



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: M21/2024
File Title: Bogan & Anor v. The Estate of Peter John Smedley (Deceased)
Registry: Melbourne
Document filed: Form 27F - Applicants' Outline of oral argument
Filing party: Applicants
Date filed: 12 Nov 2024

Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

ANTHONY BOGAN

First Applicant

MICHAEL THOMAS WALTON

Second Applicant

and

THE ESTATE OF PETER JOHN SMEDLEY (DECEASED)

First Respondent

ANDREW GERARD ROBERTS

Second Respondent

PETER GRAEME NANKERVIS

Third Respondent

JEREMY CHARLES ROY MAYCOCK

Fourth Respondent

KPMG (A FIRM) ABN 51 194 660 183

Fifth Respondent

**APPLICANTS’
OUTLINE OF ORAL SUBMISSIONS**

Part I: Certification

1. This outline of submissions is in a form suitable for publication on the internet.

Part II: Outline of argument

2. **Background:** This is a representative proceeding on behalf of persons throughout Australia alleging contraventions of national law, against directors resident in multiple States and a national accounting firm. The proceedings have a strong connection to Victoria. There is nothing in the agreed facts to allow any meaningful judgment about any inconvenience or practical problems that may arise in the VSC: **J [166]**. There is ‘little to distinguish between Victoria and NSW’: **J [167]; AS [10]-[11], [58]**.
3. **NOC Ground 1:** (i) Section 1337H(2) must be approached in light of the Commonwealth’s choices to vest federal jurisdiction concurrently in Federal, State and Territory superior courts, and to leave s 79 of the *Judiciary Act 1903* (Cth) to operate according to its terms: *Gordon v Tolcher* (2006) 231 CLR 334 at [29]-[40]. (ii) The NSWSC was not an ‘eligible court’ for transfer before the GCO was made, and is not now an eligible court, because it lacks ‘jurisdiction’ in one of the ‘matters for determination’ in the proceedings, being the claim for the making, and ultimately due administration, of a GCO. (iii) A transfer *before* deciding the application for the GCO would have fallen on ‘barren ground’ in NSW (**J [148]**); (iii) a transfer *after* the GCO has been made would fare no better. There is no provision of NSW law (picked up by s 79 of the *Judiciary Act 1903* (Cth)) which gives the NSWSC the *authority to administer* the GCO made by the VSC: cf **J [99]-[101]; AS [26], [56]**.
4. **Question 1:** (i) Alternatively, KPMG has failed to discharge the onus of establishing, having regard to the ‘interests of justice’ that it is ‘more appropriate’ for the proceeding to be determined in the NSWSC; or that the VSC should exercise the residual discretion (‘may’ in s 1337H(2) vs. ‘must’ in s 1337H(3)) to transfer the proceeding. (ii) Differential procedural or substantial outcomes which s 79 calls forth in different forums can bear on the ‘interests of justice’. (iii) The ‘interests of justice’ are not disembodied from, but instead may mirror or reflect, the private interests of one or other party: *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at [15], [21], [27]. Beyond that, the cross-vesting scheme, which only partially survives *Re Wakim* (1999) 198 CLR 511, concerns a different context and is of limited relevance: s 1337A(2)(a).
5. (iv) Beyond conventional ‘connecting factors’, differential outcomes which bear on access to justice, including denial of access to justice by reason of absence of litigation

funding in a forum, are relevant either as one of the ‘interests of justice’ or at the discretionary stage: *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460, 478; *Lungowe v Vedanta Resources Plc* [2020] AC 1045, [88]-[98]. (v) The transfer should be refused because the GCO is secure in the VSC but at risk in the NSWSC: it is “probable” that, in the absence of a GCO, the litigation will terminate without adjudication or other resolution on the merits, such that justice would not be able to be done in the proceeding: **CRB, p.82 [121]-[124]; AS [13]-[16], [18]-[33]; AR [8]-[9].**

6. **Question 2(a): (i)** There is no provision of federal law that an order limited in terms to proceedings in the VSC (**J [60]**), ‘remains in force’ (cf s 43(d) of the *Judiciary Act*) if proceedings are transferred to NSW, let alone is enlarged to be an order which the NSWSC must ‘enforce’ under the terms of Victorian law. The GCO, on its terms and in its legislative context, is spent if and when the proceeding exits Victoria. **(ii)** Section 79, preserved by s 1337A(3), is inconsistent with any such outcome, because it commands the NSWSC to apply NSW law. **(iii)** There are other provisions of NSW law, picked up by s 79, which would *prevent* the NSWSC recognising the GCO as an order which ‘remains in force’ and would *prevent* the NSWSC ‘enforcing’ such an order: *Civil Procedure Act 2005* (NSW), ss 3, 98-99, 173, 177-178, 181; *UCPR*, r 42.21. **(iv)** *R&B Investments v Blue Sky* [2024] FCAFC 89, on the assumption that it is correct, does not alter this result: **AS[38], AR[13].**
7. **Section 1337P(2): (i)** Section 1337P(2) should be construed harmoniously with, rather than in derogation from, s 79. **(ii)** It does not provide that the GCO (or any other order) ‘remains in force’ in the NSWSC; nor confer any powers on the NSWSC to enforce the GCO **(iii)** Like s 1337N, it does no more than impose a duty on the NSWSC to deal with the transferred proceedings *as if* a category of steps (including orders) in or of the VSC had been taken in the NSWSC; that category being those steps or orders where the same or similar step or order could have been taken in the NSWSC in the first place; which excludes the GCO. **(iv)** Even if required to ‘deal’ with the proceedings going forth on the fiction, the NSWSC must do so under s 79 with the powers and constraints it has under NSW law: **AS[36]-[47], AR[10]-[20].**
8. **Historical antecedents:** Section 1337P(2), at most, is a shorthand version of s 43 of the *Judiciary Act 1903* and its US 1875 antecedents. The US cases hold that the transferee court has no authority or power to enforce orders of the transferor court which the transferee court had no power to make in the first place: compare *Ex parte*

- Fisk*, 113 US 713, 725-726 (1885); *King v Worthington*, 104 U.S. 44, 50-51 (1881); *Granny Goose Foods Inc v Brotherhood of Teamsters*, 415 US 423, 436-438 (1974).
9. **Question 2(b):** (i) The question does not arise. (ii) If it does, the NSWSC would be duty bound to deal with the GCO as it would when faced with any order made without power; that is to revoke the order. (iii) The other parties contend for something different; that s 1337P(2) commands the NSWSC to *enforce* the GCO (as if bound by the dictates of the Victorian Parliament); while at the same time reserving to the NSWSC a discretion to vary or revoke it. They do not identify *any standard* by which the NSWSC is to decide between *enforcing, varying or revoking* the GCO. (iv) None of the powers identified by them assist: (A) s 1337P(2) is not a source of power. The words “subject to any order” recognise that the *existing powers* of the court can be used to disengage the statutory fiction: J[152]-[155]; (B) inherent power permits a superior court “to vary *its own orders*” (*Bailey v Marinoff* (1971) 125 CLR 529, 544) of a procedural character: *Wilkshire v Commonwealth* (1976) 9 ALR 325, 331; (C) s 183 cannot be given a “*more expansive construction and a wider scope of operation*” than the CPA itself: *BMW v Brewster* (2019) 269 CLR 574, [70]. AS[50]-[53], AR[21]-[25].
10. **Constitutional Invalidity:** Section 1337P(2) would travel beyond a law regulating federal jurisdiction and be contrary to Chapter III, *if* it required the NSWSC to enforce orders which it has no power to make merely because they were lawfully made under the command of a different State Parliament; or *if* it left the NSWSC in the invidious position of a quasi-legislator, deciding whether to *enforce* the order (and thus follow the Victorian Parliament’s dictates); to *revoke* it (and thus follow the NSW Parliament’s dictates); or *vary* it in an unspecified way: AS[48]-[49]; AR[26]-[28].
11. **Question 3:** If the GCO is relevant, it is common ground that the proceeding should not be transferred: AS[54]. If the GCO is irrelevant or neutral, the VCA’s discretion miscarried in two respects which KPMG does not seek to defend: AS[55]. Irrelevant matters aside, the defendants have not made out a case for transfer: AS[58].

12 November 2024



Justin Gleeson SC