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Jurisdiction	Australia
Tribunal	Supreme Court of South Australia
Date of the decision	22 May 2025
Case no./docket no.	[2025] SASC 75 / CIV-23-002179
Case name	*San Remo Macaroni Company Pty Ltd v. Pastificio Guido Ferrara S.p.A.*

1 **1**
On 23 February 2023, San Remo Macaroni Company Pty Ltd («the applicant») filed a claim against Pastificio Guido Ferrara («the respondent»). The applicant alleges negligence and/or a breach of contract resulting in a claim for $2,726,406.48. There are two claims for breach of contract and one in the tort of negligence. The second claim for breach of contract is advanced pursuant to the *United Nations Convention on Contracts for the International Sale of Goods* («CISG»). That convention applies to South Australia by the *Sale of Goods (Vienna Convention) Act 1986* (SA).

2 **2**
On 26 May 2023, the respondent filed an interlocutory application[1] seeking orders to set aside service of the claim, brought by the applicant, pursuant to r 4(2)(a) of sch 1 of the *Uniform Civil Rules 2020* (SA) («UCR»). In the alternative the respondent sought an order dismissing the proceedings pursuant to r 4(2)(a) and/or (b) of sch 1 of the UCR, or in the further alternative, an order permanently staying the proceedings pursuant to r 4(2)(a) and/or (b) of sch 1 of the UCR.

3 **3**
There are effectively four questions that arise for consideration on this interlocutory application. These are:

1. Has service of the claim been validly effected on the respondent?
2. Did the applicant require leave to serve the claim outside of Australia?
3. Is this Court «clearly an inappropriate forum» to hear the applicant's claim?
4. Does the claim have insufficient prospects of success to warrant putting the respondent to the time, expense and trouble of defending the claim?

[1] FDN 8.

Background

4 **4**
Since about 2004, the respondent has supplied pasta to the applicant for the purposes of the applicant's business.

5 **5**
The applicant at all material times:

- was a company incorporated in Australia pursuant to the *Corporations Act 2001* (Cth);
- had its central place of business in South Australia;
- manufactured pasta in Australia and imported pasta from overseas for sale in Australia and New Zealand under brand names including San Remo and Zafarelli.

6 **6**
The respondent at all material times:

- was a company regulated pursuant to the Italian Civil Code;
- had its central place of business at Polvica 80035 Nola, Naples, Italy; and
- manufactured pasta at its factory in Nola, which it supplied to overseas purchasers including the applicant.

7 **7**
The supply of pasta by the respondent to the applicant involved the following steps:

- the applicant placed an order with the respondent for the supply of pasta;
- the respondent manufactured the pasta at its factory in Nola, Naples;
- the respondent packaged the pasta in sealed branded plastic bags which were then packed into sealed labelled cardboard boxes;
- the respondent stored the boxes at storage facilities at or in the vicinity of its factory;
- the respondent subsequently packed the cartons into shipping containers and delivered those containers to shipping ports in Italy for shipment to the applicant;
- the shipping containers were shipped from Italy to various destination ports in Australia and New Zealand;
- the shipping containers were delivered from the destination ports to the applicant's warehouses where they were unpacked and the cartons stored awaiting distribution by the applicant to its customers.

8 **8**
In or around April and May 2020, the applicant and the respondent entered into a contract for the respondent to supply pasta to the applicant («the contract»).

9 **9**
The express terms of the contract were:

- The respondent would supply the applicant with pasta comprising of 654,860 cartons of various San Remo and Zafarelli branded pasta («the stock»);

- The price payable by the applicant to the respondent was approximately $6,302,700.48 AUD (€4,052,698.44);

- The landed cost of the stock including freight costs, container costs and container destuffing was approximately $2,120,991.72;

- The respondent would deliver the stock to the applicant at destination ports in Adelaide, Sydney, Melbourne, Brisbane, Fremantle and Auckland.

10 **10**
Nothing was agreed by the parties to the contract, regarding jurisdiction or the competent Court, in the event of a dispute arising from the agreement.

11 **11**
Between about May 2020 and December 2020, the stock was shipped from Italy to the destination ports in various tranches. The stock was received between about mid-September 2020 and late January 2021 at the destination ports. Overall, 65 shipments were received in Australia and 10 in New Zealand. Upon arrival at the destination ports, the stock was transferred to the applicant's warehouses, unpacked from the shipping containers and stored pending its sale and delivery to the applicant's customers.

12 **12**
On or around 16 December 2020, the applicant received a complaint that insects commonly known as «weevils» had been found in pasta sold by the applicant and supplied by the respondent. In about January 2021, the applicant received a further two complaints about weevils being located in the pasta.

13 **13**
Shortly thereafter, the applicant commenced an internal preliminary investigation into the complaints. That investigation determined that portions of the stock was infested with weevils, weevil eggs and larvae.

14 **14**
On 3 March 2021 and 22 April 2021, the applicant notified the respondent, by way of email, regarding the infested pasta. On 23 April 2021, the respondent replied to the applicant and denied liability in relation to the infestation. The respondent suggested that the infestation

may have occurred during transit as a consequence of the stock being packed in shipping containers infested by invisible pest eggs which escaped the respondent's hygiene checks.

1. Has there been effective service of the Claim by the applicant on the respondent?

15 **15**
Service outside of the Australian jurisdiction is dealt with in sch 1, pt 1 of the UCR. Prior to effecting service on a person outside of the jurisdiction, an applicant must determine whether service of its claim requires the leave of the Court. The parties have made competing submissions as to whether leave was required in the circumstances of this claim. The applicant contends that leave was not required; the respondent argues to the contrary. In due course I will come back to this issue.

16 **16**
On the basis of a view that leave was not required, the applicant took steps to serve the respondent in accordance with the process that is prescribed in sch 1, pt 1, div 3 of the UCR.

17 **17**
There has been a protracted and unfortunate history behind the efforts made by the applicant to effect service on the respondent. It is necessary to set out some of that history to put into context the competing submissions made by the parties.

The Hague Convention – service between Central Authorities

18 **18**
The first means by which the applicant attempted to effect service of the statement of claim was pursuant to the requirements set out under the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* («the *Hague Service Convention*») as set out in sch 1, div 3, sub-div 3 of the UCR, which both Australia and Italy are a party to. The following steps were undertaken:

- On 17 February 2023, DW Fox Tucker Lawyers (the applicant's solicitors) sent an email to the Registry of the Supreme Court of South Australia requesting that the statement of claim and accompanying court documents be filed with the Court.

- That same day, a telephone call was made to the Supreme Court Registry by the applicant's solicitors enquiring about the service requirements under the Hague Convention.

- On 23 February 2023, the statement of claim (in English and Italian) was filed with the Supreme Court.

- On 28 March 2023, the applicant's solicitors sent an email to the Supreme Court Registry attaching all necessary supporting documentation in accordance with the Hague Convention, requesting confirmation that the Court would accept the documents for filing.

- On 6 April 2023, the Supreme Court Registry sent an email to the applicant's solicitors confirming that the court documents, required to be served pursuant to the Hague Convention, had been sent to Italy.

- On 4 July 2023, the applicant's solicitors sent an email to the Italian Central Authority to obtain an update on the status of the service of the claim. The email was sent to an email address listed for the Italian Central Authority on the «Hague Conference on the Private International Law» website. The applicant's solicitors did not receive a response to this email.

- On 17 October 2023, the applicant's solicitors made further enquiries in respect of the service of the claim. This involved:

    1. A telephone call to the Supreme Court Registry. During that call advice was received that service would take between three to six months when effected through the Italian Central Authority.

    2. An email was sent to the initial contact person in the Supreme Court Registry requesting an update on the service of the claim documents through the Italian Central Authority.

    3. An email was sent to the Italian Central Authority requesting an update on the service of the claim documents.

- On 25 October 2023, the Supreme Court Registry sent an email to the applicant's solicitors advising that the Court had not received any proof of service documents from Italy and attached correspondence which had been received by the Court from the Italian Central Authority on 6 April 2023. This correspondence did not appear to relate to these proceedings.

- On 27 October 2023, the Supreme Court Registry sent an email to the Italian Central Authority requesting an update on the service of the claim documents.

- On 30 October 2023, the applicant's solicitors sent an email to the Italian Central Authority (copying in the Supreme Court Registry) advising that it appeared likely, based on the correspondence (sent by the Italian Central Authority) of 6 April 2023, that the Italian Central Authority had made a mistake in relation to the service of the claim documents, in all likelihood, mixing this matter up with another.

- On 13 November 2023, the applicant's solicitors received an email from the Italian Central Authority advising that it had no record of the claim documents.

- On 14 November 2023, the applicant's solicitors sent an email to the Italian Central Authority attaching a further copy of the claim documents.

- On 17 November 2023, the applicant's solicitors sent an email to the Supreme Court Registry requesting that the claim documents be posted to the Italian Central Authority.

The email further stated that the reason for the request was that it appeared that there was a requirement for the initial claim documents to be posted by the Court initially, but that this had not been attended to.

- On 22 November 2023, the Supreme Court Registry sent an email to the applicant's solicitor confirming that it had posted the claim documents to the Italian Central Authority.

- On 6 December 2023, the applicant's solicitors checked the tracking status of the claim documents on the Australia Post website. At that stage, the claim documents had arrived in Italy and had been delivered to the local facility in the Hunter Region, Italy for delivery to the Italian Central Authority.

- On 14 December 2023, the applicant's solicitors again accessed the Australia Post website to check the tracking for the claim documents. The website confirmed that the documents had been delivered to the Italian Central Authority. As a consequence, the applicant's solicitors sent an email to Dr Claudio Tullii, who had become the applicant's point of contact at the Italian Central Authority and requested that he advise the applicant's solicitors when the claim documents would be served on the respondent. Dr Tullii did not respond to this email.

- On 8 January 2024, the applicant's solicitors sent a follow-up email to Dr Tullii requesting a response to the email of 14 December 2023. Dr Tullii responded by email that same day requesting a copy of a «request Form A».

- On 9 January 2024, the applicant's solicitors sent an email to Dr Tullii attaching a Form A, however contested that such a form was required to be completed by the applicant. Dr Tullii replied later that day requesting that the applicant's solicitors advise him of when the claim documents were sent to the Italian Central Authority and a copy of the receipt.

- The applicant's solicitors replied on 10 January 2024 and provided the information that had been requested. Dr Tullii did not reply to this email.

- On 24 January 2024, the applicant's solicitors sent a further email to Dr Tullii and requested a response to the email of 10 January 2024.

- On 22 February 2024, the applicant's solicitors sent yet another email to Dr Tullii requesting a response to the 10 January 2024 email. As at 28 February 2024, the applicant's solicitors had not received a reply from Dr Tulli since 9 January 2024. On the same day, being the 22 February 2024, the applicant's solicitors also sent an email to the Supreme Court Registry advising of the difficulties that they were experiencing with contacting the Italian Central Authority. The email also contained a request that the Court follow up the Italian Central Authority on the applicant's behalf.

- On 29 February 2024, the Supreme Court Registry sent an email to the Italian Central Authority requesting urgent confirmation as to whether service of these proceedings had been completed.

- On 22 March 2024, the applicant's solicitors received an email from the Supreme Court Registry which stated that the Court had not received a response to the email sent on 29 February 2024.

19 **19**
The interlocutory application was listed for argument on 1 May 2024. No doubt in advance of that hearing, on 30 April 2024 the Supreme Court Registry sent a further email to the Italian Central Authority and asked for urgent confirmation of whether service of the proceedings had been completed.

20 **20**
As of the date of submissions, the applicant had not received confirmation from the Italian Central Authority that it had affected service and subsequently, the respondent had not been served by them with the claim.

Service by post

21 **21**
In addition to the attempts to serve the respondent through the Italian Central Authority, the applicant also attempted to effect service pursuant to Article 10(a) of the *Hague Service Convention* by international post.

22 **22**
On 24 March 2023, the applicant sent a statement of claim and accompanying Court documents to the respondent's registered office via International Post Express.

23 **23**
On or about 13 April 2023, Australia Post sent an email confirming that the statement of claim and accompanying Court documents were served on the respondent's registered office.

24 **24**
On 18 April 2023, the applicant's solicitors sent an email enclosing a letter to the respondent's solicitors located in Italy, confirming that the statement of claim had been delivered by International Post Express to the respondent's registered office.

25 **25**
The respondent does not dispute that they received the relevant documents by registered post on 13 April 2023, nor do they dispute that they have full knowledge of the claim that the applicant is bringing. They contend however, that it was not open for the applicant to effect service by registered post on the grounds that while Article 10(a) of the *Hague Service Convention* permits service by mail, it does not authorise it. The applicant disagrees. I heard detailed submissions in support of both arguments.

26 **26**
For reasons that I will come to, it is not necessary that I determine the issue of whether it was open for the applicant to serve the respondent by registered post. However, the provision of the documents by post and the respondent's knowledge of the claim are relevant to a

consideration of whether there could be «deemed service» pursuant to r 12(b) of sch 1, div 3, sub-div 1 of the UCR.

Email communications

27 **27**
In addition to the two methods of service that I have referred to, on 24 March 2023 and 4 April 2023, the applicant's solicitors sent emails to the respondent's solicitors seeking confirmation that they had instructions to accept service of the statement of claim via email. Such confirmation was not forthcoming.

Recent developments

28 **28**
As I have said, at the time of submissions,[2] there had not yet been effective service under the process laid down by the *Hague Service Convention*, namely the process of sending of documents through the Central Authority from one state to the Central Authority of another state. At that time, the evidence disclosed that the Italian Central Authority had not confirmed that it had served the claim and associated documents on the respondent, and had not issued a certificate of service in accordance with Article 6 of the *Hague Service Convention*.

29 **29**
It was the respondent's submission that in those circumstances the Court did not need to proceed to determine the respondent's interlocutory application, submitting that the Court should make a declaration that there had not been effective service of the claim on the respondent. That would mean that it would not be necessary to rule on the interlocutory application to set aside service or dismiss or stay the proceedings.

30 **30**
That position has, however, changed. There has now been effective service.

31 **31**
On 2 October 2024, subsequent to the completion of submissions, the Court was advised by the applicant's solicitors that a certificate had been received from the Italian Central Authority confirming that the respondent had been served with the claim and I subsequently received sealed copies of the certificates.[3]

32 **32**
I note that in the event that this development had not occurred, and there had not been effective service, I would have found this to be an appropriate case in which to utilise r 12 of sch 1, div 3, sub-div 1 for deemed service. That rule provides:

[2] FDN 29, Written Submissions of the Applicant dated 7 December 2023.
[3] FDN 46, FDN 47.

12—Deemed service

A party may apply to the Court without notice for an order that a document is taken to have been served on a person on the date mentioned in the order if—

(a) it is not practicable to serve the document on the person in a foreign country in accordance with a convention, the Hague Convention or the law of a foreign country; and

(b) the party provides evidence that the document has been brought to the attention of the person to be served.

Note—

without notice is defined in rule 2.1 of the Rules.

33 **33**
This is not a situation in which the applicant has made feeble or half-hearted efforts to serve the respondent. To the contrary, they have demonstrated considerable diligence in following up with the Supreme Court Registry and the Italian Central Authority. The errors and mis-steps that have occurred along the way have not been of their making. In addition to this, the applicant has attempted to serve the respondent by two alternative means. A party cannot be required to wait indefinitely for the mechanism under the *Hague Service Convention* to take effect, which, somewhat ironically, is meant to expedite and simplify the issue of service of judicial and extrajudicial documents abroad[4].

34 **34**
In my view, at the time that submissions were made on the interlocutory application, it had been established by the applicant that it was not practicable to serve the documents in accordance with the *Hague Service Convention*. In addition, it had been established that the applicant brought the claim to the attention of the respondent. In such circumstances it would have been appropriate to make an order for deemed service, particularly given the passage of time since the claim had been filed.

2. Did the applicant require leave to serve the claim outside of Australia?

35 **35**
It is the respondent's submission that despite the fact that there has now been effective service, the respondent's interlocutory application should be allowed in that I should still set aside the service of the claim or dismiss or permanently stay the proceedings on the basis that the applicant failed to seek leave to serve the claim outside of Australia.

36 **36**
As previously mentioned, the applicant did not seek leave to serve the claim on the basis of their view that leave was not required as the proceedings fell within r 2 of sch 1, div 2, sub-

[4] The express purpose of the Hague Convention is «to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time» and «to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure.»

div 1 of the UCR. This rule permits an originating process to be served outside of Australia without leave in certain circumstances, including the following:

> **2—When allowed without leave**
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> An originating process may be served out of Australia without leave in the following cases—
>
> (a) when the claim is founded on a tortious act or omission—
>
> (i) which was done or which occurred wholly or partly in Australia; or
>
> (ii) in respect of which the damage was sustained wholly or partly in Australia;
>
> …
>
> (c) when the claim is in respect of a breach in Australia of any contract, wherever made, whether or not that breach was preceded or accompanied by a breach out of Australia that rendered impossible the performance of that part of the contract that ought to have been performed in Australia;
>
> …
>
> (j) when the claim arises under an Australian statute and—
>
> (i) any act or omission to which the claim relates was done or occurred in Australia;
>
> (ii) any loss or damage to which the claim relates was sustained in Australia;
>
> (iii) the statute applies expressly or by implication to an act or omission that was done or occurred outside Australia in the circumstances alleged; or
>
> (iv) the statute expressly or by implication confers jurisdiction on the Court over persons outside Australia (in which case any requirements of the statute relating to service must be complied with);
>
> …
>
> (n) when the claim is founded on a cause of action arising in Australia;
>
> …
>
> (p) when the claim concerns the construction, effect or enforcement of an Australian statute;
>
> (s) when the claim, so far as concerns the person to be served, falls partly within one or more of the above paragraphs and, as to the residue, within one or more of the others of the above paragraphs.
>
> …

37 **37**

The Court also has the power pursuant to r 3(1) of sch 1, div 2, sub-div 1 of the UCR to grant leave to a party to serve a claim out of Australia, in circumstances in which the manner in

which an originating process is to be served does not fall within r 2, provided that the Court is satisfied of the matters set out in r 3(5) of sch 1. These are:

(a) the claim has a real and substantial connection with Australia;

(b) Australia is an appropriate forum for the trial; and

(c) in all the circumstances the Court should assume jurisdiction.

38 **38**
It was the respondent's contention that the applicant was not authorised to serve the claim on the respondent on the basis that the proceedings did not fall under r 2 of sch 1 and consequently leave was required under r 3 of sch 1. The respondent relied on a technical argument that involved distilling down into the finer details of the contract entered into by the parties and a critique of the manner in which the claim is currently pleaded.

39 **39**
It is important to bear in mind the nature of the inquiry to be embarked upon to determine the question of whether the applicant required leave to serve the claim. In *Agar v Hyde*,[5] the High Court considered an analogous rule in the previous *Supreme Court Rules 1970* (NSW) and discussed the type of inquiry which was required at this stage in order to determine whether a plaintiff was permitted to serve proceedings outside of Australia. The majority discussed the approach to be taken in determining whether a plaintiff met the statutory requirement and said:[6]

> In deciding whether Pt 10, r 1A applied, and thus permitted service outside Australia of the originating process in these two actions, attention must be directed to the way in which the claims made by the respondents are framed. The paragraphs speak of «proceedings [which] are founded on» a specified matter such as a cause of action arising in the State or a tort committed in the State. That focuses attention upon the nature of the claim which is made. That is, is the claim a claim in which the plaintiff *alleges* that he has a cause of action which, *according to those allegations*, is a cause of action arising in the State?
>
> The inquiry just described neither requires nor permits an assessment of the strength (in the sense of the likelihood of success) of the plaintiff's claim. The Court of Appeal was wrong to make such an assessment in deciding whether the Rules permitted service out. In so far as the contrary was held in *Bank of America v Bank of New York* it should be overruled. The application of these paragraphs of r 1A depends on the nature of the allegations which the plaintiff makes, not on whether those allegations will be made good at trial. Once a claim is seen to be of the requisite kind, the proceeding falls within the relevant paragraph or paragraphs of Pt 10, r 1A, service outside Australia is permitted, and prima facie the plaintiff should have leave to proceed.

[5] (2000) 201 CLR 552.
[6] Ibid at [50]-[51].

(Footnote omitted, Emphasis in original)

40 **40**
In adopting this approach it is apparent from the claim that the applicant is alleging a tortious act or omission (in this case, negligence)[7] in respect of which the damage was sustained wholly or partly in Australia,[8] and a claim which arises under an Australian statute (in this case, the *Sale of Goods (Vienna Convention) Act 1986* (SA)),[9] and any loss or damage to which the claim relates was sustained in Australia.[10]

41 **41**
In my view, the applicant did not require leave to serve the claim outside of the jurisdiction.

42 **42**
Even if I am wrong about that and leave was required, I would have made an order under r 12.1(1) of ch 2, pt 2 of the UCR dispensing with the need for leave, on the basis that I would have granted leave in accordance with r 3 of sch 1 because the criteria of r 3(5) had been satisfied. In my view, the claim has a real and substantial connection with Australia, Australia is an appropriate forum for the trial (for reasons that I will come to), and in all of the circumstances, the Court should assume jurisdiction.[11]

3. Is this Court «clearly an inappropriate forum» to hear the applicant's claim?

43 **43**
That is not however the end of the matter. The respondent relies upon the Court's broad discretion to dismiss or stay proceedings or set aside service pursuant to r 4 of sch 1, div 2, sub-div 1 of the UCR on the grounds that the Court is an inappropriate forum for the trial, even if service without leave was authorised under r 2.

44 **44**
Specifically, r 4 provides:

4—Court's discretion whether to assume jurisdiction

(1) On application by a person on whom an originating process has been served out of Australia, the Court may dismiss or stay the proceeding or set aside service of the originating process.

(2) Without limiting subrule (1), the Court may make an order under this rule if satisfied—

(a) that service of the originating process is not authorised by the Rules,

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[7] FDN 1 at [28]-[32].
[8] *Uniform Civil Rules 2020* (SA) r 2(a)(ii) of sch 1.
[9] FDN 1 at [20]-[27].
[10] *Uniform Civil Rules 2020* (SA) r 2(j)(ii) of sch 1.
[11] I note that compliance with the procedural requirements set out in r 3 may be modified or dispensed with under the general powers contained within r 12.1 of the UCR.

(b) that the Court is an inappropriate forum for the trial of the proceeding; or

(c) that the claim has insufficient prospects of success to warrant putting the person served outside Australia to the time, expense and trouble of defending the claim.

45 **45**

In addition to this, the respondent relies on the Court's inherent jurisdiction to stay a proceeding in whole or in part where the Court is «clearly an inappropriate forum» («forum non conveniens») for the dispute that is the subject of the proceedings.[12] This power is discretionary and is part of the Court's broader jurisdiction to stay a proceeding where its continuation is oppressive, vexatious or an abuse of process.

46 **46**

The wording in r 4(2)(b) is less emphatic and broader than the test that is applied in the exercise of the Court's inherent jurisdiction to stay a proceeding. The inherent jurisdiction to stay exists when the Court is a «clearly inappropriate forum» in which to litigate the proceedings, whereas r 4(2)(b) provides that the Court may stay a proceeding when satisfied that this Court is «an inappropriate forum» for the trial of the proceedings.

47 **47**

Having said that, in the context of the consideration of a rule in New South Wales that was analogous to r 4 of sch 1, in *Regie Nationale des Usines Renault SA v Zhang*,[13] it was held by the High Court that because the power to stay a proceeding is, ultimately an aspect of the Court's inherent jurisdiction, the principles that govern the exercise of the inherent jurisdiction apply, and apply in the same way, when considering an application for a stay brought under the relevant rule. That means that notwithstanding the fact that the test as stated in the rule is in less emphatic terms, the test to be applied is that laid down by the High Court in the context of the Court's exercise of its inherent jurisdiction to stay a proceeding.

48 **48**

The respondent accepts that this Court is bound to apply *Regie Nationale* and construe r 4 of sch 1 in the same manner, at least insofar as r 4(2)(b) is concerned. That is, that the appropriate issue to be considered is whether this Court is «clearly an inappropriate forum» in which to bring these proceedings.

Forum non conveniens – Legal principles

49 **49**

The doctrine of forum non conveniens is an international private common law doctrine that allows for an Australian Court to decline to exercise its jurisdiction when satisfied that having regard to the particular circumstances of the case, it is clearly an inappropriate forum for the determination of the proceedings.

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[12] The respondent also relies on the corresponding general power under r 12.1(2)(o) of ch 2, pt 2 of the UCR.
[13] (2002) 210 CLR 491 at [45].

50 **50**
In *Voth v Manildra Flour Mills Pty Ltd*,[14] the majority of the High Court analysed the principles relevant to the exercise of the Court's discretion to stay proceedings on the basis that Court is clearly an inappropriate forum for the dispute. In an often cited passage, the majority said:[15]

> Before we refer to the judgments of the majority in *Oceanic Sun*, we should state very briefly what we take to be the common ground between them. First, a plaintiff who has regularly invoked the jurisdiction of a court has a prima facie right to insist upon its exercise. Secondly, the traditional power to stay proceedings which have been regularly commenced, on inappropriate forum grounds, is to be exercised in accordance with the general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious or an abuse of process and the rationale for the exercise of the power to stay is the avoidance of injustice between parties in the particular case. Thirdly, the mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction would provide a more appropriate forum does not justify the dismissal of the action or the grant of a stay. Finally, the jurisdiction to grant a stay or dismiss the action is to be exercised «with great care» or «extreme caution».
>
> (Footnote omitted)

51 **51**
It follows that an applicant has a prima facie right to have the chosen forum exercise the jurisdiction regularly invoked by the applicant, unless the Court is satisfied that the forum is clearly inappropriate. In *Henry v Henry*,[16] the majority of the High Court emphasised that the weight to be placed on this consideration will vary from case to case. It may be a significant consideration when the case is finely balanced, or at the other end of the spectrum, there may be cases in which the forum is so clearly inappropriate that the notion of an applicant's prima facie right can have no real bearing on the matter.[17]

52 **52**
Whilst in order to exercise the power to order a stay of proceedings a Court must be satisfied that there is another foreign tribunal available to hear the claim,[18] the focus of the Court must be «upon the inappropriateness of the local Court and not the appropriateness or comparative appropriateness of the suggested foreign forum».[19] As Kourakis CJ explained in *Moldauer v Constellation Brands Inc*:[20]

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[14] (1990) 171 CLR 538.
[15] Ibid at [554].
[16] (1996) 185 CLR 571.
[17] Ibid at [589].
[18] *Puttick v Tenon Ltd* (2008) 238 CLR 265.
[19] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 565.
[20] [2013] SASC 38 at [9].

> … [the] test focuses on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum rather than on a comparative evaluation of the suitability of the two forums. …

53 **53**
The process also does not involve the Court undertaking a «balance of convenience» exercise in determining the question of whether to stay proceedings on the basis of forum non conveniens. As the majority said in *Voth*:[21]

> …[t]he mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction would provide a more appropriate forum does not justify the dismissal of the action or the grant of a stay.

54 **54**
The power to stay proceedings on the basis of forum non conveniens is discretionary. The manner in which that discretion is to be exercised was described by Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* in the following manner: [22]

> That power is a discretionary one in the sense that its exercise involves a subjective balancing process in which the relevant factors will vary and in which both the question of the comparative weight to be given to particular factors in the circumstances of a particular case and the decision of whether the power should be exercised are matters for individual judgement and, to a significant extent, matters of impression.

55 **55**
The bar is set high, and the power should only be exercised in a clear case, in circumstances in which the respondent satisfies the Court that the forum, in which the proceedings have been instituted, is so inappropriate that it would be vexatious or oppressive to continue.[23] As Stanley J observed in *Stewart v Paladin Aus Pty Ltd*,[24] citing *Regie Nationale des Usines Renault SA v Zhang*:[25]

> … the respondents must satisfy the Court that a trial in this State would be productive of injustice, because it would be oppressive in the sense of seriously and unfairly burdensome, prejudicial or damaging, or vexatious, i.e. productive of serious and unjustified trouble and harassment.

56 **56**
In *Colosseum Investment Holdings Pty Ltd v Vanguard Logistics Services Pty Ltd*,[26] Palmer J conducted a review of the relevant High Court authorities and identified a number of factors that had been found to be relevant to the exercise of the Court's discretion to stay proceedings

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[21] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554.
[22] (1988) 165 CLR 197 at 247-248.
[23] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247.
[24] [2020] SASC 244 at [67].
[25] (2002) 210 CLR 491 at [78].
[26] [2005] NSWSC 803.

or decline jurisdiction on the ground of forum non conveniens. These included, but were not limited to, the following:[27]

i) a consideration of the true nature and full extent of the issues involved in proceedings in the local court and in the foreign court;

ii) whether, in the light of that consideration, the foreign court has jurisdiction to deal with the same subject matter as is before the local court;

iii) the degree of connection which both proceedings share with the law of the foreign court and the law of the local court;

iv) where the relevant acts or omissions occurred;

v) where the parties reside and carry on business;

vi) whether local professional or other standards of care have a bearing on the legal quality of the relevant acts or transactions or the liability of the parties;

vii) where and how the damage was suffered;

viii) where the relevant evidence in the action is to be found;

ix) whether the application to the local court for a stay or dismissal has been made with reasonable promptness;

x) the stage which proceedings in the foreign court have reached in comparison with the stage of proceedings in the local court;

xi) the order in which the two sets of proceedings were instituted and the costs which have been incurred in each;

xii) whether each court recognises the orders and decrees of the other;

xiii) which court can provide more effectively for the complete resolution of the whole of the controversy between the parties;

xiv) that a party properly invoking the jurisdiction of the local court has a prima facie right to insist upon the exercise of that jurisdiction, so long as that prima facie right is not given undue emphasis;

xv) that considerations of comity and restraint should be taken into account where a defendant carries on business in a foreign country and the jurisdiction of the courts of that country would be recognised under local conflict rules;

[27] Ibid at [69].

xvi) the undesirability of allowing two independent actions involving the same question of liability to proceed contemporaneously in the courts of different countries;

xvii) whether the dominant purpose of a party in commencing proceedings in one jurisdiction or another is to prevent another party from pursuing remedies available in the courts of another country having jurisdiction.

Considerations relied upon by the respondent

57 **57**
In support of the application for a stay or dismissal of the proceedings, on the basis that the Court is «clearly an inappropriate forum», the respondent relies upon a number of factors. It was submitted by the respondent that no one consideration is decisive, but rather, the Court should adopt a holistic approach, weighing up the relevant matters to determine whether a conclusion can be reached that this Court is clearly inappropriate to hear these proceeding.

58 **58**
The matters relied upon by the respondent include that, at least in respect of the negligence claim, the relevant law will be Italian law. Whilst it was accepted that this is not necessarily decisive, it was submitted that it is a relevant consideration which is frequently of central importance.

59 **59**
In addition to that, the respondent relied on a number of factual matters. These include that the respondent's client and witnesses are based in Italy, it is incorporated in Italy, all of its employees are in Italy, it has no presence in Australia and any breach is alleged to have occurred in Italy.

60 **60**
Further factual considerations relied upon by the respondent were that the applicant shares directors with a related entity in Italy and the respondent may look at joining a third party, the pest controllers who they had commissioned, who are also based in Italy. It was the respondent's submission that the only factor connecting the claim with this jurisdiction is that the applicant's registered office is in South Australia.

61 **61**
An additional matter raised by the respondent was that the respondent has no assets in Australia and therefore any judgment that the applicant may obtain against the respondent will have to be enforced (to the extent this is possible) in Italy. It was however accepted by the respondent that this consideration of itself is not decisive but rather a factor that weighs into the mix and, further, it was accepted that proceedings are regularly issued against foreign corporations that do not have assets in this jurisdiction.

62 **62**
The final matter relied upon by the respondent was that there is an alternative tribunal available to hear the proceedings in Italy. The applicant did not accept, and challenged that submission.

The availability of an alternative tribunal – Expert Witnesses

63 **63**
Relevant to this issue, both parties have instructed and filed affidavits and reports from witnesses who purport to be experts in Italian law. Each of the experts was asked to provide an opinion as to whether «there are any bars which would prevent the claims being brought by San Remo Company Pty Ltd in Italy, having regard to the Breach of Contract Claim, Breach of CISG Claim and Negligence». The opinions of the experts are at odds.

64 **64**
The expert instructed by the respondent expressed the view «that there are no bars which would prevent those claims being brought by San Remo in Italy, and precisely at the Court of Nola, where the defendant has its registered office; it is my opinion that there are no bars for the Italian Judge to issue a decision on all the three causes of action pursued by San Remo: breach of contract, breach of CISG and negligence».[28]

65 **65**
The applicant's expert was given the opportunity to review the respondent's expert's report and an affidavit filed on behalf of the respondent.[29] His conclusion was «if this claim should be brought onto the Italian Jurisdiction it would likely be dismissed since it is not the appropriate Jurisdiction according to the Regulation 1215/2012 and consolidated National and European Jurisprudence».[30]

66 **66**
Neither witness was called to give evidence. Neither of the parties made submissions about whether I should prefer the evidence of one expert over the other. In such circumstances, I am unable to determine which witness, if either, I should rely upon. The respondent submitted that in those circumstances the evidence is neutral, and I should place no weight on it. The applicant however submitted that given the onus is on the respondent, and a necessary consideration is whether there is an appropriate alternative forum in which to commence proceedings, it is relevant that there is, at the very least, a question mark over whether this claim could be brought in Italy. There is force to that submission.

Considerations relied upon by the applicant

67 **67**
It was the applicant's submission that the respondent has not met the high bar set for demonstrating that this Court is clearly an inappropriate forum in which to institute these

[28] FDN 21, Expert Report of Alessandro Gravante at [28].
[29] FDN 25, Affidavit of Eve Danielle Thomson dated 31 October 2023.
[30] FDN 27, Expert Report of Fabrizio Fiorino at [29].

proceedings. To the contrary, it was submitted that there were a number of matters that collectively suggest that this jurisdiction is in fact the most appropriate forum.

68 **68**
The applicant submitted that whilst the respondent is based in Italy, the applicant is based in South Australia and that the damages have been incurred in Australia. The applicant also relied on the overarching supply contract between the parties, which is an Australian contract, drafted in English. It was the applicant's submission that the terms of that agreement suggest that any loss incurred by the applicant would be suffered in Australia. Counsel for the applicant summarised the situation in the following terms:[31]

> And so the suggestion that the only connection that this case has with South Australia is San Remo's registered office just ignores reality. These parties knew that San Remo was importing this pasta into Australia for sale in Australia and if it was not to be of merchantable quality, San Remo's losses would be incurred in Australia. We say that if you look at an important question in relation to the characterisation of the relationship between these parties it warrants the conclusion that the inference to be drawn is that the proper law of the contract was the law of South Australia. At the least it can't be said that that's not an entirely respectable argument that a trial judge is going to have to grapple with.

69 **69**
The applicant accepted the submission that the choice of law issue is a relevant factor, however, suggested that it should not be overstated.[32] It was submitted that the very reason that there is a choice of law doctrine is so that it can be invoked in a foreign forum and that litigation can be conducted with reference to the law of the foreign country.[33]

70 **70**
Having made that submission, whilst not conceding that the tort claim would necessarily be based on Italian law, it was submitted that it was least arguable that the law applicable to the breach of contract claims would be that of South Australia. Counsel for the applicant went on to reinforce the point, that it is not necessary to determine this question at this stage, but the fact that these issues exist for resolution strongly militates against the suggestion that South Australia is a clearly inappropriate forum.[34] Counsel for the applicant summarised their position in the following terms:[35]

> The proper law of the contact may or may not be of South Australia, it may be Italy. Even if we accept that the law applicable to the tort claim is Italian law, choice of law considerations are not decisive to the case not being conducted in South Australia. Overarching all of that, we say, which can be gleaned from the material it's abundantly clear in this case that San Remo was imposing a whole raft of requirements on its

[31] T77.
[32] Ibid.
[33] T72-73.
[34] T74.
[35] T88.

supplier and making it very clear that if those requirements were not met it would be making a claim for losses, consequential losses so described, which it would be likely to suffer as a result. All of those losses, to the knowledge of the parties, would be suffered in Australia or Australia and New Zealand.

Conclusion – forum non conveniens

71 **71**
The exercise of the discretion of whether or not to decline jurisdiction in this Court does not involve a weighing up of the factors placed by the parties on one side of the scales or another, in order to arrive at a view of whether it is more appropriate that all of the issues between the parties be tried in Naples, Italy or South Australia. Rather, the exercise requires that I am persuaded by the respondent that the Supreme Court of South Australia is a clearly inappropriate forum for trial.

72 **72**
For the reasons identified by the applicant, the respondent has not established that this Court is clearly an inappropriate forum in which to hear these proceedings; to the contrary, there are strong reasons why it is appropriate for these proceedings to be brought in this jurisdiction. It certainly has not been established that the continuation of the proceedings in this Court would work a serious injustice in that it would be oppressive or vexatious to the respondent. The applicant has a prima facie right to insist upon the exercise of the competent jurisdiction that has been regularly invoked. None of the matters raised by the respondent displace or abrogate that right.

4. Does the claim have insufficient prospects of success to warrant putting the respondent to the time, expense and trouble of defending the claim?[36]

73 **73**
In support of the application for a stay or dismissal of proceedings, the respondent also relied on r 4(2)(c) of sch 1, div 2, sub-div-1 that is that «the claim has insufficient prospects of success to warrant putting the person served outside Australia to the time, expense and trouble of defending the claim».

74 **74**
In making that submission, the respondent contends that there is an inconsistency between the pleaded case and the underlying evidence. The underlying evidence is that there was effectively an overarching agreement going back 20 years for the sale of pasta, and that orders were placed pursuant to that overarching agreement, however that is not pleaded in the claim. The case pleaded in the claim is much simpler; it is that orders were placed, money was

[36] Although r 4(2)(c) of sch 1, pt 1, div 2, sub-div 1 of the UCR was not expressly referred to in the interlocutory application, it was relied upon in argument in support of the broader submission that the claim should be set aside or dismissed.

paid, pasta was delivered and in this case the pasta was defective. On that basis it was contended that there is a disconnect between the evidence and the pleaded case.[37]

75 **75**
It was the applicant's response to this argument that effectively the respondent was seeking summary dismissal of the claim and contended that this is not the occasion for the Court to resolve complex factual and legal issues that surround a 20 year commercial relationship between the parties.[38]

76 **76**
Counsel for the applicant candidly foreshadowed that as things presently stand, an amendment to the pleadings is likely to be necessary however submitted that is «neither here nor there» as the UCR expressly accommodates «a free kick» amendment in civil proceedings.[39] It was the applicant's submission that it does not follow as a matter of logic or law, that the existence of an inconsistency between the existing pleadings and evidence contained in affidavit material means that the causes of action agitated in the pleadings do not enjoy sufficient prospects of success to permit the case to proceed. It was submitted that «[p]edantic pleading points as to the adequacy of particulars in a pleading obscure the task of the Court at this stage of the proceedings which is to consider in a holistic way whether it can be fairly said that the causes of action do not enjoy sufficient prospects of success. Plainly, in this case they do enjoy sufficient prospects of success».[40]

77 **77**
In *Ceneavenue Pty Ltd v Martin*,[41] in the context of considering an application for summary judgment pursuant to r 232(2) of the *Supreme Court Rules 2006* (SA) (as it was at that time), Debelle J discussed the approach to be taken in considering the question of whether «a claim or defence has reasonable prospects of success». His Honour said:[42]

> … The test in r 232(2) requires the court first to identify the issues to be tried and then to assess whether the claim or defence has reasonable prospects of success. In the case of an application for summary judgment by a plaintiff against a defendant, it is doubtful, therefore, whether there is a material difference between that test and the former test as it had been expressed in Fancourt. That is because the question whether there is a real question to be tried denoted that the task for the court was to determine whether the issues at the trial are real or fanciful and have reasonable prospects of success.
>
> The question whether there is no reasonable basis for the claim or defence must be determined in a summary way. It is entirely inappropriate for there to be a mini trial on that question. It must, therefore, be evident or obvious that the party defending the application for summary judgment has no reasonable basis for the claim or the defence.

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[37] T56.
[38] T63.
[39] T68.
[40] FDN 29, Written Submissions of the Applicant at [68].
[41] (2008) 106 SASR 1.
[42] Ibid at [81]-[82].

> While adversarial argument will assist in the determination of that question, the question should be capable of ready resolution without prolonged argument. A prolonged argument might suggest that there is a reasonable basis for the claim or the defence. Comparison with the requirements in rules in other jurisdictions providing for summary judgment confirms these propositions.

78 **78**

Adopting that approach, in my view it cannot be said that the claim has insufficient prospects of success to warrant putting the respondent to the time, expense and trouble of defending the claim.

79 **79**

I dismiss the respondent's interlocutory application.