Centrebet Pty Ltd v Baasland [2012] NTSC 100

PARTIES:	CENTREBET PTY LTD (ACN 106 487 736) v BJARTE BAASLAND
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Practice and Procedure – Leave to serve proceedings in a foreign country – Applicable principles – Statutory factors – Claim pursuant to s 52 of *Trade Practices Act* is a tort for this purpose – Where a tort is committed – Residual discretion – Factors relevant to the exercise of residual discretion – Impact of concurrent proceedings overseas – *forum non conveniens* – Prospects of success – Principle of *ex turpi causa non oritur actio* – Stay of proceedings – Principles relevant to determining whether a stay should be ordered – Whether a local court is a clearly inappropriate forum – Enforcement of foreign judgments in Australia at common law.

Contract – Formation of contract where acceptance is by instantaneous communication.

Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)
Trade Practices Act 1974 (Cth) s 52
Foreign Judgments Act 1991 (Cth)
Foreign Judgments Regulations 1992 (Cth)
Supreme Court Rules rr 7.01, 7.02
Federal Court Rules rr10.42, 10.43

Commonwealth Bank v White [1999] 2 VR 681.
Agar v Hyde (2000) 201 CLR 552.
Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd (1996) 68 FCR 539.
Telesto Investments Ltd v UBS AG [2012] NSWSC 44.
Olivaylle Pty Ltd v Flottweg AG (2009) 255 ALR 632.
ACCC v April International Marketing Services Australia Pty Ltd [2009] SCA 735.
ACCC v April International Marketing Services Australia Pty Ltd (No.6.) [2010] 270 ALR 504.
Hillside (New Media) Limited v Baasland [2010] 2 CLC 986.
Reynolds v Katoomba RSL All Services Club Limited (2001) 53 NSWLR 43.
Foroughi v Star City Pty Ltd (2007) 163 FCR 131.
Kakavas v Crown Melbourne Ltd [2009] VSC 559.
Stone & Rolls Ltd v Moore Stephens [2009] 1 AC 1391.
Gala v Preston (1991) 172 CLR 243.
Oceanic Sun Line Special Shipping Company Inc. v Faye (1988) 165 CLR 197.
Puttick v Tenon (2008) 250 ALR 582.
Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538.
Henry v Henry (1996) 185 CLR 571.
TS Productions LLC v Drew Pictures Pty Ltd (2008) 172 FCR 433.
Global Partners Fund Ltd v Babcock & Brown Ltd (2010) 267 ALR 144.
Emanuel & Ors v Symon [1908] 1 KB 302.
Independent Trustee Services Ltd v Morris (2010) 79 NSWLR 425.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Wyvill SC
Defendant:	Ex-parte

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Plaintiff:	Jude Lawyers
Defendant:	Ex-parte

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Centrebet Pty Ltd v Baasland [2012] NTSC 100
No. 101 of 2012 (21237777)

BETWEEN:

CENTREBET PTY LTD
(ACN 106 487 736)
Plaintiff

AND:

BJARTE BAASLAND
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 13 December 2012)

[1] On 1 November 2012 I made orders pursuant to Rule 7.02(2) of the *Supreme Court Rules* ('the SCR') and Rule 10.43(2) of the *Federal Court Rules* ('the FCR') granting leave to the Plaintiff to serve the Writ filed in these proceedings on the Defendant in Norway. I then indicated that reasons would be separately published and the reasons now follow.

[2] The relevant rules from the SCR are as follows:-

> **7.01 Originating process that may be served outside Australia**
>
> (1) Subject to rule 7.02, an originating process may be served on a person in a foreign country in a proceeding if:
>
> (a) - (e) Omitted

(f) the proceeding is brought to enforce, rescind, dissolve, rectify, annul or otherwise affect a contract, or to recover damages or other relief in respect of the breach of a contract, and the contract:

(i) was made in the Territory; or

(ii) was made by or through an agent carrying on business or residing in the Territory on behalf of a principal carrying on business or residing out of the Territory; or

(iii) is governed by the law of the Territory; or

(g) the proceeding is brought in respect of a breach committed in the Territory of a contract, wherever made, even though the breach was preceded or accompanied by a breach out of the Territory that rendered impossible the performance of that part of the contract which ought to have been performed in the Territory; or

(h) the proceeding is founded on a contract the parties to which have agreed that the Court will have jurisdiction to entertain a proceeding in respect of the contract; or

(i) the proceeding is founded on a tort committed in the Territory; or

(j) the proceeding is brought in respect of damage suffered wholly or partly in the Territory and caused by a tortious act or omission, wherever occurring; or

(k) - (o) Omitted

(2) Omitted.

7.02 Application for leave to serve originating process outside Australia

(1) Service of an originating process on a person in a foreign country is effective for the purpose of a proceeding only if:

(a) the Court has given leave under subrule (2) before the originating process is served; or

(b) the Court confirms the service under subrule (5); or

(c) the person served waives any objection to the service by filing an appearance in the proceeding.

(2) The Court may give leave to a person to serve an originating process on a person in a foreign country under a Convention, the Hague Convention, or the law of the foreign country, on the terms and conditions it considers appropriate, if the Court is satisfied:

(a) the Court has jurisdiction in the proceeding; and

(b) the proceeding is of a kind mentioned in rule 7.01; and

(c) the person seeking leave has a prima facie case for the relief claimed by the person in the proceeding.

(3) The evidence on an application for leave under subrule (2) must include the following:

(a) the name of the foreign country where the person to be served is or is likely to be;

(b) the proposed method of service;

(c) a statement that the proposed method of service is permitted by:

(i) if a Convention applies – the Convention; or

(ii) if the Hague Convention applies – the Hague Convention; or

(iii) in any other case – the law of the foreign country.

(4) - (5) Omitted

[3] The relevant rules from the FCR are as follows:-

10.42 When originating application may be served outside Australia

Subject to rule 10.43, an originating application, or an application under Part 7 of these Rules, may be served on a person in a foreign country in a proceeding that consists of, or includes, any one or more of the kinds of proceeding mentioned in the following table.

Item	Kind of proceeding in which originating application may be served on a person outside Australia
1	Proceeding based on a cause of action arising in Australia
2	Proceeding based on a breach of a contract in Australia

Item	Kind of proceeding in which originating application may be served on a person outside Australia
3	Proceeding in relation to a contract that: (a) is made in Australia; or (b) is made on behalf of the person to be served by or through an agent who carries on business, or is resident, in Australia; or (c) is governed by the law of the Commonwealth or of a State or Territory; in which the applicant seeks: (d) an order for the enforcement, rescission, dissolution, rectification or annulment of the contract; or (e) an order otherwise affecting the contract; or (f) an order for damages or other relief in relation to a breach of the contract
4	Proceeding based on a tort committed in Australia
5	Proceeding based on, or seeking the recovery of, damage suffered wholly or partly in Australia caused by a tortious act or omission (wherever occurring)
6-11	Omitted
12	Proceeding based on a contravention of an Act that is committed in Australia
13-14	Omitted
15	Proceeding seeking any relief or remedy under an Act, including the *Judiciary Act 1903*
16-18	Omitted
19	Proceeding in which the person to be served has submitted to the jurisdiction of the Court
20-24	Omitted

10.43 Application for leave to serve originating application outside Australia

(1) Service of an originating application on a person in a foreign country is effective for the purpose of a proceeding only if:

(a) the Court has given leave under subrule (2) before the application is served; or

(b) the Court confirms the service under subrule (6); or

(c) the person served waives any objection to the service by filing a notice of address for service without also making an application under rule 13.01.

(2) A party may apply to the Court for leave to serve an originating application on a person in a foreign country in accordance with a convention, the Hague Convention or the law of the foreign country.

(3) The application under subrule (2) must be accompanied by an affidavit stating:

(a) the name of the foreign country where the person to be served is or is likely to be; and

(b) the proposed method of service; and

(c) that the proposed method of service is permitted by:

(i) if a convention applies — the convention; or

(ii) if the Hague Convention applies — the Hague Convention; or

(iii) in any other case — the law of the foreign country.

(4) For subrule (2), the party must satisfy the Court that:

(a) the Court has jurisdiction in the proceeding; and

(b) the proceeding is of a kind mentioned in rule 10.42; and

(c) the party has a prima facie case for all or any of the relief claimed in the proceeding.

(5)- (7) Omitted

[4] Section 4(1) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) ('the Act') is also relevant. That section provides:-

4 Additional jurisdiction of certain courts

(1) Where:

(a) the Federal Court or the Family Court has jurisdiction with respect to a civil matter, whether that jurisdiction was or is conferred before or after the commencement of this Act; and

(b) the Supreme Court of a State or Territory would not, apart from this section, have jurisdiction with respect to that matter;

then:

(c) in the case of the Supreme Court of a State (other than the Supreme Court of the Australian Capital Territory and the Supreme Court of the Northern Territory)—that court is invested with federal jurisdiction with respect to that matter; or

(d) in the case of the Supreme Court of a Territory (including the Australian Capital Territory and the Northern Territory)—jurisdiction is conferred on that court with respect to that matter.

[5] The genesis of the claim is an internet betting agreement and account set up by the Defendant with the Plaintiff on 26 May 2004. The evidence is sufficient to inferentially find that the Defendant was a professional gambler. The Plaintiff is a sports bookmaker licensed to carry on business in the Northern Territory. It predominantly transacts business by way of the internet. Its operations are based in Sydney where its computers are also located. The agreement was made over the internet by the Defendant completing an application for an account. The Defendant could not complete that process without accepting the terms and conditions set out on the Plaintiff's website. Those terms provide that the agreement was to be construed in accordance with the laws of the Northern Territory of Australia and that the parties submitted to the jurisdiction of the courts of the Northern Territory, albeit not exclusively.

[6] The account operated by way of an initial deposit and thereafter bets were debited and winnings were credited to that account on an ongoing basis. Substantial sums were transacted through the Defendant's account. The evidence shows total deposits by the Defendant were, in round figures, NOK32.8 million. In 2008 the exchange rate was approximately 5 Norwegian kroner to the Australian dollar. The current exchange rate is approximately 5.90 Norwegian kroner to the Australian dollar. Hence, at the time of that initial deposit it represented approximately AUD6.5 million. The Defendant made drawings on the account in the sum of NOK16.7 million in round figures which, at the time was the equivalent of AUD3.4 million. The Defendant's losses over the relevant period were, again in round figures, NOK15.9 million or approximately AUD3.2 million at that time. When the account was finally closed the Defendant had a small credit in the account namely NOK2.63 which is the equivalent of approximately 53c in Australian currency. That small credit has since been repaid to the Defendant.

[7] The evidence in relation to the operation of the account is voluminous. The Defendant's betting was on an extensive and varied range of sports, on a regular basis and for large amounts, hence my conclusion that the Defendant was a professional gambler.

[8] For extended periods the Defendant was gambling profitably. If I interpret the Plaintiff's records correctly, total bets placed were of the order of NOK285 million and total winnings were of the order of NOK268 million.

In the end the Defendant has lost approximately NOK15.9 million. This appears to be only part of his total gambling losses as the evidence shows that there were losses with other internet betting operators which took the Defendant's total losses to approximately NOK70 million.

[9] The evidence reveals that at least part of the funds used by the Defendant for gambling purposes were obtained by way of loans from family and friends and under false pretences. The result was that the Defendant was convicted and imprisoned in Norway for fraud and remains incarcerated at the present date.

[10] On 13 November 2008 the Defendant gave notice of his intention to claim damages from the Plaintiff in the Norwegian courts. The Plaintiff denied liability to the Defendant. Proceedings were commenced by the Defendant against the Plaintiff in the District Court of Oslo on 7 May 2009.

[11] The Plaintiff challenged the jurisdiction of that Court and on 25 November 2009 that Court found that it had no jurisdiction. That decision was upheld on appeal to the Norwegian Court of Appeal but subsequently overturned on further Appeal to the Norwegian Supreme Court. The case was then remitted to the District Court of Oslo. In a recent decision, that Court decided that Norwegian law was the appropriate law to apply. An appeal by the Plaintiff against that ruling is pending.

[12] The Plaintiff's claim in the proceedings in this Court is based in contract, on misleading and deceptive conduct pursuant to section 52 of the *Trade*

Practices Act and at common law. The Plaintiff seeks declarations firstly, that the laws of the Northern Territory of Australia exclusively govern the rights of the parties, secondly, a no liability declaration, thirdly an anti-suit injunction and lastly, damages.

[13] With that background the issue of leave to serve is a preliminary one and in that respect relevant issues for determination on the application are:-

1. Whether the Supreme Court of the Northern Territory has jurisdiction in the proceedings (SCR 7.02(2)(a) and FCR 10.43(4)(a));

2. Whether the proceedings are of a kind mentioned in SCR 7.01 and FCR 10.42 (SCR 7.02(2)(b) and FCR 10.43(4)());

3. Whether the Plaintiff has a prima facie entitlement to the relief claimed (SCR 7.02(2)(c) and FCR 10.43(4)(c));

4. Whether service of the proceedings in Norway is permitted and on what legal basis (SCR 7.02(3) and FCR 10.43(3));

5. Whether it is otherwise appropriate to grant leave.

[14] The requirements referred to in sub-paragraphs (1)-(4) of the preceding paragraph derive from the SCR and the FCR. They are threshold requirements but they are not the only requirements. The grant of leave is a discretionary matter and other factors are relevant to the exercise of the discretion. Most obvious in the current case are considerations related to *forum non conveniens*. This is potentially always an issue when proceedings

are served in a foreign country, something which is readily apparent in the current case given that there are proceedings between the parties in the Norwegian courts.

[15] There is some uncertainty as to whether the Plaintiff is able to rely on some of the jurisdictional facts specified in rule 7.01 of the SCR. For example, for the reasons discussed more fully below, the making of the contract depends on where the Plaintiff's computers are located. To that extent, the corresponding jurisdictional facts in the FCR can apply given that section 4 of the Act confers the necessary jurisdiction on this Court. For this reason the Plaintiff also sought leave pursuant to the FCR.

[16] There also appears to be some controversy regarding the test to be applied in determining the jurisdictional facts. In *Commonwealth Bank v White,*[1] it was held that a plaintiff was only required to show a strongly arguable case in respect of the relevant jurisdictional facts to satisfy the specified pre-requisites.

[17] The position was considered by the High Court in *Agar v Hyde.*[2] The case concerned the corresponding rule relating to service outside Australia applicable in New South Wales at the time. The procedure in New South Wales at the time was different to that specified in the SCR and the FCR. Leave was not required to serve proceedings outside of Australia for proceedings of a specified type. Once service was effected, absent an

[1] [1999] 2 VR 681.
[2] (2000) 201 CLR 552.

appearance by the named defendant, leave was then required to proceed further. Furthermore, if there was an appearance by the named defendant then the rules provided that the defendant could apply for various orders, such as to set aside service, or a declaration that the court did not have jurisdiction, or an order that the court decline to exercise jurisdiction. The rules did not specify the grounds upon which those orders could be made.

[18] In respect of the possible grounds the High Court said[3]:-

> "On an application to set aside service, or to have the Court decline to exercise jurisdiction, attention might be directed to any of a number of features of the proceeding, the claims made in it, or the parties to it, in aid of the proposition that the Court should not exercise jurisdiction. Part 10, r 6A is cast in general terms and it would be wrong to attempt some exhaustive description of the grounds upon which the rule might be invoked. Nevertheless, it may be expected that three common bases for doing so are first, that the claims made are not claims of a kind which are described in Pt 10, r 1A, secondly, that the Court is an inappropriate forum for the trial of the proceeding and thirdly, that the claims made have insufficient prospects of success to warrant putting an overseas defendant to the time, expense and trouble of defending the claims."

[19] Unless there is a relevant distinction between the rules as applied in *Agar* and the corresponding rules in the SCR and the FCR which would restrict the general application of the decision in *Agar*, and at present I cannot see any, then the case confirms that there are other relevant considerations in the exercise of the discretion to grant leave which include at least considerations as to forum and considerations as to whether there are insufficient prospects of success.

[3] (2000) 201 CLR 552 at 575.

[20] Even if *Agar* could be distinguished, which I do not think is the case, the additional factors referred to in that case are valid factors to take into account in determining whether leave should be granted under the SCR and the FCR. In *Agar*, in the context of the question of insufficient prospects of success, it was noted that the objective of that requirement was to ensure that putting an overseas defendant to the time trouble and expense of defending the claim was warranted. That consideration is at least equally important at the initial stage where, as is the case here, leave is sought as a pre-requisite to service overseas.

[21] For those reasons I am of the view that in addition to establishing a strong arguable case, the Plaintiff must also satisfy the Court in respect of all other relevant factors including that the Australian courts are not a clearly inappropriate forum and that the claims made in the proceedings cannot be said to have poor prospects of success. I note that the test to be applied in determining the adequacy of the prospects of success is the same test as is applied in the context of applications for summary judgment.[4] Having said that, I have no doubt that the Plaintiff's case has sufficient prospects of success for the reasons which appear below.

[22] With that background I deal first with the specified matters prescribed by the SCR and the FCR (see sub-paragraphs 13(1)-(4) above). The first of those is that the Court has the required jurisdiction.

[4] *Agar v Hyde* (2000) 201 CLR 552 at 576.

[23] This can be dealt with quickly as there can be no argument that this Court has jurisdiction to grant the declarations and other relief arising under the laws of the Northern Territory and laws of the Commonwealth of Australia.

[24] Secondly I must be satisfied that the proceedings are within at least one the categories described in SCR 7.01 or FCR 10.42.

[25] For the reasons which follow I am of the view that the proceedings are of a kind described in Rule 7.01(1)(f)(iii), (h) and (j) of the SCR and in Items 1, 2, 3(a) and (c), 4, 5, 12, 15 and 19 of the table to Rule 10.42 in the FCR:-

1. *FCR 10.42, Item 1: The cause of action arose in Australia*: The evidence shows that the computers which received the communications via the internet from the Defendant are all based in Australia, specifically in Sydney, as are the bank accounts which held his funds. The relevant transactions all occurred in Australia and that is sufficient nexus, see *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd*,[5] *Telesto Investments Ltd v UBS AG*.[6]

2. *FCR 10.42, Item 3(a): The contract was made in Australia*: The evidence is that although the Plaintiff is licensed to carry on its business in the Northern Territory, its management is located in Sydney. More relevantly its computers which receive internet communications are also located in Sydney. *Olivaylle Pty Ltd v*

[5] (1996) 68 FCR 539.
[6] [2012] NSWSC 44.

Flottweg AG[7] is authority for the proposition that in situations where a contract is accepted by instantaneous communication such as email or internet, the contract is made where the acceptance is received. Given that the Plaintiff's computers are located in Sydney, therefore the contract cannot be said to be made in the Northern Territory. It is made in Sydney. That however satisfies the requirements of the FCR.

3. *FCR 10.42, Item 2: The proceedings are based on a breach of contract in Australia*: The corresponding jurisdictional fact in the SCR is that in SCR 7.01(g). For the same reasons as apply in relation to FCR 10.42 - Item 3(a), the factor in SCR 7.01(g) cannot be satisfied as the breach cannot be said to have occurred in the Northern Territory. However for the same reasons the breach will have occurred in New South Wales and that is sufficient for the purposes of this item in the FCR.

4. *SCR 7.02(1)(f)(iii) and FCR 10.42, Item 3(c): The contract is governed by the law of the Northern Territory/Australia*: This applies given the express provision in the agreement that the contract is to be construed in accordance with the laws of the Northern Territory of Australia. The FCR requirement is thereby also necessarily satisfied.

5. *SCR 7.02(1)(i) and FCR 10.42, Item 4: The proceeding is founded on a tort committed in the Northern Territory/Australia*: The relief

[7] (2009) 255 ALR 632.

sought pursuant to section 52 of the *Trade Practices Act* has been held to be the equivalent of a claim in tort for the purposes of the rule corresponding to SCR 7.01(1)(i) and FCR 10.42, Item 4 in the Victorian court rules.[8] As to where a tort with an international aspect is committed for the purpose of the rule, the tort is committed at the place to which it is directed.[9] Relying again on the evidence that the Plaintiff's computers are located in Sydney, the tort is committed in New South Wales. Hence, although the provision in the FCR is satisfied, the evidence does not satisfy the jurisdictional fact in SCR 7.02(1)(i).

6. *SCR 7.02(1)(j) and FCR 10.42, Item 5: The proceeding is for damages suffered in the Northern Territory/Australia as a result of tort wherever committed*: The claim pursuant to section 52 of the *Trade Practices Act* is a claim in tort for this purpose. Some of the Plaintiff's damages are suffered in the Northern Territory to the extent that the costs incurred in these proceedings are part of the damages. Therefore the jurisdictional fact in the SCR is satisfied as the place where the tort is committed is irrelevant for this purpose. Regardless of that, the loss occurs in Australia in any case and that satisfies the requirement of the FCR.

[8] *Commonwealth Bank v White* [1999] 2 VR 681.
[9] *Telesto Investments Ltd v UBS AG* [2012] NSWSC 44.

7. *FCR 10.42, Items 12 and 15: The proceeding is based on a contravention of an Act or seeks a remedy under an Act*: The proceedings seek relief pursuant to the *Trade Practices Act* and this is sufficient to bring the matter within the type of proceedings described in both of these items.

8. *SCR 7.01(1)(h) and FCR 10.42, Item 19: The parties have submitted to the jurisdiction of the Court*: The agreement provides that the parties irrevocably and unconditionally submit to the jurisdiction of the Courts of the Northern Territory and that is sufficient to satisfy the requirements in both Rules.

[26] The next pre-requisite derives from SCR 7.02(3) and 10.43(3) of the FCR, which are in near identical terms. The affidavit evidence satisfactorily establishes these matters. The foreign state is Norway. The proposed method of service is to deliver the documents to the Defendant in prison. A copy of the Hague Convention, more properly referred to as 'The Convention of 15 November 1965 Of Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters', has been put in evidence together with evidence that both Australia and Norway have ratified the Hague Convention. The evidence establishes that the proposed method of service on the Defendant in Norway is permitted by the Hague Convention process.

[27] The last of the requirements in the SCR and FCR is that the Plaintiff has a prima face case for the relief claimed. This requirement derives from SCR 7.02(2)(c) and FCR 10.43(4)(c), which again are in near identical terms.

[28] The authorities establish what is required to establish a prima facie case: see *ACCC v April International Marketing Services Australia Pty Ltd*,[10] *ACCC v April International Marketing Services Australia Pty Ltd (No.6.)*[11] In summary form the principles are:-

1. The existence of a prima facie case is to be determined on a broad examination of the proceedings rather than by way of an intense scrutiny;

2. As the application is interlocutory in nature, hearsay evidence is admissible for this purpose;

3. In the case of claims based on multiple causes of action, it is sufficient if a prima facie case is established on any one cause of action;

4. A prima facie case exists if facts are established or inferences are open which, if translated into findings of fact, would support the grant of relief;

5. Ultimately it is sufficient if the material shows a controversy which justifies the use of the court process to resolve and which justifies

[10] [2009] SCA 735.
[2010] 270 ALR 504.

causing the proposed defendant to be involved in the proceedings in Australia.

[29] The declaration of no liability is out of the ordinary. However the Plaintiff seeks the same relief as was granted by the English High Court of Justice against the Defendant in favour of another internet betting operator. This was in the case of *Hillside (New Media) Limited v Baasland*.[12] The making of the declaration will of course depend on the evidence adduced at the trial. The evidence before me is sufficient to satisfy the prima facie case requirement. Firstly the evidence shows that the credit in the Defendant's account has been paid to the Defendant. Therefore, prima facie the Plaintiff is entitled to the declaration. The Defendant might assert, as he has done in the Norwegian Courts, that the Plaintiff still has some liability to the Defendant. Based on the allegations in the pleadings in the Norwegian proceedings, damages for breach of duty appears to be the only readily apparent basis for any liability in Australia.

[30] Although at present I can only gauge what the Defendant might allege on this account by reference to the allegations in the Norwegian proceedings, it is fairly well settled in Australia that gamblers are not owed a duty of care by the person with whom bets are placed: *Reynolds v Katoomba RSL All Services Club Limited*,[13] *Foroughi v Star City Pty Ltd*[14] and *Kakavas v*

[12] [2010] 2 CLC 986.
[13] (2001) 53 NSWLR 43.
[14] (2007) 163 FCR 131.

Crown Melbourne Ltd.[15] Hence, on the current law, the Defendant will not have a case against the Plaintiff on that basis.

[31] The Plaintiff submits that even if the existence of a duty was established then the claim would fail as there is no suggestion that the Plaintiff knew or should have known that the Defendant was gambling with money he has procured by fraud from others. It is not known at this stage precisely what evidence the Defendant will rely on in this respect but that is not an issue at a prima facie case stage.

[32] The Plaintiff seeks to shore up its claim to a no liability declaration by pointing out that there are a number of obstacles which the Defendant would need to overcome to successfully claim against the Plaintiff. The first of these is that his claim may be precluded by the principle of *ex turpi causa non oritur actio*. The Plaintiff relies on *Stone & Rolls Ltd v Moore Stephens*[16] and submits that a defence based on the principle arises because the duty which the Defendant would need to establish is a duty to prevent him gambling with money he had procured by fraud. The defence would prevent the Defendant from founding a claim based on his own fraud. This does not sit very well with the submission of the Plaintiff as described in the preceding paragraph. The principle of *ex turpi causa non oritur actio* operates most clearly in contract claims. Although it can apply to claims in tort, it is then more problematic. Its application in tort is the clearest where,

[15] [2009] VSC 559.
[16] [2009] 1 AC 1391.

unlike in the present case, there is joint involvement between a plaintiff and a defendant in an illegal activity. However the illegality of a particular enterprise does not automatically negate the duty of care which otherwise exists between the parties.[17] Although at least arguable, I am not convinced that is the case. Establishing that the fraud in procuring the funds to gamble would not necessarily be a part of any duty owed to the Defendant (assuming for the purposes of argument that any such duty can be established). In any case the defence only applies where the tort is an essential part of the illegal activity[18] and I do not think that the application of the principle to the current case is that clear cut.

[33] The Plaintiff also submits that even if a duty was found to exist and even if a breach was found to occur then the Defendant would have to establish that he would not have gambled the money elsewhere. In this respect the evidence reveals that the Defendant had a substantial betting history with Bet365. The evidence shows that he lost almost GDP 3 million in a period roughly corresponding to the period of his losses with the Plaintiff. I think this causation issue could be a significant obstacle for the Defendant given his gambling history. It is noteworthy that Bet365 took proceedings in relation to the matter in England and was found not to be liable to the Defendant in any way, see *Hillside (New Media) Limited v Baasland*.[19]

[17] *Gala v Preston* (1991) 172 CLR 243.
[18] *Gala v Preston* (1991) 172 CLR 243.
[19] [2010] 2 CLC 986.

[34] Although I am not in a position to determine or assess what the result might ultimately be, that is not necessary at the current procedural stage of the proceedings. Overall, I am satisfied that the Plaintiff has a prima facie entitlement to the relief claimed.

[35] There remains consideration of other matters relevant to the exercise of the discretion to grant leave. The fact that proceedings are underway in Norway raises forum considerations. A stay of one or the other appears inevitable, albeit that it is not inconceivable that proceedings could continue in both jurisdictions.

[36] The power to dismiss or stay proceedings which have been regularly instituted on inappropriate forum grounds is a discretionary one which involves the balancing of all of the relevant factors.[20] The most recent High Court authority in this respect is *Puttick v Tenon.*[21] The High Court there restated the test in *Voth v Manildra Flour Mills Pty Ltd,*[22] in the following terms:-

> In *Voth* the court held that a defendant will ordinarily be entitled to a permanent stay of proceedings instituted against it and regularly served upon it within the jurisdiction, if the defendant persuades the local court that, having regard to the circumstances of the particular case, and the availability of an alternative foreign forum to whose jurisdiction the defendant is amenable, the local court is a clearly inappropriate forum for determination of the dispute. The reasons of the plurality in *Voth* pointed out that the focus must be "upon the inappropriateness of the local court and not the appropriateness or comparative appropriateness of the suggested foreign forum".

[20] *Oceanic Sun Line Special Shipping Company Inc. v Faye* (1988) 165 CLR 197 at 247.
[21] *Puttick v Tenon* (2008) 250 ALR 582.
[22] (1990) 171 CLR 538.

[37] In turn *Voth* adopted the test propounded by Deane J in *Oceanic Sun Line Special Shipping Company Inc. v Faye*[23] to determine when a forum is a clearly inappropriate one namely, where the continuation of proceedings in a court would be oppressive and vexatious, oppressive in the sense of *"being seriously and unfairly burdensome, prejudicial or damaging"*[24] and vexatious in the sense of *"meaning productive of serious an unjustified trouble and harassment"*.[25]

[38] With that background the principles I have extracted from the various cases relevant to the determination of whether a local court is a clearly inappropriate forum, in summary form are:-

1. The test is whether a forum is a clearly inappropriate forum not the comparative appropriateness of a foreign court.[26]

2. It is *prima facie* vexatious and oppressive in the strict sense to commence proceedings in Australia if an action is already pending in another country, although that does not automatically mean that a stay will be granted[27] and it does not of itself render litigation in Australia inappropriate.[28]

3. The existence of proceedings in another jurisdiction does not of itself establish that subsequent action is vexatious and that will only found

[23] (1988) 165 CLR 197.
[24] *Oceanic Sun Line Special Shipping Company Inc. v Faye* (1988) 165 CLR 197 at 247.
[25] *Oceanic Sun Line Special Shipping Company Inc. v Faye* (1988) 165 CLR 197 at 247.
[26] *Puttick v Tenon* (2008) 250 ALR 582 at 589.
[27] *Henry v Henry* (1996) 185 CLR 571 at 591.
[28] *Commonwealth Bank v White* [1999] 2 VR 681at 704.

to be the case if it can be shown that there is no legitimate interest or point in the subsequent proceedings.[29]

4. The substantive law of the forum is relevant but is not to be given undue emphasis to the exclusion of other factors.[30]

5. Whether orders of one forum are enforceable or are recognised in the other forum is a relevant consideration.[31]

6. A stay is inappropriate if the proceedings are fundamentally different notwithstanding a common factual base,[32] or if the evidence to be adduced will differ in each case.[33]

7. Likewise if there is a variance in the availabilities of certain remedies.[34]

8. The parties' connection with the jurisdiction is a relevant consideration.[35]

9. The stage that the proceedings in the other jurisdiction have reached[36] and the jurisdiction where the proceedings can be more efficiently resolved[37] are also relevant factors.

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[29] *Henry v Henry* (1996) 185 CLR 571.
[30] *Henry v Henry* (1996) 185 CLR 571 at 589.
[31] *Henry v Henry* (1996) 185 CLR 571 at 592.
[32] *Commonwealth Bank v White* [1999] 2 VR 681at 704; *TS Productions LLC v Drew Pictures Pty Ltd* (2008) 172 FCR 433 at 446.
[33] *Commonwealth Bank v White* [1999] 2 VR 681at 704.
[34] *Commonwealth Bank v White* [1999] 2 VR 681at 704 and 706.
[35] *Henry v Henry* (1996) 185 CLR 571 at 592.
[36] *Henry v Henry* (1996) 185 CLR 571 at 592.
[37] *Henry v Henry* (1996) 185 CLR 571 at 592.

10. The grant of the stay is not to be done without great caution.[38]

[39] A very telling consideration here is that any judgment obtained in the Norwegian proceedings may not be able to be enforced in Australia. The *Foreign Judgments Act* does not apply as Norway is not a nation whose courts are included in the list in the *Foreign Judgments Regulations*.

[40] That leaves only the possibility of enforcement of a foreign judgment at common law. *Emanuel & Ors v Symon*,[39] (which has been followed in Australia in *Independent Trustee Services Ltd v Morris*[40]), sets out the circumstances where that can occur. In *Emanuel,* Buckley LJ said[41]:-

> "In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained."

[41] None of the instances described by Buckley LJ seem to apply in respect of a judgment by the Defendant against the Plaintiff in the Norwegian proceedings. The unenforceability of the judgment in Australia is very decisive on the question of a stay. On this issue, in *Henry v Henry*[42] the plurality said[43]:-

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[38] *Global Partners Fund Ltd v Babcock & Brown Ltd* (2010) 267 ALR 144 at 171.
[39] [1908] 1 KB 302.
[40] (2010) 79 NSWLR 425.
[41] [1908] 1 KB 302 at 309.
[42] (1996) 185 CLR 571.
[43] *Henry v Henry* (1996) 185 CLR 571 at 592.

> "… if both have jurisdiction, it will be relevant to consider whether each will recognise the other's orders and decrees. If the orders of a foreign court will not be recognised in Australia, that will ordinarily dispose of any suggestion that the local proceedings should not continue."

[42] Another major consideration in the context of a stay is that part of the Plaintiff's claim against the Defendant is a statutory claim under the *Trade Practices Act*. Although at first blush the basis for such a claim is not as clear given that it requires favourable findings for the Plaintiff based on implications at the outset, that is a matter of evidence. That part of the claim remains arguable and the inability of the Plaintiff to ventilate that in the Norwegian proceedings is a very relevant factor: *Commonwealth Bank v White*.[44]

[43] Although I acknowledge that the parties' connection with a jurisdiction is a relevant factor, the test remains whether the local jurisdiction is a clearly inappropriate forum and not a determination of the more appropriate forum. In this context the Plaintiff submits that the connection with Norway is tenuous. This relies on the evidence which reveals that over the significant part of the relevant period, the Defendant resided in the Czech Republic and Germany. His only connection with Norway is his citizenship, that he had a residence in Olso and that he sourced his funds for gambling purposes from residents of Norway.

[44] The Plaintiff submits that the connection with the Northern Territory is more tangible on the basis that the Plaintiff is a Northern Territory company,

[44] [1999] 2 VR 681.

licensed to carry on its business under the laws of the Northern Territory, having entered into a contract which by agreement is to be governed by the laws of the Northern Territory and with all of the records and equipment to facilitate the agreement (the computers for internet betting), all being in Australia. Although I do not consider the parties' connection with either jurisdiction to be overly important in the overall scheme of things, I am satisfied to the extent that it is relevant, that this favours the Plaintiff.

[45] For the forgoing reasons I made the Orders earlier described.