Robb Evans of Robb Evans and Associates v European Bank Ltd

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Abstract

Robb Evans examines the ambit of exclusionary doctrines in private international law. Following a spectacular credit card fraud with a worldwide money trail, the US Federal Trade Commission sued under a US Act to recover on behalf of defrauded consumers. At first instance, the NSW Supreme Court held that this fell within the exclusionary doctrine against foreign "governmental interests"; the Court of Appeal then overturned the ruling, using a rather broader conception of "governmental interests" than Australian law previously recognised. This article examines that conception, and the inconsistency of Australian approaches to government-interest analysis within private international law, in the fields of exclusionary doctrines and choice of law.

1. Introduction

Exclusionary doctrines the common law world over have long precluded the enforcement in a forum of foreign penal and revenue laws.[1] However, the status of 'foreign public law' remains unsettled. The High Court has ruled that the phrase has no meaning in Australia and has approached the matter in terms of 'governmental interests'.[2] The ambit of those interests is yet to be determined authoritatively; whilst matters of national security are clearly encompassed, little else is certain.[3] *Robb Evans of Robb Evans and Associates v European Bank Ltd*[4] (hereinafter *Evans*) casts an interesting light on this question. It seemingly accepts as given an interpretation which extends well beyond questions of national security; in doing so, it highlights the inconsistency between the High Court's approaches to governmental interest analysis in choice of law and exclusionary doctrines. Finally, the practical approach of *Evans* may spur a less restrictive application of foreign law, principally in the areas of competition and securities law.

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1 *Government of India v Taylor* [1955] AC 491; *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301.

2 *Attorney–General (UK) v Heinemann Publishers Australia Pty Ltd (No 2)* (1988) 165 CLR 30 at 44–45.

3 Ibid.

4 [2004] NSWCA 82.

2. The Facts

Evans concerned the aftermath of a spectacular credit card fraud perpetrated by a Mr Kenneth Taves, which involved his dishonestly debiting 912 125 credit card accounts a total of over $US47.5 million. This violated the *Federal Trade Commission Act*[5] (hereinafter *FTC Act*). On 6 January 1999, the appellant, Mr Robb Evans, was appointed by a Californian court[6] under the *FTC Act* as receiver of the assets of Taves, his wife and several corporations controlled by them. Taves then began to move the fraudulently obtained money further from the US authorities' grasp. This included having European Bank Ltd, a Vanuatu corporation and the respondent, establish a Vanuatu corporation, Benford Ltd; $US7 527 900 was then deposited into Benford's account with European Bank in Vanuatu. European Bank then deposited the funds into an account in its own name with Citibank Ltd in Sydney.

Evans, as receiver of Benford, subsequently commenced proceedings in the Supreme Court of New South Wales to recover the funds from European Bank. NSW jurisdiction arose from the presence of the subject-matter of the dispute in NSW.[7] European Bank argued that the matter fell within the private international law exclusionary doctrine that courts may not entertain actions 'for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state';[8] it submitted that the *FTC Act* constituted such a law, and that the claim was therefore unenforceable.

3. At Trial

At first instance, Palmer J held that Evans' claim was not enforceable, as it was made 'on behalf of an agency of a foreign State for the direct enforcement of a public law of that State'.[9] He gave several reasons for this characterisation. Firstly, he held that the proceedings were brought by Evans not to enforce his personal rights or those of individual fraud victims, but in his capacity as an appointee of the Federal Trade Commission seeking to enforce the *FTC Act.*[10] Second, he held that the *FTC Act* was a foreign public law.[11] He then framed this in terms of the Australian approach in *Heinemann*, characterising the Act as one the purpose of which 'was to secure the "*governmental interests*" of the United States in regulating the manner of conducting commerce...so as to protect a certain class of the public, namely consumers'.[12] Alternatively, he classified the Act as a penal law, as the damages recoverable under it were not calculated by or limited to the victims' losses, but were based on the wrong-doers' profits.[13] Additionally,

5 15 USC 45 at 45(a)(1).
6 The United States District Court for the Central District of California, Western Division.
7 *Evans and Associates v Citibank Ltd* [2003] NSWSC 204 at para 8.
8 Id at para 45.
9 Id at para 82.
10 Id at para 83.
11 Id at para 84.
12 Ibid.
13 Id at para 86.

Palmer J held that Evans derived his status from the *FTC Act* and that this Act was legislated in the exercise of a prerogative of the United States Government.[14] Finally, he considered the decision he would have handed down, in the event of later overturning of his characterisation, and set forth other grounds for dismissing the claim unrelated to private international law.[15]

4. On Appeal to the NSW Court of Appeal

On appeal, Evans claimed that Palmer J had erred by characterising the *FTC Act* as either a foreign public law or a law enforcing foreign governmental interests, and that the exclusionary rule should not, therefore, apply. He also appealed aspects of the ruling which did not concern private international law. Spigelman CJ, with Handley and Santow JJA concurring, held that Palmer J had erred in his classification, but dismissed the appeal on grounds unrelated to private international law.

5. Reasons for the Decision

The major factor underlying the decision was a preference for substance over form with regard to exclusionary doctrines. This applied in two main areas: the characterisation of the *FTC Act* and its remedies, and the position of plaintiffs in proceedings under the Act.

Spigelman CJ first established his methodology for assessing the question. He considered the development of the public law exclusionary doctrine and its various formulations.[16] He established that governmental interests were not merely 'public interest[s] protected by legislation',[17] and that whether applying particular statutes would enforce such interests depended on the relevant provisions' scope, nature and purpose and the facts of the case.[18] He noted that this was a question of substance, not form.[19]

Spigelman CJ then considered the case at hand. The two main bases of his decision concerned the characterisation of the *FTC Act* and its remedies, and the nature of the plaintiff. First, the Act authorised several remedies, some of which 'would have the requisite governmental character'.[20] However, the damages sought here were, in substance, compensatory rather than penal; they would be divided amongst the fraud victims in recompense for their losses. Spigelman CJ noted that the damages recoverable were, as identified by Palmer J, based on the profits of the wrong-doers rather than the victims' losses, and were not co-extensive with or limited to the amount defrauded.[21] However, whilst Palmer J

14 Id at para 88.
15 Id at para 91.
16 Id at para 37.
17 Id at para 42.
18 Id at para 44.
19 Id at para 45.
20 Id at para 86.
21 Id at para 56.

took this as evidence of the penal nature of the Act and a basis for application of the exclusionary doctrine, Spigelman CJ, approvingly cited Cardozo J in *Loucks v Standard Oil Co of New York*[22] to the effect that penal classification, in the private international law sense, depended not on the method of calculating damages, but on their destination and purpose;[23] as the damages here were intended to compensate individuals, rather than penalise wrong-doers on behalf of the state, they were not penal in nature.[24] Where Palmer J looked to form, Spigelman CJ looked to substance; whilst Spigelman CJ noted that the Act allowed for surplus funds, or funds which could not be distributed to victims, to pass to the US Treasury, he held that, given the small proportion of the total defrauded available for recovery, no such award to the state would be made and no penal character would arise.[25] As the damages were, in substance, compensatory, and as they would be awarded to the fraud victims rather than a foreign government, Spigelman CJ held that the interests enforced were not governmental in nature, and that the exclusionary doctrine did not apply.[26]

The second concern surrounded the nature of the plaintiff. The *FTC Act* empowered only the Federal Trade Commission or its appointees to seek relief. However, Spigelman CJ again turned to substance rather than form. Applying the above analysis, he held that, whilst an appointee of a public body might be the nominal plaintiff, the interests being enforced were those of the fraud victims; the Act simply provided a practical means for victims to recover amounts too small to pursue individually.[27] This prevented the interests enforced from bearing a governmental character, and the exclusionary doctrine from arising.

6. Ambit of the Exclusionary Doctrine

Perhaps the most interesting issue arising from *Evans* concerns the scope of governmental interests and, accordingly, the exclusionary doctrine. Spigelman CJ appears to accept a rather wider interpretation of governmental interests than that previously contemplated in Australia.

The ambit of the exclusionary doctrine has recently begun to widen in Australia. It is well established that foreign revenue and penal laws will not be enforced in Australian courts.[28] Internationally, questions have arisen as to the application of the doctrine to a somewhat amorphous third category of 'foreign public law';[29] the nature and scope of the kinds of foreign public laws to which this would apply are matters which remain unresolved. Domestically, the High Court has formulated the question in terms of whether the application of the

22 120 NE 198 (1918).
23 *Evans*, above n4 at para 51.
24 Id at para 87.
25 Id at para 74–83.
26 Id at para 89.
27 Id at para 85.
28 *Heinemann*, above n2 at 40–2.
29 *Attorney–General (New Zealand) v Ortiz* [1984] AC 1 at 20–1 (Lord Denning MR); *Nanus Asia Co v Standard Chartered Bank* [1990] 1 HKLR 396.

relevant law would amount to the enforcement of the governmental interests of the foreign state, in the sense of powers peculiar to government.[30]

The High Court seems to have conceived of governmental interests in a narrow sense. In passing beyond the facts of the case, the joint judgment limited its discussion to other matters of national security.[31] This may indicate that the court intended only the most essential of state functions to fall within the exclusionary doctrine.

More recently, the Federal Court has suggested that the doctrine applies in matters which do not involve national security.[32] *Petrotimor* concerned a compensation claim arising from a purported granting by Portugal of proprietary rights over an area of the seabed outside Portuguese territory. Beaumont J held that the grant constituted a Portuguese exercise of sovereign authority outside Portuguese territory, and that upholding the agreement embodying it would amount to enforcing foreign governmental interests in Australia.[33] This created a possible extension of the scope of 'foreign governmental interests' beyond matters of national security.

Whilst *Petrotimor* may have broadened the interpretation of governmental interests beyond that suggested by *Heinemann*, both cases remained within the ambit of what might be called 'essential state functions'. A state will not exist for long without the ability either to determine its borders, as in *Petrotimor*, or to maintain its security, as in *Heinemann*. However, *Evans* seemed to accept almost as a given a much wider approach to governmental interests; Spigelman CJ cited academic discussions of matters such as price control regulations and anti-trust legislation.[34] Whilst peculiar to government, these do not reflect essential state functions; a state could well survive as a state without price controls or competition legislation. Spigelman CJ then continued:

> There are, however, many regulatory interventions...which do not have the requisite governmental quality.[35]

The contrast suggests that, whilst many interventions may not fall within the scope of governmental interests, many others may do so; when combined with his citations of more broadly-interpreted academic discussions, Spigelman CJ gave the impression that he conceives of governmental interests as potentially encompassing broader considerations than those previously held in Australia.

30 *Heinemann*, above n2 at 44.
31 Ibid.
32 *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* [2003] FCAFC 3.
33 Id at para 160.
34 *Evans*, above n4 at para 46; Peter Nygh & Martin Davies, *Conflict of Laws in Australia* (7th ed, 2002) at [18.14]; Lawrence Collins (ed), *Dicey and Morris on the Conflict of Laws* (13th ed, 2000) at [5–036].
35 *Evans*, ibid.

7. Broader Implications

Two main issues emerge from *Evans*. First, whilst there have been moves in many areas of law to unify doctrines under a small number of theories, applied consistently across their fields, *Evans* highlights theoretical conflicts within Australian private international law. Second, applying the distinction between form and substance in *Evans* may lead to a less restrictive approach to laws surrounding government regulatory authorities; the two most important appear to be competition and securities laws.

A. Internal Inconsistencies in Australian Law

One curious aspect of Australian private international law is highlighted by *Evans*: the seeming inconsistency between the guiding principles behind choice of law principles and exclusionary doctrines. *Heinemann* structured the Australian exclusionary doctrine in terms of governmental interests, and *Evans* has embraced this; by contrast, the High Court has rejected the influence of government interest analysis in its approach to choice of law.[36] Insofar as *Evans* widens the scope of governmental interests, it heightens the inconsistency between the approaches taken by the High Court within the sphere of private international law.

In *John Pfeiffer Pty Ltd v Rogerson*[37] and *Renault*, the High Court adopted the *lex loci delicti* as the applicable law for both intra- and inter-national torts. In doing so, it rejected both the 'proper law of the tort' and the possibility of a 'flexible exception'.[38] The High Court attacked the 'American "governmental influence"' analysis, which it saw as underlying the 'proper law of the tort' approach and influencing the English 'flexible exception'; it noted academic claims of its 'parochialism and systematic unfairness to defendants'.[39]

However, as Lindell notes,[40] this contrasts rather strongly with the approach of Australian courts to exclusionary doctrines. From their adoption by the High Court in *Heinemann*, to their approving citation in *Renault* as a means of systematising public policy reservations[41] and their furthering in *Evans*, governmental interests have formed a cornerstone of private international law exclusionary doctrines in Australia. Lindell is correct to point out the inconsistency of rejecting 'government interest' analysis in the context of choice of law and accepting it in the context of exclusionary doctrines; in widening the possible ambit of such interests, *Evans* further heightens the internal inconsistency of Australian private international law.

36 *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10 at para 63.

37 (2000) 172 ALR 625.

38 *Renault*, above n36 at para 63.

39 Ibid; Catherine Walsh, 'Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims' (1997) 76 *Canadian Bar Review* 91 at 110.

40 Geoffrey Lindell, '*Regie Nationale des Usines Renault SA v Zhang*: Choice of Law in Torts and Another Farewell to *Phillips v Eyre* but the *Voth* Test Retained for *Forum Non Conveniens* in Australia' (2002) 3 *Melbourne J of Int'l Law* 364 at 374.

41 Above n36 at para 53.

B. Competition and Securities Laws

Arguably the most relevant areas affected by *Evans* concern foreign securities and competition law. These fields frequently involve regulatory authorities or their appointees acting to secure compensation on behalf of a number of individuals or corporations. Here, the distinction emphasised by *Evans* between form and substance is likely to have its most significant application.

As Dodge notes, courts have often refused to enforce the competition laws of other countries.[42] The House of Lords has refused to enforce the American *Clayton Act*;[43] a long line of American authority has held such non-enforcement to be a factor when making *forum non conveniens* rulings.[44] The Federal Court has refused to void an acquisition which infringed even Australian law, on the grounds that its order would not be enforced in England.[45] In the wake of *Evans*, though, greater attention might be paid to the substance of claims over their form. Whilst Spigelman CJ did cite English academic work suggesting that anti-trust legislation might fall within the exclusionary doctrine, two considerations arise from his analysis. First, competition legislation would seem to form a part of the 'standard of commercial behaviour' he addressed;[46] there need not be an inherent characterisation of competition law as reflecting a governmental interest. Second, if it can be shown that the purpose of proceedings is to compensate victims rather than to punish wrong-doers, then the substance of those proceedings would involve the enforcement of private rather than governmental interests, even if a government body or appointee were acting as the nominal plaintiff.[47] The key criterion for this appears to be the destination of the money recovered; should it go to the individuals involved as compensation, rather than to a government as a penalty, then there seems no reason to characterise the interests enforced as governmental.

Similar considerations should apply to foreign securities laws. Securities legislation has often been characterised as penal in nature,[48] even where the plaintiffs are private individuals.[49] Perhaps the most significant contrast lies in *Nanus*, in which the US Securities and Exchange Commission sought disgorgement of profits payable to defrauded investors and a penalty payable to the

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42 William Dodge, 'Breaking the Public Law Taboo' (2002) 43 *Harv Int'l LJ* 161 at 185–7; see also Hans Baade, 'The Operation of Foreign Public Law' (1995) 30 *Texas Int'l LJ* 429 at 472–4; Felix Strebel, 'The Enforcement of Foreign Judgments and Foreign Public Law' (1999) 21 *Loyola of Los Angeles Int'l and Comparative LJ* 55 at 87.

43 *British Airways Board v Laker Airways Ltd* [1985] 1 AC 58.

44 See, for example, *Industrial Investment Development Corporation v Mitsui and Company* 671 F 2d 876 (1982); see also the discussion in Dodge, above n42 at 185–6.

45 *Re Trade Practices Commission and Australian Meat Holdings Pty Ltd* (1998) 83 ALR 299 (Wilcox J).

46 *Evans*, above n4 at para 84.

47 Id at para 83 and 87.

48 *Schemmer v Property Resources Ltd* [1975] Ch 273.

49 *McIntyre Porcupine Mines Ltd v Hammond* (1975) 119 DLR 3d 139, in which the Ontario High Court of Justice, whilst deciding the case on a different ground, suggested that prima facie it would follow *Schemmer*, ibid.

US Treasury.[50] Unsurprisingly, the Hong Kong court characterised the latter measure as penal in nature. However, even though the damages would go to individuals in recompense for private losses suffered, the court also ruled that the disgorgement sought was public in nature and would not be recognised.

By contrast, *Evans* emphasised substance over content; most relevantly here, it required an assessment of the nature and role of the plaintiff and the character and destination of the damages.[51] By *Evans*, there seems little reason to treat individuals who have been defrauded in violation of foreign securities legislation any differently from those who have been defrauded in contravention of the *FTC Act*; both establish a standard of commercial conduct and closely parallel common-law rights to recover money of which individuals have been defrauded.[52] Should a securities regulator seek, under a foreign statute, to recover on behalf of a group of defrauded investors, with the money to be returned to them, then *Evans* would lend support to their case.

8. Conclusion

Evans is an interesting case. On the one hand, its approach to the scope of the definition of 'governmental interest' is less than satisfactory; Spigelman CJ gives the impression that the doctrine might extend beyond essential state functions, but does little to structure his musing. However, his possible acceptance of a wider doctrine also highlights the theoretical inconsistency which has developed in Australian private international law since *Pfeiffer* and *Renault*; to the extent that further attention is focused on this matter, the decision is welcome. Finally, the most important and potentially enduring aspect of the judgment is its focus on substance over form and its practical application of the distinction. This should be welcomed as being better able to adapt to a multitude of possible circumstances than a less flexible approach; it should better serve the ultimate end of the law in doing justice between the parties.

50 *Nanus*, above n29.

51 *Evans*, above n4 at para 83 – 89.

52 Id at para 84.