SUPREME COURT OF QUEENSLAND

CITATION:	*Bradley v Placements (PNG) Ltd* [2014] QSC 16
PARTIES:	**CHRISTOPHER LEE BRADLEY** (plaintiff) **v** **PLACEMENTS (PNG) LTD** (defendant)
FILE NO:	10682 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	27 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	12 February 2014
JUDGE:	Daubney J
ORDER:	**1. The application filed 20 December 2013 is dismissed;** **2. I will hear the parties as to costs and with respect to any further orders or directions.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – where plaintiff claims damages for personal injury in course of employment – where defendant is employer – where defendant is a company incorporated in Papua New Guinea – where sole basis of defendant's application is that proceeding should be stayed or dismissed on the basis that the Supreme Court of Queensland is a *forum non conveniens* – whether the proceeding should be stayed or dismissed on the basis that the Supreme Court of Queensland is an inappropriate forum for the resolution of this dispute *Uniform Civil Procedure Rules* 1999 (Qld), r 16 *Henry v Henry* (1961) CLR 571, followed *Placer (PNG) Pty Ltd v Anderson* [1997] QCA 74, considered
COUNSEL:	J A Griffin QC, with him D H Katter, for the plaintiff J H Davies for the defendant
SOLICITORS:	Smith Lawyers for the plaintiff McCullough Robertson Lawyers for the defendant

[1] By a claim and statement of claim filed on 12 November 2013, the plaintiff commenced this proceeding against the defendant, a company incorporated in Papua New Guinea, seeking damages for personal injuries said to have been suffered by the plaintiff in the course of his employment with the defendant.

[2] On 16 December 2013, the defendant filed a conditional notice of intention to defend. The defendant now applies for an order pursuant to *UCPR* r 16 for the proceeding to be struck out or permanently stayed.

[3] By his statement of claim, the plaintiff relevantly alleges:

(a) As at 3 December 2010, he was employed by the defendant as a gas compression supervisor in Papua New Guinea pursuant to a contract of employment made on 6 April 2010;

(b) On 3 December 2010, while the plaintiff was working at a specific site in Papua New Guinea, he was engaged in manually unloading a cylinder head, in the course of which he sustained an injury to his lower back;

(c) He performed the unloading of the cylinder head manually with a co-worker, one Roger Hereva;

(d) The injury to his lumbar spine at L4/5 and L5/S1 required a total disc replacement at L4/5 and a spinal fusion at L5/S1;

(e) The injury was caused by the negligence or breach of contract of the defendant (the statement of claim particularises the breaches of duty on which the plaintiff relies);

(f) The plaintiff claims damages for the personal injury and its consequences, totalling $1,244,432.

[4] The only basis for the defendant's present application is the *forum non conveniens* principle. Counsel for the defendant properly submitted that the only issue on the application, phrased in the form of a question, is whether this proceeding should be stayed or dismissed on the basis that the Supreme Court of Queensland is an inappropriate forum for the resolution of this dispute. It needs to be remembered that the relevant question for present purposes is not whether Papua New Guinea is an appropriate, or even the more appropriate, jurisdiction in which to bring the present proceeding. The proper approach is to determine what is in "the interests of all the parties and for the ends of justice"[1], and in that context, it is long-established that the relevant question is whether the defendant has persuaded this Court that, having regard to the circumstances of the particular case and the availability of the foreign tribunal (in this case, the courts of Papua New Guinea), this Court is a clearly inappropriate forum for the determination of the dispute.[2]

[5] The principal contention advanced on behalf of the defendant was that, because the plaintiff had lodged a worker's compensation claim in Papua New Guinea in respect

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1 *Henry v Henry* (1996) 185 CLR 571 at 587 and the authorities cited.

2 *Oceanic Sunline Special Shipping Co Inc v Fay* (1988) 165 CLR 197 per Deane J at 247-8; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564-5.

of the subject incident, the plaintiff had thereby unequivocally adopted Papua New Guinea as his forum for pursuing compensation.

[6] The following description by the defendant's Port Moresby lawyer of Papua New Guinea's statutory scheme for claiming workers' compensation and the entitlement to common law damages was not in issue:

> "(a) Papua New Guinea (**PNG**) has a legislative and common law regime to compensate injured employees that is similar to schemes in most Australian States;
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> (b) the PNG workers' compensation scheme is regulated by the *Workers' Compensation Act 1978* (**Act**), which is administered by the Office of Workers' Compensation (**OWC**). The OWC has jurisdiction to hear matters in its statutory tribunals and otherwise deal with matters for which it has power under the Act;
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> (c) insurance coverage under the PNG workers' compensation scheme is provided by private insurers. Private insurers accept claims and administer payments under the Act. The OWC may become involved on a complaint by a worker or a dispute over a claim;
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> (d) an employee injured in PNG may also bring a claim, in the PNG court system, for common law damages, whether or not that person has a made claim for workers' compensation under the Act. Such an action may be commenced against any party who the injured person considers is wholly or partly responsible for the injury including an employer;
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> (e) an award under the Act is limited to the statutory compensation. A common law claim allows for uncapped damages including general damages, medical expenses, future loss of earnings, special damages etc. If an injured employee obtains an award under the Act there is provision in the Act for payback for any workers compensation benefits received; and
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> (f) a common law claim for damages is commenced in the discretion of the employee, and his legal advisors. This may be just after the injury, or when the medical prognosis is known and settled."

[7] The defendant's manager, Mr Gavin Powell, deposed to having submitted the relevant "Notice by Employer of Injury to Worker" to the Office of Workers Compensation in Boroko.

[8] There was no direct evidence of the plaintiff himself actually having made a claim under the Statutory Workers' Compensation Scheme. In his affidavit sworn on 4 February 2014, the plaintiff referred to a letter written by one of his Australian doctors referencing the Papua New Guinea "Office of Workers Compensation" and said:

> "I have never received any payment of any type from the Office of Workers Compensation, Papua New Guinea. I have never had any communications to me from the Office of Workers Compensation, Papua New Guinea. I have never received any workers compensation payments in accordance with the *Workers Compensation Act* 1978 (PNG)."

[9] However, in a letter dated 29 August 2013 from the plaintiff's Port Moresby lawyers to the Office of Workers Compensation, it was said that the plaintiff's "claim for worker's compensation was lodged with the Office of Workers Compensation on 13 April 2011". That letter went on:

> "Mr. Bradley instructs us that he has not received an award from the Workers' Compensation Tribunal.
> Mr Bradley instructs that he wishes to discontinue the application for compensation with the Tribunal. Specifically Mr Bradley instructs that he does not wish for a "final award" to be issued by the Tribunal. Notice will be provided of this request to the employer entity, Placements (PNG) Limited."

[10] On 17 October 2013, the Office of Workers' Compensation acknowledged that the plaintiff wished to discontinue his workers' compensation claim and advised that his file would be closed.

[11] Even if the plaintiff had lodged and then withdrawn a notice by which he made claim for workers' compensation, however, the fact that he had made a claim on that statutory scheme meant nothing more than he was exercising his entitlements under the relevant legislation. It is not suggested that he had brought a claim in the courts in Papua New Guinea in respect of his injury. As appears from the summary of the relevant law produced by the defendant's solicitor, the right to make a claim for common law damages in the courts is quite separate from the statutory entitlement to make a claim for workers' compensation. It cannot, in my view, sensibly be said that the fact that the plaintiff might have made a claim under the statutory scheme for workers' compensation amounted to an unequivocal and irrevocable election to submit to the sole jurisdiction of the courts of Papua New Guinea in respect of his claim for damages.

[12] Counsel for the defendant pointed to a number of other discretionary considerations in seeking to persuade me that Queensland is an inappropriate forum.

[13] It was said that Papua New Guinea law applies to the plaintiff's claim. That is clearly so, and is a relevant, but not determinative factor. Whilst the fact that the Court will need to apply foreign law is a significant factor to be taken into account in determining whether this is an inappropriate forum,[3] it was common ground before me that the relevant law will be the common law pertaining to workplace injuries. It was not suggested that a judge of this Court would have any difficulty in identifying and applying those common law principles.

[14] It was argued that a relevant witness, Mr Hereva, is resident in Papua New Guinea. Again, that is relevant, but not necessarily determinative. The plaintiff has no objection to Mr Hereva giving his evidence by telephone, if necessary.

[15] Further considerations, namely that the incident occurred in Papua New Guinea and that there is no suggestion that justice is not available in Papua New Guinea, really do not advance the defendant's case in persuading me that the Supreme Court of Queensland is an inappropriate forum.

[16] Counsel for the defendant also argued, albeit somewhat faintly, that the fact that the defendant company is resident in Papua New Guinea is a persuasive factor. In that context, however, counsel for the defendant also properly conceded that, not only is the defendant a registered foreign company for the purposes of Australian company law, it actually has a connection with Australia.

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3 *Murakarmi v Wiryadi* (2010) 268 ALR 377 at 406.

[17] A further argument that the defendant may seek to bring third party proceedings against another Papua New Guinea company was significantly undermined when it was pointed out that the prospective third party company's registered office is, in fact, in Sydney.

[18] The present case is not dissimilar to that considered by the Court of Appeal in *Placer (PNG) Pty Ltd v Anderson.*[4] That case concerned a personal injuries claim by a plaintiff who was injured during the course of his employment while working at the appellant's mine at Porgera in Papua New Guinea. Davies JA and Mackenzie J, with whom Williams J agreed, said in the course of their joint judgment:

> "The appellant submitted that the learned primary Judge could not reasonably have concluded that the Supreme Court of Queensland was not a clearly inappropriate forum because a court in Papua New Guinea was the natural or more appropriate forum and, that being so, this was not one of those cases in which it could not be said that the Queensland Supreme Court was a clearly inappropriate one: *Voth v. Manildra Flour Mills Pty. Ltd.* (1990) 171 C.L.R. 538 at 558. The appellant submitted that a Papua New Guinea court was the natural or more appropriate forum because of the factors, to which we have referred, that the contract of employment was made there and that the alleged breach of it occurred there.
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> There is no doubt that those factors mean that a Papua New Guinea forum was, at the time of institution of these proceedings, an available and appropriate one, though that is no longer the case because the limitation period has expired and no offer was made to the learned primary Judge to waive reliance on the relevant limitation statute in that jurisdiction. But it does not necessarily follow, in our view, that Papua New Guinea would be the natural or more appropriate forum. That phrase means the forum with which the action has the most real and substantial connection: *Voth* at 557. The connecting factors, in this sense, include factors affecting convenience or expense (such as availability of witnesses) and factors such as the law governing the relevant transaction: *Spiliada Maritime Corporation v. Cansulex Ltd*. [1987] 1 A.C. 460 at 478; *Voth* at 564-5."

[19] It is notable that, in the present case, the plaintiff has given evidence that all his medical treatment in respect of the injury he claims to have suffered has been performed in Australia. His first consultation was with a general practitioner in Roma on 4 January 2011. Prior to going to Papua New Guinea to work for the defendant, the plaintiff had lived in Roma. He said that after the relevant incident on 5 December 2010, he returned to Queensland from Papua New Guinea and he has not since returned there due to the injury he sustained. The plaintiff now lives in Brisbane. The plaintiff's affidavit gives details of the various medical procedures and investigations which have been undertaken. It is sufficient to note that all of the plaintiff's medical witnesses are in Queensland.

[20] Having rejected, as I do, the defendant's principal submission that the plaintiff had unequivocally adopted Papua New Guinea as his forum for pursuing compensation, the question then is whether the other factors on which the defendant relied can be said to justify a finding that Queensland is an inappropriate forum. Those factors might indicate that a court in Papua New Guinea is the more natural forum, but, as I have said above, that is not the relevant test. It is for the defendant to satisfy me that

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4 [1997] QCA 74 at 2.

pursuit of this proceeding by the plaintiff in the Supreme Court of Queensland would be oppressive and vexatious to the defendant. None of the matters to which the defendant has referred satisfy me in that regard. The factual issues raised by the plaintiff, particularly with respect to the evidence concerning his medical treatment, point to the desirability of this proceeding continuing in this Court.

[21] Accordingly, the present application ought be dismissed.

[22] There will be the following orders:

1. The application filed 20 December 2013 is dismissed;

2. I will hear the parties as to costs and with respect to any further orders or directions.