relevant to the securities other than the allegation that they are void for uncertainty. The other allegations going to the matter as to the invalidity of the securities is made against Lloyd's and/or Fenchurch. The plaintiff by his counsel has submitted that with respect to the cause of action of the plaintiff against the fifth defendant bank both Lloyd's and Fenchurch are necessary and proper parties to the same within the provision of R7.01(1)(1) thereby enabling him to serve such parties out of the jurisdiction. That submission was made on the basis that they were each a "proper" party to that cause of action on the grounds that had they been each resident in Victoria it would have been proper for them to be joined as defendants by reason of the provisions of R9.02(a)(i) and R9.02(a)(ii). It was submitted that the claim against Lloyd's and Fenchurch and the fifth defendant bank involve common questions of law or [*132] fact and further that the rights to relief claimed in the proceedings arise out of the same transaction or series of transactions: see James Rolfe Transport (Vic) Pty Ltd v Livdon Engineering Ltd (unreported, McDonald J, 1 March 1991). To bind Lloyd's to any decision of the court with respect to the guarantee provided by the defendant bank to Lloyd's in proceedings instituted by the plaintiff against the bank it would be necessary for Lloyd's to be a party to those proceedings. On the material before the court and having regard to the allegations of the plaintiff contained within the statement of claim relevant to the relief sought with respect to the guarantees, I am of the opinion that in reality the plaintiff's claim against Lloyd's is the primary claim and that against the bank is secondary to it. In such circumstances although the bank may be a "proper" or "necessary" party to the plaintiff's proceedings against Lloyd's the situation is not the other way about for the purpose of R7.01(1)(l). In my view the claim for relief against the bank, which is secondary to the claim made against Lloyd's in respect of the guarantees, should not be able to provide the foundation to otherwise [*133] serve Lloyd's out of the jurisdiction on the basis that it is a proper or necessary party to its claim against the bank - see Rosler v Hilbery [1925] Ch 250. Having regard to the nature and extent of the plaintiff's claim against the fifth defendant bank I am not persuaded that either Lloyd's or Fenchurch is a proper or necessary party to such a claim as would enable them to be otherwise served out of the jurisdiction in respect of the same under R7.01(1)(l).

I turn now to consider the question of the exercise of the court's discretion in determining whether the proceedings against the applicant defendants should be heard and determined by this court, even if the proceedings are able to be served on them out of the jurisdiction pursuant to the rules in respect of some or all of the causes of action relied on by the plaintiff.

The general undertaking by the plaintiff and entered into with Lloyd's on 1 January 1987, as referred to, contained the clause by which each party irrevocably agreed to submit any dispute arising out of the plaintiff's membership of and/or underwriting of insurance business at Lloyd's to the jurisdiction of the Courts of England. Similarly the agreements [*134] that the plaintiff entered into with Fenchurch and dated 1 January 1987 and 6 October 1989 provided that the parties irrevocably and unconditionally agreed to submit for all purposes of and in connection with the agreement to the exclusive jurisdiction of the English Courts.

Where such a special agreement exists between the parties although the court is not obliged or compelled to give effect to the same on applications such as this brought by Lloyd's and Fenchurch the court should consider the circumstances of the case and determine whether or not a stay should be granted commencing with a strong bias in favour of maintaining the agreement struck by the parties: Huddart Parker Ltd v The Ship Mill Hill and Her Cargo (1950) 81 CLR 502, Dixon J, at 508 and 509. In Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197, Brennan J in his judgment at 230 and 231, emphasised that: "... where the plaintiff seeks the exercise of a discretion to refuse to give effect to a contractual stipulation that a nominated court should have exclusive jurisdiction requires justification of a different order from that required in a case [*135] where the plaintiff has simply chosen to sue in one forum rather than another, both being available to him."

As to the general principles applicable his Honour, at 224, further said: "Where the parties to a contract agree that the courts of a foreign country shall have exclusive jurisdiction to decide disputes arising under the contract or out of its performance, the courts of this country regard that agreement as a submission of such disputes to arbitration and will, in the absence of countervailing reasons, stay proceedings brought here to decide those disputes." In the same case Gaudron J, at 259, said: "Where there is an agreement to submit to another jurisdiction, the power to grant a stay rests on the principle that the courts will, except where the plaintiff adduces strong reasons against doing so, require the parties to abide by their agreement."

In The Eleftheria [1970] P 94, Brandon J identified the principles to be applied on an application for a stay where such an agreement existed between the parties. At 99, he summarised the principles as follows: "(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants [*136] apply Esr a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

"(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

"(3) The burden of proving such strong cause is on the plaintiffs.

"(4) In exercising its discretion the court should take into account all the circumstances of the particular case."

He then went on to identify a number of particular relevant circumstances. At 103 of his judgment, Brandon J cautioned that it is essential that the court: "... should give full weight to the prima facie desirability of holding the plaintifFs to their agreement" and further stated that ". . the Court must be careful not just to pay lip service to the principle involved, and then fail to give effect to it because of a mere balance of convenience."

An example where an exclusive jurisdiction clause was not enforced was in Ramcorp Ltd v DFC Financial Services Ltd (unreported, Supreme Court of New South Wales, Waddell CJ in Eq, 30 April 1990) in which case it was held that it was not appropriate to do so in relation at [*137] least to the plaintiff's claim for injunctive relief where such relief was not available in the court of the agreed forum. See also Evans Marshall and Co Ltd v Bertola SA [1973] 1 WLR 349. The plaintiff submitted that to stay the proceedings against Lloyd's would deprive it of Its causes of action against it based on the Trade Practices Act for the court in England would not, pursuant to the provisions of s86 of that Act, have jurisdiction in respect of such causes of action. For the reasons previously expressed it is my view that it has not been established that the proceedings against Lloyd's relying on such causes of action were able to be served out of the jurisdiction and determined by this court. However the same argument was put in answer to the application of Fenchurch to stay the proceeding on this ground. Accordingly, I have regard to it both on the application of Fenchurch and also with respect to Lloyd's application in the event that my primary conclusion is in error. The question that arises is whether the deprivation of the plaintiff of a cause of action in his suit against Fenchurch and/or Lloyd's, in the circumstances of this case, is sufficient [*138] for the court to put to one side the agreement of the parties and refuse to stay the proceedings. It was having regard to a similar type of consideration that caused Waddell CJ in Ramcorp to not grant a stay. Although the discretion rests with the court to not grant a stay notwithstanding the existence of an "exclusive

jurisdiction" clause, care should be taken not to reduce the agreement reached to nought on the ground that to permit reliance on the same would be to the juridical disadvantage of the plaintiff.

In the circumstances of this case and having regard to the plaintiff's pleadings and the evidence advanced by the plaintiff, this submission to my mind is more theoretical than real. If the plaintiff establishes at trial the allegations made by him that he was induced to enter agreements with Fenchurch and/or Lloyd's in consequence of the misrepresentations alleged, even if the plaintiff has not terminated the agreements as pleaded, he will be entitled at common law to the relief sought without need to rely on the provisions of s82 and s87 of the Trade Practices Act.

It is good commercial commonsense that parties to an international commercial agreement or a commercial [*139] agreement where it is to be performed in one country while a party to the same is resident in another, should agree as to the court in which disputes arising thereunder or in consequence of the performance or non performance of the same should be litigated. Where parties do so agree and a party institutes proceedings in a court other than that agreed upon the court of the country in which the proceedings have been instituted should only exercise its discretion to not stay such proceedings on a strong and clear case put forward by the plaintiff. Such is not the case with respect to the plaintiff's claims against Lloyd's and Fenchurch. In the event of the court staying the plaintiff's claims against such parties he would be able to proceed in England and within the jurisdiction of the commercial court at London where practices and procedures would enable him to fairly, fully and expeditiously prosecute his claim. On the evidence it appears that a large number of claims against Lloyd's and underwriting agents already are pending before that court where procedures are being adopted to save costs and to enable the claims to be fairly and properly tried. Although the plaintiff was recruited [*140] in Victoria, the place where the contract was to be performed by his agents and on his behalf while he remained a member of Lloyd's was specifically in the Lloyd's insurance market at London. In so far as it is alleged by the plaintiff that acts were performed, things done and practices followed which were in breach of his agreements with Lloyd's and/or Fenchurch, the evidence concerning the same would be reasonably expected to be in the main evidence of documents located in England and witnesses resident in that country. On the facts in these proceedings there is no good reason why the court in the exercise of its discretion should not grant a stay of the proceeding against Lloyd's and Fenchurch having regard to the agreement entered into between them with the plaintiff. I am of the view that their agreement should be given effect to.

I turn next to consider the submissions made that the proceedings should be stayed against the first four defendants on the ground that the forum o this court is, on the evidence before the court, clearly inappropriate.

In Oceanic Sun Line Special Shipping Co Inc v Fay, Deane J, at 241 commenced his judgment with a statement of the fundamental [*141] principle that: "A party who has regularly invoked the jurisdiction of a competent court has a prima facie right to insist upon its exercise and to have his claim heard and determined." At 247 and 248, his Honour identified in summary form the "modern content of the traditional principles governing the power of a Court in this country to order that proceedings which have been regularly instituted within jurisdiction should be dismissed or stayed on inappropriate forum grounds." His Honour said: "That power is discretionary one in the sense that its exercise involves a subjective balancing process in which the relevant factors will vary and in which both the question of the comparative weight to be given to particular factors in the circumstances of a particular case and the decision whether the power should be exercised are matters for individual judgment and, to a significant extent, matters of impression. The power should only be exercised in a clear case and the onus lies upon the defendant to satisfy the local court in which the particular proceedings have been instituted that it is so inappropriate a forum for their determination that their continuation would be oppressive and [*142] vexatious to him. Ordinarily, a defendant will be unable to discharge that onus unless he can identify some appropriate foreign tribunal to whose jurisdiction the defendant is amenable and which would entertain the particular proceedings at the suit of the plaintiff. Otherwise, that onus will ordinarily be discharged by a defendant who applies promptly for a stay or dismissal if he persuades the local court that, having regard to the circumstanCeS of the particular case and the availability of the foreign tribunal, it is a clearly inappropriate forum for the determination of the dispute between the parties. The reason why that is so is that, once it is accepted that the adjectives 'oppressive' and 'vexatious' are not to be narrowly or rigidly construed and are to be applied in relation to the effect of the continuation of the proceedings rather than the conduct of the plaintiff in continuing them, the continuation of proceedings in a tribunal which is a clearly inappropriate forum would, in the absence of exceptional circumstances being established by the plaintiff (cf Spiliada Maritime Corp v Cansulex Ltd [1987] 1 AC 460, at 478), be oppressive or vexatious to such a defendant if [*143] there is some available and appropriate tribunal in another country. Admittedly, that approach to the 'vexatious' and 'oppressive' test is less stringent and less rigid than would have been accepted in the nineteenth century. Under it, the applicable test pursuant to traditional principles can, in the ordinary case, properly be seen as an

'inappropriate forum' test. It cannot, however, properly be seen as a 'more appropriate forum' test since the mere fact that a tribunal in some other country would be a more appropriate forum for the particular proceeding does not necessarily mean that the local court is a clearly inappropriate one." In Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538, Mason CJ, Deane, Dawson and Gaudron JJ held that the principles to be applied in an application such as this for a stay on inappropriate forum grounds were those stated by Deane J in Oceanic Sun Line Special Shipping Co Inc v Fay as previously referred to. In the application of that test it is of significance to have regard to that which those members of the court said when comparing the "clearly inappropriate forum" test with the "clearly more appropriate forum" [*144] test. At 558, they said: "The 'clearly inappropriate forum' test is similar to and, for that reason, is likely to yield the same result as the 'more appropriate forum' test in the majority of cases. The difference between the two tests will be of critical significance only in those cases - probably rare - in which it is held that an available foreign tribunal is the natural or more appropriate forum but in which it cannot be said that the local tribunal is a clearly inappropriate one. But the question which the former test presents is slightly different in that it focuses on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum rather than on the need to make a comparative judgment between the two forums. That is not to deny that considerations relating to the suitability of the alternative forum are relevant to the examination of the appropriateness or inappropriateness of the selected forum. The important point is that, in those cases in which the ascertainment of the natural forum is a complex and finely balanced question, the court may more readily conclude that it is not a clearly inappropriate forum."

Having regard to the nature [*145] of the plaintiff's claims against the defendant applicants and on consideration of the evidentiary material before the court on these applications, I am satisfied that this court is clearly an inappropriate forum for the hearing and determination of the proceedings of the plaintiff against the applicant defendants. On the plaintiffs case the connection of this court with the issues raised by the pleadings and in dispute, as appears from the material placed before the court and submissions made on this application and the evidence likely to be called at trial, is that firstly it is within this State that the plaintiff resides and it was within this State that he was initially recruited by Zouche and Keeling to become a member of Lloyd's. At that time Zouche resided in Victoria. On the evidence, it appears that it was the practice of Keeling, on behalf of Fenchurch, to visit this State annually for the purpose of recruiting persons for whom Fenchurch would act as agent on them becoming underwriting members of Lloyd's. The evidence that is likely to be available and to be called at trial which is to be expected to be available in this State would be principally that relating to the representations [*146] that the plaintiff alleges were initially made to him in Victoria. On behalf of the plaintiff it has been said that at trial there will be called "similar fact" evidence as previously referred to. It is not clear at this stage what will constitute that evidence or how such evidence would be admissible at trial, but even if it was it would be expected to be of a limited nature.

The other evidence that it is to be expected will be led at trial and tendered relating to the issues as pleaded by the plaintiff is evidence as to the falsity of the alleged representations and evidence relevant to the control and management by Lloyd's of the Lloyd's insurance market in London, the management of the plaintiff's account and business by Fenchurch with respect to the various syndicates of which the plaintiff was a member and the comparison of the fortunes of members of these syndicates and underwriting undertaken by them during the relevant periods with other syndicates in the market. Relevant to the allegations that the representations made were false and that the Lloyd's agreement and the member's agency agreements and the collateral agreements were breached are allegations made in the [*147] pleadings including those previously referred to that: * Lloyd's did not at any material time properly or efficiently control, supervise, govern or administer the under writing of insurance, including re insurance, by members of Lloyd's; * Lloyd's did not properly control the business of members conducted at Lloyd's to protect members; * underwriting business at Lloyd's was not safe or profitable; * Fenchurch did not carry out the plaintiff's instructions; * Fenchurch did not act on behalf of the plaintiff in the best interests of the plaintiff but rather acted so as to best suit its and Lloyd's interest; * the underwriting risks of the plaintiff were never properly or effectively re insured; * the underwriting business of the plaintiff was not spread widely by Fenchurch causing the plaintiff to be exposed to extreme and unusual losses; * Lloyd's caused, encouraged and permitted improper and ineffective re insurance of syndicates by means of re insurance through the "LMX spiral"; * Lloyd's caused, encouraged and permitted members' agents to place non working members at Lloyd's in high risk syndicates to the profit of members' agents and to the disadvantage and loss of non working members [*148] including the plaintiff; * Lloyd's caused, encouraged and permitted working members of Lloyd's to underwrite the more profitable and less risk business while non working members underwrote the less profitable and greater risk business; * Fenchurch placed non working members including the plaintiff in syndicates underwriting low profit and high risk insurance; * Fenchurch did not provide the plaintiff with proper or effective re insurance but rather re insured with other underwriters and provided the plaintiff with illusory re insurance through the "LMX spiral"; * Fenchurch, with the knowledge and approval of Lloyd's, placed non working members including the plaintiff in syndicates that re insured to close

out high and extreme risk insurance policies from earlier open years that should not have been re insured to close out.

Having regard to the factual issues that may be expected to be in contest at trial arising from the nature of such allegations it can be readily expected that both from the plaintiff's side and that of the defendants that there is likely to be a very large body of evidence to be called and tendered before the court relevant to these matters. The allegations go [*149] to the very foundation of the conduct of Lloyd's insurance market in London, as to how it was managed and controlled by Lloyd's. The allegations also relate to how the plaintiff's business was managed by Fenchurch and as to how the fortunes of the syndicates of which the plaintiff was a member fared in comparison not only with other syndicates generally but also with other syndicates comprising working members as against those of non working members. It is these allegations and the proof of the same that are at the very root of the plaintiff's case against Lloyd's, Fenchurch and, in so far as they relate to the falsity of representations alleged to be made by Zouche and Keeling, against them also. On the material before the court on this application, it is to be readily expected that, witnesses to be called both expert and otherwise, to give oral evidence in relation to these matters are Likely to be considerable in number. Also one can readily expect and conclude that the volume of documents to be discovered and made available at trial and likely to be tendered at trial are documents in the possession of persons in England and which are likely to be extremely large in number. Having [*150] regard to the submissions made before the court on this application it is to be reasonably expected that each of these allegations will be contested by the applicant defendants for they go to the very foundation of the conduct of the Lloyd's market in London. It is these matters and the propriety of the same that are put in issue by the plaintiff. In my view the very identification of the width and nature of the allegations made by the plaintiff and the fact that evidence relevant to the same will come from persons who do not reside within this State and from documents, by far the greatest number of which are not in the possession of persons in this State nor readily or easily available to this State, that leads to the clear conclusion, in my view, that this court is a clearly inappropriate forum to manage the proceedings at the interlocutory stage and to hear the trial of the action. Even if consideration was given to using very modern communication facilities that are now becoming available to courts both for the purpose of conducting interlocutory applications and for receiving evidence at trial, nevertheless, in my view, it would be entirely inappropriate for this court to manage [*151] the proceedings before trial and to conduct the trial. It is not just a matter of one party assembling documents which may be relevant to a commercial transaction and giving discovery of the same and making the same available at trial in a country foreign to that in which they are held. Having regard to the width and extent of the issues raised by the plaintiff, not only would such a task be enormous but it is likely that many of such documents are relevant to the continued conduct of the market. To require the applicant defendants to contest these proceedings in this jurisdiction, when by far the greatest part of the trial will be likely to relate to the management and conduct of the market in London and Fenchurch's representation of the plaintiff in the same, when it was to that market that the plaintiff went to trade as an underwriter would, to my mind, be vexatious and oppressive to those defendants. For the reasons previously expressed, the fact that the plaintiff would not be able to pursue his claims pursuant to the provisions of the Trade Practices Act in the event of the proceedings being tried in England does not provide a balancing factor that causes me to come to a different [*152] conclusion. In reaching this conclusion I also have regard to the fact that the practices and procedures of the Commercial Court in London enable proceedings such as those presently instituted by the plaintiff to be managed at an interlocutory stage and to be expeditiously and fairly and fully tried and determined.

In the result I am satisfied on the material placed before the court on this application that this court is clearly an inappropriate forum to try the issues raised by the plaintiff's pleadings in the proceedings brought by it against the first four defendants.

In support of the submissions made on behalf of Fenchurch that this court is a clearly inappropriate forum, reliance was also placed on the provision of the arbitration clauses as contained in the 1984, 1987 and 1989 members' agency agreements. It was submitted that on the evidence there existed an entitlement in Fenchurch to obtain an order in reliance upon s7(1)(a) and s7(2)(a) and s7(b) of the International Arbitration Act 1974 (Cth) to obtain an order that the proceedings against it be stayed and that the parties be referred to arbitration. Based on such submission reliance was placed on the stated intention [*153] of Fenchurch as expressed in the affidavit of Belinda Schofield sworn 13 July 1992 and previously identified and referred to.

In support of the primary submission, evidence was placed before the court establishing that the Arbitration (Foreign Awards and Agreements) Act 1974 (as the International Arbitration Act 1974 was then named) was assented to on 9 December 1974 and that the United Kingdom of Great Britain and Northern Ireland was a contracting state to the convention referred to in the Act. It was submitted that the present proceedings before the court "involved the determination of a matter" that, pursuant to the arbitration agreements, was "capable of

settlement by arbitration" within s74(2)(b) of the International Arbitration Act 1974. It was further submitted, in support of the basic premise relied on, that if the court was satisfied that the provisions of s7 of the Act had been satisfied it was mandatory for the court to grant a stay pursuant to the Act. Reliance was placed on Flakt Australia Ltd v Wilkins and Davies Construction Co Ltd [1979] 2 NSWLR 243; Mitchell Cotts Freight (Australia) Pty Ltd v Through Transit Mutual Insurance Association Ltd (1989) 98 FLR 99 [*154] and Elders CED Ltd v Dravo Corporation (1984) 59 ALR 206.

On behalf of the plaintiff it was submitted that no regard should be had to these submissions in considering whether this court was clearly an inappropriate forum to hear and determine the plaintiffs case against Fenchurch. It was further submitted that even if the submissions were taken into account there was no jurisdiction in the court having regard to the terms of the arbitration agreement for the court to consider the matter with reference to the plaintiff's claim under Pt5 of the Trade Practices Act as those claims were not matters capable of settlement by arbitration within the terms of the arbitration agreements. In this respect reference was made to Allergan Pharmaceuticals Inc v Bausch and Lomb Inc (1985) ATPR 47,163.

In reaching the conclusion that I have that this court is clearly an inappropriate forum to hear and determine the proceeding I have not had regard to this submission made on behalf of Fenchurch because in my view the very matter itself is not a relevant matter for the court to take into account in determining the issue as to whether, in the circumstances of this case, [*155] this court is clearly an inappropriate forum to hear and determine the proceedings. The wishes of Fenchurch to not litigate the plaintiff's claim against it in victoria while threatening to make application for an order to stay the proceedings pursuant to the provisions of the International Arbitration Act 1974 if the proceedings are otherwise not stayed, but its preparedness to waive its rights under the arbitration agreements in order that the proceedings may be heard in England cannot be a relevant consideration as to whether this court is an inappropriate forum to hear and determine the proceedings. Different considerations may have applied if absolute reliance was placed on the arbitration agreements and the provision of the International Arbitration Act 1974 in order to have the proceedings stayed so that the arbitration agreements may be given their intended effect. However here, in the circumstances of this case, Fenchurch seeks to threaten to rely on the arbitration agreement not to achieve resolution of the dispute between it and the plaintiff by arbitration but to stop this court hearing the same. This cannot be a relevant consideration to take into account in determining [*156] whether this court is a clearly inappropriate forum to hear and determine the issues in dispute between the parties. In the result it is my judgment that the proceedings of the plaintiff in this court against the first defendant the Society of Lloyd's, the second defendant Fenchurch Underwriting Agencies Limited, the third defendant Zouche and the fourth defendant Keeling, should be ordered to be permanently stayed.

No application has been made to the court in respect of the plaintiff's proceedings against the fifth defendant the National Australia Bank Ltd, and accordingly, no order is made in respect of the plaintiff's proceedings against that defendant. In the event of the plaintiff continuing its proceedings against the fifth defendant it will be necessary for the court to give directions relevant to the same.

The order of the court is that the plaintiff's proceedings against each of the first, second, third and fourth defendants be permanently stayed.

ORDER:

Order that the plaintiff's proceedings against the first, second, third and fourth defendants be permanently stayed.

Solicitors for the plaintiff: Brian Ward and Partners.
Solicitors for the first defendant: Freehill [*157] Hollingdale and Page.
Solicitors for the second, third and fourth defendants: Corrs Chambers Westgarth.
Solicitors for the fifth defendant: Mallesons Stephen Jaques
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