

NSD 995 / 2005

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY

No. NSD / 2005

On appeal from a single judge of the Federal Court of Australia.

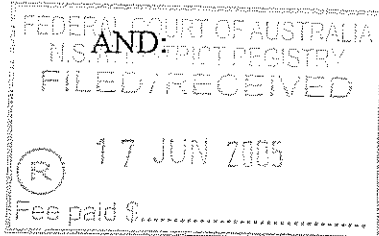
BETWEEN:

HUMANE SOCIETY INTERNATIONAL INC

Appellant

KYODO SENPAKU KAISHA LTD

Respondent



NOTICE OF APPEAL

(Order 52, rules 10(1) and 12)

The Appellant appeals from part of the interlocutory judgment of the Honourable Justice Allsop, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664, given on 27 May 2005 at Sydney, in proceedings No NSD 1519 of 2004 ("the proceedings"). The part of the judgment appealed from is the order that the application for leave to serve originating process on the Respondent in Japan be dismissed, pursuant to Order 8, rule 2 of the *Federal Court Rules 1979* ("the Rules").

The appeal is brought in accordance with leave granted under Order 52, rule 10(1) of the Rules by the Honourable Justice Allsop on 27 May 2005.

GROUND OF APPEAL:

The grounds of the appeal are that in the exercise of the Court's discretion pursuant to Order 8, rule 2 of the Rules:

Failure to consider prima facie right to exercise of jurisdiction

1. His Honour erred by failing to consider that a party who has regularly invoked the jurisdiction of a competent court has a *prima facie* right to insist upon its exercise and to have its claim heard and determined.

Failure to consider legislative intention to apply law to foreign nationals

2. His Honour erred by failing to take into account a relevant consideration, being the intention of the Parliament of the Commonwealth expressed in a relevant report of a committee of the Parliament, that, "as a matter of principle, Australian law be extended and applied to those foreign nationals in the Australian Antarctic

NOTICE OF APPEAL
Filed on behalf of the Appellant
Form 55, Order 52, rule 12

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Territory who are not otherwise exempt under Article 8(1) of the *Antarctic Treaty*.¹

3. His Honour erred by failing to take into account the legislative intention, evident in sections 5 and 224-230 of the *Environment Protection and Biodiversity Conservation Act 1999*, to prohibit the killing, injuring, taking, interfering with, treating, or possessing of whales by foreign nationals in the whole of the Australian Whale Sanctuary, including that part of the sanctuary adjacent to the Australian Antarctic Territory.

Erroneous consideration of political and diplomatic issues

4. His Honour erred by considering political and diplomatic issues incidentally associated with proceedings between private litigants, which are regularly brought, do not infringe the principle of international comity, and are consistent with Australian domestic law and international law.² The issues in the proceedings involve activities of a foreign corporation within Australian territory and can be resolved by the application of judicial and manageable standards, under Australian domestic law and international law, without requiring the court to review the transactions of any foreign state, any non-justiciable issues or political questions.

Consideration of irrelevant issues

5. His Honour erred in considering “a number of normative and judgmental premisses” as a basis for not applying Australian domestic law.³ Those issues are irrelevant to the operation of Australian domestic law and the exercise of discretion under Order 8, rule 2 of the Rules.

Erroneous finding that proceedings are futile

6. His Honour erred in finding that the proceedings are futile at the preliminary and *ex parte* stage of the application for leave to serve outside the Commonwealth. The question of whether the grant of any remedy in the proceedings is futile can only properly be dealt with at a later stage in the proceedings, with an understanding of the response (or refusal to respond) of the Respondent to the proceedings following service of the originating process.⁵ The finding that the proceedings are futile is, therefore, premature.
7. His Honour erred in finding that the making of a declaration would be devoid of utility beyond use as a political statement, by failing to consider, in circumstances of highly complex law and facts, that a declaration will clarify and determine the legal rights and obligations of the parties under Australian domestic law.⁶

¹ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Australian Law in Antarctica: The report of the second phase of an inquiry into the legal regimes of Australia's external Territories and the Jervis Bay Territory* (AGPS, Canberra, 1992), p 15, Recommendation 1.

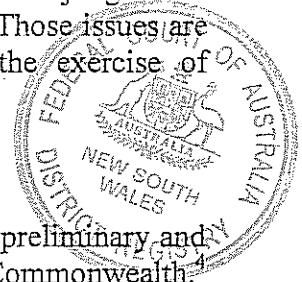
² *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [5]-[27], [31]-[32] and [35].

³ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [29].

⁴ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [33].

⁵ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510 at [70].

⁶ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 at [34].



8. His Honour erred in finding that the making of a declaration would be futile, by failing to consider whether the objects of the *Environment Protection and Biodiversity Conservation Act 1999*, concerning the protection of the public interest in the environment, warrants the court, in appropriate cases, exercising its power to grant declaratory relief to mark its disapproval of particular conduct contravening the Act.

ORDERS SOUGHT

The orders sought are that:

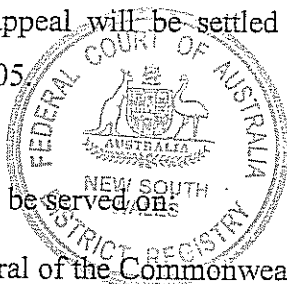
1. The appeal be allowed; and
2. Subject to amending the Statement of Claim to remove the words "purported to be" from paragraph [7], the Appellant be granted leave pursuant to Order 8, rule 2 of the Rules to serve the originating process on the Respondent in proceedings NSD 1519 of 2004 outside the jurisdiction.

To the respondent: Kyodo Senpaku Kaisha Ltd of 4-5, Toyomi-cho, Chuo-ku, Tokyo, Japan:

TAKE NOTICE:

- (a) Before taking any step in the proceeding you must enter an appearance in the Registry, unless you have already entered an appearance under Order 52, rule 7.
- (b) The papers in the appeal will be settled before the Registrar at Sydney on

1st July 2005
11:00am



This Notice of Appeal is to be served on:

The Attorney-General of the Commonwealth
c/- Australian Government Solicitor
50 Blackall Street
Barton ACT 2600

The Appellant's address for service is:

c/- Environmental Defender's Office NSW Ltd
Level 9, 89 York Street
Sydney NSW 2000

Date: 17 June 2005

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Ilona Millar
Principal Solicitor
Environmental Defender's Office NSW Ltd
Solicitor for the Appellant