JUGGLING THE CROCKERY - CROSS-VESTING BETWEEN THE STATES

Leo Grey examines the potential pitfalls of the system of cross-vesting between State Courts which commenced on 1 July 1988.

Recently, in the Equity Division, a number of learned counsel had gathered to argue an interesting case in which a person was attempting to sue in New South Wales to restrain a New South Wales company from carrying on proceedings in Victoria.

Issues of some complexity were involved relating to the doctrine of *forum non conveniens*, and for various reasons it was agreed between counsel that the matter should be adjourned for a time.

At this suggestion, a Cheshire cat grin spread slowly across the slightly florid complexion of the judge (who shall remain nameless).

"I suppose you would like me to adjourn it until after the first of July", His Honour said - rather too casually, I thought.

There was a momentary silence at the bar table.

"What's happening on the first of July?", whispered counsel on his feet, out of the corner of his mouth.

"I don't know", was the equally side-mouthed response from counsel opposing.

Unfortunately, His Honour did not enlighten any of us. However, discretion suggested that the hint of a date after the first of July might best be taken up, and it was. Later in chambers, the reason why this was a prudent course became apparent.

In short, 1 July 1988 marked the commencement of the package of Federal and State cross-vesting Acts. This article takes a brief and rather whimsical look at the State to State cross-vesting legislation relevant to the little vignette recounted above. For those wishing to read a more learned exposition by eminent authority, there is the excellent and recent article by Keith Mason QC (Solicitor-General for New South Wales) and Professor James Crawford of the University of Sydney : (1988) 62 ALJ 328.

In New South Wales, the relevant State Act is the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (No 125 of 1987; assent 16 June 1987; commencement 1 July 1988, notified in *Gazette* No. 105, 24 June 1988, at 3263), hereafter called "the Cross-vesting Act". This has the same short title, assent date and commencement date as the complementary Commonwealth Act (Act No 24 of 1987), and analogous content, but should not be confused with it. Similar Acts have also been passed by each of the other States.

The first and central function of the Cross-vesting Act is to empower another Supreme Court to "exercise original and appellate jurisdiction" with respect to matters in which the Supreme Court of New South Wales has jurisdiction under New South Wales law: see s.4(3). Corresponding provisions are found in the Cross-vesting Acts applicable to the other States and Territories, which confer jurisdiction under their State laws on the Supreme Court of New South Wales. The Cross-vesting Act then empowers the Supreme Court of New South Wales to accept the jurisdiction conferred on it by the other States: see s.9. In exercising that jurisdiction, the Supreme Court is empowered to "apply the written and unwritten law of that other State or Territory": see s.11.

Taken alone, the effect of these provisions might be seen as creating one modularised fuzzy-edged national Supreme Court administering simultaneously several parallel bodies of non-Federal law. One romantic metaphor for the result is to imagine each of the Supreme Courts as a kind of judicial rainbow. But with no disrespect intended, I prefer the less romantic image of the Supreme Courts as a troupe of jugglers each required to be able, in theory, to keep at least eight different items of crockery in the air at the one time.

I say "in theory" because, of course, each Court deals mostly with its own State's laws, as the jugglers in my hypothetical troupe might specialise in plates, bowls or saucers, and because the requirement to be able to juggle eight bits of crockery at once is balanced by a safety net to keep the breakages down. This safety net is the power to transfer proceedings to another Supreme Court: see s.5(2). A broad discretion is conferred upon the judges of the various Supreme Courts to give directions intended to enable proceedings to be dealt with in the most appropriate and convenient place. In short, when the plate juggler is thrown a saucer to juggle amongst the plates, (s)he can decide to flick it across to the juggler whose specialty it is to juggle saucers.

Although the discretion conferred on the judges is broad, the Cross-vesting Act does set out some general criteria to be taken into account in the exercise of the power to transfer.

If the proceeding before the Supreme Court of New South Wales "arises out of, or is related to" a proceeding pending in another Supreme Court, the New South Wales judge may transfer the proceeding before him or her to that other Court if it appears to be "more appropriate" that the proceeding should be determined by that other Court: s.5 (2) (b) (i).

Even where no proceeding is on foot before the Supreme Court of another State, a New South Wales judge might still decide to transfer the proceeding to another Supreme Court where the judge believes it is a "more appropriate" forum because (s.5(2)(b)(ii)) -

(a) if it were not for the cross-vesting legislation the proceeding could not be brought in New South Wales;
(b) the proceeding involves questions as to the "application, interpretation or validity" of a

law of the other State which (apart from the cross-vesting legislation) would be outside the jurisdiction of the Supreme Court of New South Wales; and

(c) it would be in the interests of justice.

In case these criteria are not broad enough, the judge can decide to transfer the proceeding if he or she believes it to be "otherwise in the interests of justice" to do so: s.5(2)(b)(iii).

It is clear that the success of the cross-vesting scheme depends on the ruthlessness with which judges will be prepared to "flick pass" matters to another Supreme Court. Their resolve to do so is likely to be strengthened by the knowledge that decisions transferring proceedings to another Court cannot be taken on appeal : see s.13. *

So far I have mentioned only transfer between Supreme Courts. But what about transfers between inferior courts and tribunals, such as between the District Court of New South Wales and the County Court of Victoria? The simple answer is that it can be done, but only by an indirect route through the Supreme Courts of each State: see s.8. An application could be made to remit the matter to the County Court.

Well, you say, isn't this fascinating, but where's the catch?

As I read the legislation, the greatest potential for smashed crockery arises under s.11, and it is worth spending a little time to consider what it says.

Section 11 deals with the conduct of proceedings where, for example, the Supreme Court of New South Wales proposes (for whatever reason of convenience) to deal with a matter arising out of a sequence of events taking place in Victoria. As a primary rule of thumb, the Court must still apply New South Wales law to the facts, notwithstanding that all the relevant events happened out of the State; s.11(1)(a). That seems fairly straightforward. For example, if the case involves only common law issues, it is the common law of New South Wales that will apply, not that of Victoria (to the extent that it may be different).

But suppose the cause of action arises under a Victorian statute? In that case, the New South Wales Supreme Court must apply both the Victorian statute and any Victorian case law which interprets it; s.11(1)(b). It is possible to imagine a situation where the relevant provisions of the Victorian statute were similar to provisions in an analogous New South Wales statute, but had been interpreted rather differently by the Victorian Full Court compared with the view taken by the New South Wales Court of Appeal. In such a case, a wise New South Wales judge might decide the best course is to despatch the matter to Victoria as quickly as possible. But if the judge chooses not to do that, he or she must be bound by whatever judicial line applies in Victoria.

Now here is the tricky bit: in interpreting and applying the Victorian legislation, is the Court of Appeal bound to follow the line taken by the Victorian Full Court, rather than the line it had taken with the analogous New South Wales legislation? As I read s.11, the obligation on the Court of Appeal is the same as that on the judge at first instance, and the answer is therefore 'yes'. Nevertheless, the opportunity will always remain for the Court of Appeal to draw a distinction on the facts, or make a creative restatement of the Victorian law which on close analysis shifts its emphasis ever so slightly northwards. Then, the interesting question will be the weight such a decision would carry in Victoria, especially in a case heard by a single judge.

The other interesting aspect of s.11 concerns the procedure that is to apply. A New South Wales judge hearing a case arising under cross-vested jurisdiction is at liberty to apply whatever rules of evidence and procedure he or she considers appropriate, "being rules that are applied in a superior court in Australia or an an external Territory" s.11(1)(c). Technically, this would allow the New South Wales judge hearing my hypothetical case of Victorian law to announce to counsel at the beginning of the case that the rules applicable in the Supreme Court of Christmas Island should govern the hearing, and such a decision would not be appellable: see s.13(b). One has to concede that this is probably unlikely to happen in practice.

More realistically, this power could be used in my hypothetical case to deal with a situation where the party commencing the matter in New South Wales gets a procedural advantage (whatever it may be) that would not have been available had the matter been commenced in Victoria. If that would be manifestly unfair to the other side, the judge could, in effect, replace the local rules with so much of the Victorian rules as may be necessary to eliminate the unfairness. For counsel involved in cases involving cross-vested jurisdiction, this means being alive to the differences between the rules applicable in the different jurisdictions, and the tactical advantages and disadvantages that might arise.

For counsel (and solicitors), the Cross-vesting Acts confer some interesting rights of practice. In effect, it allows a

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* (In Bankinvest AG v. L.F. Seabrook & Ors. on 4 August 1988, Mr. Justice Rogers heard a motion filed by the defendants to transfer the proceedings to Queensland pursuant to the Jurisdiction of Courts (Cross-vesting) Act 1987. In view of the fact that there was no appeal from such a decision, and having regard to the importance of the question of construction of the Act, he referred the case to the Court of Appeal where it was re-argued before the Chief Justice, Sir Laurence Street, the President of the Court of Appeal, Mr. Justice Kirby, and Mr. Justice Rogers on 16 August 1988. The Court reserved its decision - Ed.)

practitioner to follow a case transferred into another State jurisdiction, where he or she is not admitted, and exercise the same rights of practice as he or she would have if the transferee court were a federal court exercising federal jurisdiction: see s.5 (8). In other words, as long as you are admitted to practice in the High Court of Australia, you may appear before the Supreme Court of any other State in Australia in a matter transferred to that Court, under the cross-vesting scheme, from the Supreme Court of New South Wales. Does this mean that all New South Wales counsel will be advising any Queensland solicitor wishing to use their services to file the originating process in New South Wales?

There are other interesting and novel features of this legislation, and it is apparent that a number of unforeseen glitches will surface as time goes by. State and Federal Governments have recognised that the scheme will need to be kept under review, and have provided a mechanism for its suspension or cessation if this becomes necessary in the future: see s.16. Nevertheless, this kind of legislation is a serious step along the road to a truly national legal system. ❑

Regina v. Lee Owen Henderson

31 May 1988

Mr. K. RYAN: Did you believe that he might have been working for the police?

A. Nobody ever said that to me.

Q. At what stage did nobody say that to you? (Objected to; rejected). ❑

Regina v. Tony Smith

Bail Application

Q. Mrs. Smith, are you the natural mother of the applicant, Tony Smith?

A. Yes.

Q. How long have you known him?

A. (with some surprise) Since he was born! ❑