
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : RE AUSTRALIA AND NEW ZEALAND BANKING
GROUP LTD; EX PARTE AUSTRALIA AND NEW
ZEALAND BANKING GROUP LTD [2023] WASC
428

CORAM : HOWARD J

HEARD : 28 SEPTEMBER 2023, 5 OCTOBER, 3 NOVEMBER
2023

DELIVERED : 10 NOVEMBER 2023

FILE NO/S : CIV 2033 of 2023

MATTER : IN THE MATTER OF AUSTRALIA AND NEW
ZEALAND BANKING GROUP LTD

EX PARTE

AUSTRALIA AND NEW ZEALAND BANKING
GROUP LTD
Plaintiff

Catchwords:

Practice and procedure - Ex parte application for leave to serve writ outside Australia - Whether requirements were satisfied - Whether each cause of action is within a head of jurisdiction for leave to serve out - Whether discretion should be exercised to grant leave - Requirement of an undertaking as to the costs of the plaintiff's application - Costs of the application fixed

Legislation:

Residential Tenancies Act 1987 (WA)
Rules of the Supreme Court 1971 (WA)

Result:

Application granted in part
Costs of plaintiff's application fixed at \$1,600 (including filing fees)

Category: B

Representation:

Counsel:

Plaintiff : (On 28 September 2023) (On 5 October 2023) (On 3 November 2023)

Solicitors:

Plaintiff : Dentons Australia

Case(s) referred to in decision(s):

ANZ Grindlays Bank v Fattah (1991) 4 WAR 296
Australian Insurance Brokers Ltd v Hudig Langeveldt Pty Ltd [No 2]
(1991) 7 WAR 343
Bombardier Inc v Avwest Aircraft Pty Ltd [2020] WASCA 2
Centurion Trust Company Pty Ltd v Director of Public Prosecutions (WA)
[2008] WASCA 6
Crawley Investments Pty Ltd v Elman [2014] WASC 233
Kent v Lechmere Financial Corporation [2002] WASC 75
Lipohar v R (1999) 200 CLR 485
Micon Mining and Construction Products GMBH & Co KG v MacMahon
Mining Services Pty Ltd [2022] WASCA 56
Obeid v R (2015) 91 NSWLR 226
PT Garuda Indonesia Ltd v ACCC (2012) 247 CLR 240
Rayner v ANZ [2003] WASCA 264
The Siskina [1979] AC 210

HOWARD J:

The original application and first hearing

1 By an Originating Motion dated 11 September 2023 (**original motion**) the plaintiff (**ANZ**) sought the following orders ex parte:

1. ANZ have leave to issue a Writ of Summons against [the defendant] and to serve the Writ of Summons on her in Ireland.
2. The time for entry of an appearance in the action by [the defendant] shall be 42 days after service on her of the said Writ of Summons.
3. ANZ have leave to serve any further order, summons or notice in the action commenced pursuant to Order 1 on [the defendant] in Ireland.

2 The original motion sought an order that the costs of and incidental to the application may be paid by the defendant as ANZ's costs in the cause.

3 The original motion also stated:

And further take notice that the grounds of this [application] are:

1. The subject matter of the action is land situated within the State of Western Australia.

4 The original motion was supported by an affidavit made by a bank officer¹ (**Uniyal Affidavit**) who deposed to:

1. ANZ and the defendant having entered into a written **loan agreement**: Uniyal Affidavit [4];
2. the loan had been secured by a **mortgage** over property at Bicton in this State: Uniyal Affidavit [4(b)];
3. the defendant had failed to pay a sum when it was due and so was in default under the loan agreement and the mortgage: Uniyal Affidavit [7]; and
4. ANZ had a good cause of action against the defendant: Uniyal Affidavit [10].

¹ Affidavit of Mayank Uniyal made 24 August 2023; filed at Court 11 September 2023.

HOWARD J

5 The matter came before me in the Master's list on 28 September
2023.

6 At the hearing I was told that ANZ proposed to:

1. endorse its writ with a statement of claim;
2. (effectively) rely on O 10 r 1(1)(a)(i) of the Rules; and
3. serve the defendant under O 11A under the Hague Convention on service (presumably in the Republic of Ireland).

7 ANZ had not by the originating motion, nor the Affidavit, annexed
a draft writ for which the plaintiff was seeking leave to issue.

8 I was told at the first hearing that as a matter of practice a draft
writ was not usually included in such an application. I am unable to
assess whether there is any such practice. However, such a practice
would not allow this Court to properly assess the exercise of its powers
under O 5 r 9 and then under O 10 of the Rules (as well as not being
consistent with the authorities).

9 Without a draft writ before the Court, I considered that it would
not be within power nor appropriate for this Court to give the plaintiff
leave to issue a writ for service outside of Australia.

10 The application was adjourned to 5 October 2023 to allow ANZ to
consider its position.

The relevant provisions

11 Service raises the question of this Court's personal jurisdiction
over a defendant in the sense of a defendant's amenability to this
Court's writ and the geographical reach of that writ.² As McLure JA (as
she then was and with whom Buss JA agreed) summarised in
Centurion Trust Company Pty Ltd v Director of Public Prosecutions
(WA) [2008] WASC 6 [99]:

A court's in personam jurisdiction over a defendant in civil proceedings
derives from the fact of service of originating process on the defendant
in the jurisdiction or by the invocation of the long arm provisions in
O 10 of the Rules. Thus, in an action in personam the rules as to the

² *Lipohar v R* (1999) 200 CLR 485 [79] (Gaudron, Gummow & Hayne JJ) as approved in *PT Garuda Indonesia Ltd v ACCC* (2012) 247 CLR 240 [15] (French CJ, Gummow, Hayne & Crennan JJ); see also *Obeid v R* (2015) 91 NSWLR 226 [10] (Bathurst CJ, Beazley P & Leeming JA).

legal service of a writ or other originating proceedings define the limits of the court's jurisdiction. (citations omitted).

12 Order 5 r 9 provides:

A writ for service outside Australia shall not be issued without the leave of the Court.

13 The introductory words to O 10 r 1(1) provide:

The Court may grant leave to serve a person outside Australia with a writ, or notice of a writ, that begins an action if ...

What then follows are (a) - (l) which have been variously described as 'heads', 'pigeonholes', or 'gateways'.

14 Order 10 r 4(2) provides:

No such leave [under r 1 or r 2] shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.

15 The Court of Appeal in *Micon Mining and Construction Products GMBH & Co KG v MacMahon Mining Services Pty Ltd* [2022] WASC 56 (Buss P, Beech and Vaughan JJA) said:³

Order 10 r 1 (1) and r 2 RSC must be read with O 10 r 4 RSC and O 5 r 9 RSC must be read with O 10 RSC. Putting aside the exception in O 10 r 1A(2) RSC, the court would not grant leave to issue a writ for service outside Australia unless the court would also grant leave to serve the writ outside Australia. O 10 r 1(1) and r 2 RSC set out relevant conditions or gateways, one of which must be satisfied ... before the discretion to grant leave under O 10 RSC is enlivened. Moreover, the discretion is not at large. In terms of O 10 r 4(2) RSC leave will not be granted unless it *sufficiently* appears that the case is a *proper* one for service out of jurisdiction under O 10 RSC. (original emphasis)

16 The relevant Rules of this Court derive from the Chancery practice which required prior leave before issue and service.⁴

³ *Micon Mining and Construction Products GMBH & Co KG v MacMahon Mining Services* [67].

⁴ *Micon Mining and Construction Products GMBH & Co KG v MacMahon Mining Services* [54]; a short history of the requirement for leave for service out of the jurisdiction was traced by Leeming M, *Authority to Decide: The Law of Jurisdiction in Australia* (2nd ed), [6.6] Federation Press 2020; see also *Crawley Investments Pty Ltd v Elman* [2014] WASC 233 [45(1) and (2)].

What is required

17 Although the world is a very different place from when the Rules on which O 5 r 9 and O 10 r 1 and r 2 are based were first made, a purpose of them remains to give this Court control (prior to issue) of the command which is inherent in each writ issued by this Court and to control if, and how, it might be made on a person or entity in a foreign jurisdiction (ie, by service).

18 Anderson J in *ANZ Grindlays Bank v Fattah* (1991) 4 WAR 296 at 302 approved of the following statement from Bridge LJ in *The Siskina* [1979] AC 210, 240:

The authority of the court to give leave to the service of process beyond the jurisdiction has always been purely a creature of statute. There are good reasons why it should be so. The exercise of this power raises delicate questions of the relationships inter se of sovereign states and of international comity. These are matters with large political implications.⁵

19 Anderson J then stated:

For a court to lend its authority to the service of documents on a foreigner abroad is a purported exercise of jurisdiction with respect to that person in a foreign sovereign state; it should not be done, I do not think, unless there is clear authority to do it.

20 The plaintiff in such an application bears an onus on its ex parte application to show two things:⁶

- (1) that its action is within a head, pigeonhole,⁷ or gateway⁸ which allows service out; and
- (2) that the Court should exercise its discretion; eg, the plaintiff must show that the action is not likely to be subsequently stayed on forum non conveniens grounds or some other basis (such as being liable to summary dismissal).⁹

21 As per O 10 r 4(2) quoted above, a Court should not grant leave unless it is positively persuaded that it should do so both on the action

⁵ The passage was also adopted by Owen J (as he then was) in *Australian Insurance Brokers Ltd v Hudig Langeveldt Pty Ltd [No 2]* (1991) 7 WAR 343.

⁶ *Bombardier Inc v Avwest Aircraft Pty Ltd* [2020] WASCA 2 [14] (Buss P, Beech & Pritchard JJA).

⁷ *Crawley Investments v Elman* [2014] WASC 233 [45(2)(i)] (Edelman J).

⁸ *Micon Mining and Construction Products v MacMahon Mining Services* [2022] WASCA 56 [67].

⁹ *Micon Mining and Construction Products v MacMahon Mining Services* [2022] WASCA 56 [71].

falling within a head of service out and in the exercise of its discretion.¹⁰

22 Further, the affidavit in support of the application should identify the rule under which that leave is sought and further pursuant to which Order or rule it is proposed to serve the writ.

23 The Court of Appeal in *Micon Mining* in [73] and [74] referred to the importance of the supporting affidavit and what was required of it.

24 The Court of Appeal in *Micon Mining* further stated, relevantly:

[76] The applicant for leave must established that *all* of the claims in the proceedings fall within O 10 r 1(1) or r 2 RSC. The plaintiff will not be allowed to proceed with causes of action for which service outside Australia cannot be sustained under O 10 RSC. Nor can there be leave to amend a writ which has not been served outside Australia to add a cause of action which does not qualify under O 10 RSC. (original emphasis) (citations omitted)

See also *Kent v Lechmere Financial Corporation* [2002] WASC 75 [7] (Pullin J).

25 The identification of each head of gateway relied upon under O 10 was further said by the Court of Appeal in *Micon Mining* to be important, because:

[75] ... The plaintiff is confined to the grounds relied on in its ex parte application when a subsequent contested inter partes application is made by the defendant to set aside the issue and service of the writ. The plaintiff is required to sustain the issue and service of the writ on the ground or grounds relied on in the ex parte application upon which the order for leave was made.

26 Without the draft writ and the proposed statement of claim (whether or not indorsed on the writ), the Court is unable to assess at the time of giving leave whether the plaintiff can or has established that all of its claims fall within a head of service out.

27 Consistently with the authorities, this Court's power to give leave to serve out is to be exercised narrowly and strictly in accordance with the Rules.

¹⁰ *Bombardier Inc v Avwest Aircraft* [2020] WASCA 2 [60]; *Micon Mining and Construction Products v MacMahon Mining Services* [2022] WASCA 56 [71].

The amended motion

28 Prior to the (first) adjourned hearing, my Chambers drew the Court of Appeal's decision in *Micon Mining* to the attention of ANZ's solicitors.

29 On 4 October 2023, ANZ filed an Amended Originating Motion (**amended motion**) by which the first order sought was amended as follows:

Pursuant to Order 5 Rule 9, Order 10 Rule 1(1) and Order 11A of the Rules of the Supreme Court, ANZ have leave to issue a Writ of Summons against [the putative defendant], in the terms of the Minute of Proposed Writ of Summons dated 4 October 2023, and to serve the Writ of Summons on her in Ireland. (amendments shown)

30 The amended motion also amended that part of the motion quoted in [3] above to read:

And further take notice that grounds of this [application] are:

1. the subject matter of the action is land situated within the State of Western Australia (Order 10 Rule 1(a)[sic]). (amendments shown)

31 The costs order sought remained as per the original motion and as quoted in para [2] above.

32 ANZ also filed a minute of a draft writ on 4 October 2023 (**draft writ**) which was endorsed with a statement of claim which sought by the following prayers for relief:

1. The amount owing pursuant to the Loan Agreement and the Mortgage as at the date of Judgment.
2. Interest continuing after Judgment at the rate and in the manner specified in the Loan Agreement and the Mortgage pursuant to clause 9.5 of the Memorandum of Provisions.
3. Possession of the Property.
4. Costs.

33 There was no further affidavit filed at that time.

34 The matter came back before me on 5 October 2023. At that hearing, I asked, in light of the principles from *Micon Mining*, especially at [75] as quoted above, and the pleading of the loan

agreement whether ANZ sought only to rely on O 10 r 1(1)(a) or whether it sought to rely on any other head under O 10 r 1(1).

35 Counsel for ANZ initially pointed me to the provisions of the loan agreement (cl 24) annexed to the Uniyal Affidavit (page 24) which provides that:

Except to the extent required by the laws of another jurisdiction, your ANZ loan or facility is governed by the law enforced in the Australian State or Territory:

- where your security property is located;

...

However if you do not live in Australia at the time the Letter of Offer is accepted your ANZ loan or facility is governed by the law enforced in Victoria.

36 When, however, counsel was directed to page 12 of the Uniyal Affidavit which appeared to show the defendant signed the letter of offer at an address in Ireland, it was (properly) accepted by the plaintiff that it did not appear that cl 24 of the loan agreement applied to make the law in Western Australia the governing law.

37 I would not have been positively persuaded, as required by the authorities, that the evidence showed the defendant lived in Australia at the time she accepted the letter of offer and, so, would not have been positively persuaded that the governing law of the loan agreement was Western Australia.

38 In any event, that was something of a side issue as the question (on the amended application) remained whether the amended motion with the draft writ would allow ANZ to proceed against the defendant for breaches of the loan agreement. That is because the draft prayers for relief 1 and 2 relied on the loan agreement, but such a claim appeared to be outside of O 10 r 1(a)(i).

39 The above cited authorities require that each cause of action sought to be relied on must be within a head of jurisdiction for leave to serve out and for that head to be invoked on the application.

40 Counsel for ANZ then sought a further adjournment to allow ANZ to further consider its position.

41 At the 5 October 2023 hearing, I also expressed my concern that
the difficulties ANZ appeared to be having in getting its application in
order should not be visited on the defendant by the legal costs of the
application to date being added to any indebtedness of the defendant.
Counsel for ANZ indicated that she would also take instructions on that
matter.

The first further amended motion

42 On 24 October 2023, ANZ filed a Further Amended Originating
Motion (**first further amended motion**) and also filed a minute of a
draft amended writ.

43 The first further amended motion kept the first order sought in
materially the same terms as that quoted in para [29] above.

44 As to costs, the first further amended motion provided (by way of
amendment) for there to be 'no order as to costs incidental to this
[application] in the action commenced by the leave given in this
application'.

45 The draft amended writ (which was not marked up) simply
claimed one prayer for relief being: 'Possession of the Property'.

46 The balance of the draft amended writ was, it appears, in the same
terms as the earlier draft writ.

47 The application was set down for a further hearing to take place on
3 November 2023. In anticipation of that hearing, my Chambers raised
some further matters with the plaintiff's solicitors.

The second further amended application

48 The plaintiff then filed a (second) further amended originating
motion (**second further amended application**) on 2 November 2023
with an outline of submissions and an affidavit of a solicitor of the
plaintiff's solicitors made on that same date.

49 The second further amended motion sought the following as
order 1:

Pursuant to Order 5 Rule 9 and Order 10 Rules 1(1)(a)(i), 1(b) [sic]
and/or 1(e)(iii) [sic] and ~~Order 11A~~ of the Rules of the Supreme Court,
ANZ have leave to issue a Writ of Summons against [the putative
defendant], in the terms of the Minute of Proposed Writ of Summons

dated 4 October 2023, and to serve the Writ of Summons on her in *the Republic of Ireland*. (amendments shown)

50 I have read the second further amended motion as seeking leave pursuant to O 10 rules 1(1)(a)(i) and 1(1)(b) and, or, 1(1)(e)(iii).

51 I recited in para [3] above what the originating motion stated and then at para [30] above what the amended motion stated. In the first further amended motion there was a minor typographical amendment to that part of the plaintiff's motion.

52 The second further amended motion, however, made substantial amendments to that part of the application and now reads:

And further take notice that the grounds of this application are:

1. The subject matter of the action is land situated within the State of Western Australia (Order 10 Rule 1(a)(i) [sic]);
2. The subject matter of the action is a contract, obligation or liability affecting land situated within the State of Western Australia (Order 10 Rule 1(b) [sic]);
3. The action is one brought to enforce or otherwise to affect [a] contract or to obtain other relief in respect of the breach of a contract, being a contract which by its terms or implications is governed by the law of Western Australia (Order 10 Rule 1(e)(iii). [sic] (With 2 and 3 being wholly new).

53 At the hearing on 3 November 2023, counsel said the plaintiff placed only 'faint' reliance on O 10 r 1(1)(e)(iii).¹¹ For the reasons given above, I remain unpersuaded that ANZ has brought itself within O 10 r 1(1)(e)(iii). I would not grant the leave on that basis.

54 In my view, ANZ's application by the second further amended motion and the draft amended writ are within the heads of service out provided by O 10 r 1(1)(a)(i) and O 10 r 1(1)(b).

55 No matters were identified by ANZ on this ex parte application which indicated that the matter might be stayed subsequently on the grounds of forum non conveniens or otherwise.

56 Further, ANZ, by the affidavit of its solicitor of 2 November 2023, put evidence before the Court that it had complied with the relevant requirements of the *Residential Tenancies Act 1987* (WA) by giving the

¹¹ Hearing 3 November 2023 ts 3.

appropriate notice to (what appears to be) a tenant of the Bicton property.

Proposed Order 3

57 As noted above, the third order sought by ANZ in the original motion was:

ANZ have leave to serve any further order, summons or notice in the action commenced pursuant to Order 1 on [the defendant] in Ireland.

58 The second further amended motion amended the third order sought as follows:

ANZ have leave to serve any further *judgment*, order, summons or notice in the action commenced pursuant to Order 1 on [the defendant] in *the Republic of Ireland*. (amendments shown)

59 The third order is presumably sought under O 10 r 7. It provides:

The Court may grant leave to serve a person outside Australia with any originating process, other than a writ, or with any summons, order or notice in any proceedings duly instituted, whether by writ of summons or otherwise, and rules 1A, 4 and 5, with any necessary changes, apply to such service.

60 In my view, without an identification of the precise documents which ANZ wishes to serve pursuant to order 3 of its second further amended motion, I should decline to make such an order.

61 Practically, any such order made would only have effect until the defendant entered an appearance, conditional or otherwise, to the action commenced.

62 If it becomes necessary for further documents to be served on the defendant before an appearance is entered, then the application may be renewed with a precise identification of the documents sought to be served.

63 That is consistent, in my view, with the approach taken by Anderson J in *ANZ Grindlays Bank* at 299 and 302.

Costs of the application

64 I note that the second further amended motion 'undid' the proposed amendments to the costs sought by the first further amended motion,

albeit without marking up that change. The second further amended motion now seeks:

And that the costs incidental to this application may be paid by [the defendant] as the Plaintiff's costs in the cause in the action commenced by the leave given in this application.

65 In correspondence with my Chambers prior to the 3 November 2023 hearing, the plaintiff effectively:

1. pursued its application for an order that the costs of the application for leave be costs in the cause of the proposed action; but
2. acknowledged that it retained a contractual right such that the order it sought in the second further amended motion would not necessarily preclude it from seeking to recover its actual costs from the defendant contractually; and
3. suggested that it would not claim the costs of the amendments and the two prior appearances and that it may be appropriate to fix the plaintiff's costs (presumably in the application) at \$1,600 plus the filing fee disbursement.

66 Thus it appeared that the plaintiff reserved its right to charge via its contractual rights costs of the application above and beyond whatever the Court was minded to fix them at within this application.

67 As I expressed in the hearing on 5 October 2023, and repeated on 3 November 2023, I am concerned that what ought to have been a straightforward application if done carefully from the beginning, has become a convoluted process with four iterations of the plaintiff's application and three hearings.

68 ANZ referred to *Rayner v ANZ* [2003] WASC 264 (Murray & Parker JJ) in this respect. With respect, that decision did not meet the concerns I had expressed: see especially at [27] - [29].

69 I consider it would not be appropriate for ANZ's actual costs (whatever they may be) to be visited upon the defendant whether by order of this Court or contractually.

70 I would fix the plaintiff's costs at \$1,600 (inclusive of the filing fees) to date to be the plaintiff's costs if the plaintiff is ultimately successful in the proceedings commenced. However, I do not consider

HOWARD J

that the defendant should be liable for any other of the plaintiff's costs to date contractually.

71 It will be a condition of leave to serve out that the plaintiff undertakes that it will not seek recovery of more than \$1,600 (inclusive of filing fees) for its costs to date whether contractually or via enforcement of an order of this Court if it is successful in the action. Of course, it follows that ANZ would not recover its actual costs (including contractually) if it was not ultimately successful. I will also order that a copy of ANZ's undertaking be served on the defendant with the writ and statement of claim.

Disposition

72 I will ask the plaintiff to bring in a minute of orders now to reflect the reasons.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

JC

Associate to the Honourable Justice Howard

10 NOVEMBER 2023