

THE ANTI-ANTI SUIT INJUNCTION: THE FIGHT BY AUSTRALIAN COURTS TO PROTECT RIGHTS CREATED UNDER AUSTRALIAN LEGISLATION EXTRA TERRITORIALY

A Case Summary: Pan Australia Shipping Pty Ltd v The Ship 'Comandate' [2006] FCA 881 (Unreported, Rares J, 22 June 2006)

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Background to the Proceeding

The plaintiff to the proceeding, Pan Australia Shipping Pty Ltd ("Pan"), a company incorporated in Australia, was the time charter of the Liberian flagged vessel MV "Comandate" ("the Vessel"). The Vessel was intended to be utilised by Pan in Australian coastal trade. On 9 June 2006, Pan applied for the arrest of the Vessel. The writ pursuant to which the vessel was arrested claimed:

1. damages arising out of the breach of the charter in the sum of \$2.5 million;
2. interest;
3. the arrest of the Vessel; and
4. an order for the return or cancellation of a standby letter of credit previously delivered to the owners of the Vessel by Pan.

The application for arrest was made in some haste as the Vessel was intending to leave the Australian jurisdiction on the date of its arrest, after having been detained by the Australian Maritime Safety Authority up to that morning. There was evidence before Rares J that the substantial dispute concerned the suitability of the Vessel to engage in Australian coastal trade and the respective obligations of the parties to ensure the Vessel and its crew were suitable for such a trade.

The Vessel was arrested on 9 June 2006 and the parties entered into negotiations for the release of the Vessel. The Vessel was released from arrest by consent on 14 June 2006 on the provision of a bank guarantee. On the application for release of the Vessel from arrest, the Vessel itself purported to appear conditionally, to leave open the possibility of challenging the Court's jurisdiction to effect the arrest. On the inter partes hearing of the application, the owner of the Vessel, Comandate Marine Corporation ("Comandate"), sought leave to amend its appearance to appear on its own behalf while retaining its conditional nature. In the course of argument, Comandate's Counsel accepted the Court's jurisdiction and requested that its appearance be entered unconditionally.

The Application

Pan applied for an injunction to restrain Comandate from taking any steps in the English High Court of Justice to obtain an injunction seeking to restrain Pan from continuing with the proceedings, which were the subject of the current Australian proceedings. Such an order, often described as an "anti-anti suit injunction", was initially made ex parte by Emmett J on 20 June 2006, and later continued, following an inter partes hearing by Rares J on 22 June 2006, notwithstanding Comandate's application to discharge the order.

The Threat of an Anti-Anti Suit Injunction

The unsigned charter annexed to the affidavit of Pan's solicitor, which supported the application for arrest of the Vessel, contained a London arbitration clause. The enforceability of the agreement as contained in this document was in issue between the parties and the subject of subsequent interlocutory argument. In support of its current application, Pan tendered an affidavit of its solicitor, which annexed a series of correspondence between the parties' solicitors. This correspondence demonstrated to the satisfaction of Rares J that, unless restrained, Comandate would seek to move the High Court of Justice in England on the basis of the arbitration clause for an anti-suit injunction preventing Pan from continuing its proceedings in the Australian Federal Court.

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Rares J considered the judgment of Thomas J of the English High Court in *Akai Pty Ltd v Peoples Insurance Co Limited*¹ (“*Akai*”). This judgment considered whether that Court would recognise as binding on the Peoples Insurance Co, the judgment of the High Court of Australia in *Akai Pty Ltd v Peoples Insurance Co Limited*.² After an analysis of the rules of private international law operative in England, Thomas J concluded that Peoples Insurance Co was able to ignore the Australian decision on the basis that the parties had freely bargained for the English jurisdiction clause and that balancing the two competing interests weighed towards upholding the parties’ bargain at the expense of international comity.

Basis for Application

Pan did not commence what it knew was going to be a disputed tussle for jurisdiction merely for the sake of engaging in a costly argument with Comandate. Pan applied for the order to preserve its right to bring an *in personam* proceeding in Australia, a proceeding that potentially had a wider scope than a proceeding commenced by way of London arbitration. What Pan sought by its injunction was time under the Admiralty Rules to formulate its claim and consider whether any Australian statutes applied to the dispute. Rule 22 allows an arresting party a period of 14 days after the filing of an Appearance in the *in rem* proceedings to file and serve its *in personam* claim. As deposed by Pan’s solicitor, if given time to finalise factual inquiries, there was a fair possibility that this claim would include an action under the *Australian Trade Practices Act 1974* (Cth) (“*TPA*”).

According to *Akai*, English law does not recognise an Australian statute as affecting or altering the rights of a party to a contract with an English jurisdiction and choice of law clause. The *Akai* reasoning was to the effect that to permit the other party to a contract the right to rely on an Australian statute, such as the *Insurance Contracts Act 1984* (Cth) (“*ICA*”), would potentially make the contract much less favourable to one party, thereby altering the bargain struck by the parties. What was relevant in the current proceeding was that while the dispute may ultimately be heard in the English jurisdiction, the proceeding was commenced in Australia, and until stayed, was subject to Australian jurisdiction; and Australian statutes, such as the *ICA* or *TPA* are very much recognised within the Australian jurisdiction, affecting or altering the rights of a party to a contract.

If Comandate had been permitted to carry out its threatened pre-emptive action to prevent Pan from bringing its *in personam* claim, Pan would have lost its rights to bring a claim under the *TPA*. The basis upon which the injunction was sought was to preserve the subject matter of any rights Pan may have under Australian jurisdiction. This jurisdiction, while initially contested by Comandate, was recognised during the course of argument as having been regularly invoked.

In effect, Pan sought to maintain the status quo, though admittedly the status quo for the progression of the proceedings under the relevant Australian procedures. Pan sought time to formulate its *in personam* claim against Comandate, which may or may not include claims under the *TPA*. Comandate would then be free to bring (and during the course of hearing foreshadowed) an application for a stay of these proceedings in favour of London arbitration. On the hearing of Comandate’s foreshadowed application for a stay of the Australian proceedings, Pan would have the opportunity to contend firstly, that not all of the claims formulated in its *in personam* action fell within the arbitration clause, and secondly, for the imposition of conditions on the stay in respect of those claims which do fall within the arbitration clause pursuant to section 7(3) of the *International Arbitration Act 1974* (Cth) and/or section 29 of the *Admiralty Act 1988* (Cth). Such conditions may include the order in which the proceedings are heard if the Court finds some aspect of Pan’s *in personam* claim falls outside the scope of the arbitration clause.

Rares J was of the view that it was in the interests of justice to restrain Comandate from seeking to pre-empt the Australian processes. His Honour referred to the High Court decisions of *CSR Limited v Cigna Insurance Australia Limited*³ and *Batistatos v Roads and Traffic Authority of New South Wales*,⁴ and held that it was within the Court’s power to protect the ability of persons to approach the court seeking the regular invocation and exercise of its jurisdiction. Once it was accepted during the course of argument that Pan had brought its *in rem* claim properly in the Australian jurisdiction, Pan was granted time to investigate and formulate its claim.

¹ [1998] 1 Lloyd’s Rep 90.

² (1996) 188 CLR 418.

³ (1997) 189 CLR 345.

⁴ [2006] HCA 27 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 14 June 2006).

The fight for jurisdiction continues

After Pan was granted the continuation of its anti-anti suit injunction, Pan filed its *in personam* claim and the parties returned before Rares J for further argument on Comandate's stay and the final resolution of Pan's injunction. This decision was reserved and is expected to be handed down shortly.