

**AVON PRODUCTS PTY LTD v MAGRIT FALLS [2010] ACTCA 21 (31 August 2010)**

**APPEAL** – application for leave to appeal – application to be heard concurrently with appeal – appeal from determination by the Magistrates Court of the “State or Territory of connection” in a workers compensation claim – whether ACT is the Territory or State connected to the respondent’s employment – where a worker is required to work does not determine where the worker usually works – leave to appeal granted – appeal allowed.

**WORKERS COMPENSATION** – determination of “State or Territory of connection” – application of tests in s 36B(3) *Workers Compensation Act 1951* (ACT) – whether respondent “usually works” in the ACT – respondent usually works in the ACT and NSW – whether the respondent is “usually based” for the purposes of employment in the ACT – respondent has no “usual base” – “State or Territory of connection” to be identified by location of employer’s principal place of business.

*CDT v VAJ* (1998) 197 CLR 172

*Workers Compensation Act 1951* (ACT), Pt 4.2A, ss 36A, 36B, 36C, 36D, 36E

*Workers Compensation Act 1987* (NSW), ss 9AA, 9AB

*Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 74

**ON APPEAL FROM A SINGLE JUDGE OF THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY**

No. ACTCA 31 of 2009

No. SC 26 of 2009

Judges: Gray P, Penfold and Marshall JJ  
Court of Appeal of the Australian Capital Territory  
Date: 31 August 2010

IN THE SUPREME COURT OF THE ) No. ACTCA 31 of 2009  
) No. SC 26 of 2009  
AUSTRALIAN CAPITAL TERRITORY )  
)  
COURT OF APPEAL )

BETWEEN: AVON PRODUCTS PTY LTD

Applicant

AND: MAGRIT FALLS

Respondent

### O R D E R

Judges: Gray P, Penfold and Marshall JJ

Date: 31 August 2010

Place: Canberra

#### THE COURT ORDERS THAT:

1. Leave to appeal is granted.
2. The appeal is allowed.
3. The order of the Supreme Court made on 19 October 2009 is set aside.
4. The order of the Magistrates Court made on 11 February 2009 is set aside and in substitution for that order it is ordered that:  
“New South Wales was the State of connection for the employment of Ms Falls by Avon Products Pty Ltd for the purposes of her claim for workers compensation made in her application for arbitration dated 20 August 2008”.
5. There is no order as to the costs of the appeal or the proceeding before the Supreme Court.

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### REASONS FOR JUDGMENT

#### THE COURT:

#### *Introduction*

1. The applicant, Avon Products Pty Ltd (**Avon**) applies for leave to appeal from a judgment of the Chief Justice dismissing its appeal from a decision of Special Magistrate Cush.
2. On 18 November 2009, Gray P ordered that the application for leave to appeal be heard with the hearing of the appeal. The Court accordingly proceeded on the basis that the parties accepted that, if leave to appeal was required, it was necessary to determine whether the decisions were attended by sufficient doubt to warrant reconsideration on appeal and, if the decisions were wrong, the applicant would suffer substantial injustice.
3. The issue that falls for determination is whether, for the purposes of Pt 4.2A of the *Workers Compensation Act 1951* (ACT) (the **ACT Act**), the Australian Capital

Territory is the “the Territory or State” with which the employment of the respondent Ms Falls was connected when Ms Falls worked for Avon before the termination of her employment.

4. Avon markets a range of cosmetics and other goods. The products are generally not sold in shops but by agents engaged by Avon who sell direct to consumers in specified areas. Ms Falls was a District Sales Manager for Avon, and was responsible for a large number of agents working in a specified district in the Canberra region. At one stage her district had included areas in both the ACT and NSW, but for some years before her workers compensation claim was made she had been responsible for a district entirely within the ACT. Ms Falls had lived in the ACT during the early years of her employment with Avon, but some 12 years ago she moved to Jerrabomberra, a suburb of Queanbeyan to the east of the ACT. Most of Ms Falls’ working time was spent in the ACT supervising her agents, but a significant proportion of her time was spent on record-keeping and other administrative work which she did mainly at her home in NSW.

### ***Procedural background***

5. In June 2008, Ms Falls made a claim for compensation using a form provided by Avon’s insurer, CGU Workers Compensation (NSW) Ltd (CGU), after it was notified of the alleged injury by Avon. The form referred to the *Workers Compensation Act 1987* (NSW) (the **NSW Act**). CGU made payments of compensation to Ms Falls for a short time until they were ceased with effect from 17 June 2008 after a decision made by CGU under s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).
6. Under Australian legislation dealing with workers compensation, compensation is payable under the workers compensation legislation of the State or Territory that is

connected with the employment of the worker. In the ACT, the “Territory or State of connection” is (under s 36C or 36D of the ACT Act) determined in accordance with s 36B of that Act. A determination made by a court of another Territory or State under a provision corresponding to s 36C or 36D is recognised under the ACT Act (s 36E), and a determination made under the ACT Act will be recognised in other jurisdictions (see, for instance, s 9AB of the NSW Act). Ms Falls’ claims for workers compensation are accordingly to be determined under the law of the State or Territory with which her employment is connected.

7. In August 2008, Ms Falls applied to the Magistrates Court of the Australian Capital Territory for an arbitration in relation to Avon’s liability, through CGU, to pay workers compensation to Ms Falls under the ACT Act. Avon, again through CGU, responded to the arbitration application by seeking, amongst other orders, a declaration:

as to the state of connection pursuant to Section 36D of the *Workers Compensation Act 1951* that the ACT is not the state or territory of connection.

8. The issue of what was the appropriate “State or Territory of connection” came before Special Magistrate Cush. The resolution of that issue depended on the proper interpretation of s 36B(3) of the ACT Act. That subsection provides:

A worker’s employment is connected with –

- (a) the Territory or State where the worker usually works in the employment; or
- (b) if no Territory or State, or no single Territory or State, is identified by paragraph (a) – the Territory or State where the worker is usually based for the purposes of the employment; or
- (c) if no Territory or State, or no single Territory or State is identified by paragraph (a) or (b) – the Territory or State where the employer’s principal place of business in Australia is located.

9. Assistance in applying s 36B(3) is derived from s 36B(6) which provides:

- (6) In deciding whether a worker usually works in a Territory or State –

- (a) regard must be had to the following:
  - (i) the worker's work history with the employer over the previous 12 months;
  - (ii) the worker's proposed future working arrangements;
  - (iii) the intentions of the worker and employer;
  - (iv) any period during which the worker worked in a Territory or State (a *relevant place*) or was in a relevant place for the purposes of employment, whether or not the worker is regarded as working or employed in the relevant place under the workers compensation law of the relevant place; but
- (b) regard must not be had to any temporary arrangement under which the worker works in a Territory or State for a period of not longer than 6 months.

10. Section 36B(3) of the ACT Act (which is mirrored in s 9AA of the NSW Act) sets up a process for determining the State or Territory with which the worker's employment is connected that provides three different tests to be applied in determining that connection. The tests are not, however, applied together. Rather, if the first test provides an answer, then that is the end of the matter, but if not, the next test is applied and failing an answer emerging from that test, the third test determines the State or Territory of connection. This approach is significant, because it means that in applying each of the first two tests, it is not appropriate to look for the best answer in all the circumstances, but to assess whether there is a clear answer at all to the question posed by the relevant test. If there is no clear answer, it is necessary to move on to the next test.

### ***Proceedings before the Special Magistrate***

11. Before the Special Magistrate, argument about the resolution of the "State or Territory of connection" issue proceeded on the basis of the parties' agreement that Ms Falls worked in both the Australian Capital Territory and in New South Wales.

12. The dispute between the parties at that point centred on where Ms Falls was “usually based” for the purposes of her employment, within the meaning of s 36B(3)(b) of the ACT Act.

**The original evidence**

13. The evidence before the Special Magistrate consisted of an affidavit of Ms Falls, an affidavit of the solicitor for Avon, through CGU, and an affidavit from the Human Resources Manager of Avon. Some paragraphs of the last affidavit were not read. No cross-examination of any deponent occurred.
14. Ms Falls’ evidence included the following points:
- she was employed as a District Sales Manager and for the last 3 years of her employment was responsible for a district wholly within the Australian Capital Territory;
  - she spent 8 to 10 hours daily performing her duties, which were to recruit, train and motivate sellers, run sales meetings, run promotions in shopping centres, and make home visits and training calls;
  - she spent a further 2 to 3 hours each day performing book work at her home in Jerrabomberra in New South Wales, but also did some book work in the Australian Capital Territory.
15. The solicitor’s evidence included the following points:
- Avon is situated at an address at Brookvale, New South Wales and does not have an office in the Australian Capital Territory;
  - Ms Falls “conducts her business” from her home office in Jerrabomberra.
16. The Human Resources Manager’s evidence included the following:
- it was an important part of Ms Falls’ role to complete paper work and book work;

- Ms Falls worked both in the Australian Capital Territory and in New South Wales, being “required to work in both states” to complete her duties.
17. Notwithstanding the way the parties approached the matter before him, the Special Magistrate first considered whether Ms Falls usually worked only in the Australian Capital Territory, and his Honour decided that she did. His Honour held that her primary and essential duties were performed in the Australian Capital Territory and that her book work was performed at a place solely determined by Ms Falls. The Special Magistrate determined that, under s 36B(3)(a) of the ACT Act, the Australian Capital Territory was the appropriate Territory of connection.

### ***Proceedings in the Supreme Court***

18. Avon appealed to the Supreme Court. The appeal came before the Chief Justice. No party sought to adduce additional evidence on the appeal.
19. The Chief Justice dismissed the appeal. At [15] of his reasons for judgment, his Honour said:
- Clearly, the worker could be said “usually” to have worked on behalf of the employer, both in the ACT and NSW. The former being an essential matter, the latter being adventitious.
20. His Honour considered that the intent of s 36B of the Act was to identify one State or Territory as the State or Territory of connection. He considered it relevant that Ms Falls was only required to perform duties in the Australian Capital Territory and that Avon had no interest or control over where the book work component of her duties was performed.
21. The Chief Justice referred to examples mentioned in the explanatory memorandum accompanying the Bill which led to the enactment of the relevant provisions of the Act. Those examples included ways to resolve the question of where one’s usual employment is, based on some factual scenarios. The Chief Justice observed at [20]

that “the examples focus on the area or areas within which the employer ‘requires’ the worker to perform work”.

22. His Honour said that there was no evidence that Ms Falls was required to perform her work in New South Wales. At [50], the Chief Justice, in referring to the decision of the Special Magistrate, said:

... his Honour was right to apply as the test for the place where the worker usually works in the course of her employment ... that place or those places at which the worker was expressly or by necessary implication contracted to work. That is, required so to work by her contract with the employer.

### ***Proceedings in the Court of Appeal***

#### **Application to adduce additional evidence**

23. As McHugh, Gummow and Callinan JJ said in *CDT v VAJ* (1998) 197 CLR 172 at [111], in respect of a statutory power to admit new evidence on appeal:

The power to admit ... further evidence exists to serve the demands of justice.

24. Counsel for Avon submitted that Avon should be permitted to adduce additional evidence about the work performed by Ms Falls in New South Wales, specifically by way of a further affidavit from the Human Resources Manager dealing with the provision by Avon of a fax machine and a dedicated telephone line at Ms Falls’ home office. Counsel explained that this further evidence was not tendered before the Chief Justice, because it was expected that his Honour would address the Special Magistrate’s error in not having regard to the original affidavit by the Human Resources Manager to the effect that Ms Falls was “required to work in both States” (being New South Wales and the ACT).
25. Counsel for Ms Falls said that if the new evidence was admitted he would not want to cross-examine on its contents, but would wish to tender a new affidavit from Ms Falls. That affidavit confirms that Ms Falls had an Avon dedicated phone home line.

It does not take issue with the new evidence of the Human Resources Manager that Avon provided a fax machine for use by Ms Falls from her home office. Ms Falls and the Human Resources Manager, in their new affidavits, differ as to the extent of the work performed in Ms Falls' home office. However, none of the new evidence detracts from or strengthens the state of the evidence before the Chief Justice about where Ms Falls usually performed her work.

26. As neither party wished to cross-examine the deponents about the new evidence, and given that it was not seriously in contest, it is in the interests of justice to admit it.
27. On the total evidence as it now stands, and on the evidence before the Chief Justice, Ms Falls performed work in the Australian Capital Territory carrying out her sales manager functions in her Territory-specific area. She also performed work at her home office in New South Wales, primarily book work and planning.

**Where did Ms Falls usually work?**

28. We turn now to apply s 36B(3) of the ACT Act to the facts in evidence before us. As already explained, our first task is to consider whether the question posed by s 36B(3)(a) can be answered by identifying one State or Territory in which Ms Falls "usually worked". In Ms Falls' case she usually worked in the Australian Capital Territory and she also usually worked in New South Wales. It does not matter that Ms Falls could have chosen to do all her planning and all her book work in the Australian Capital Territory. As a matter of fact, she did not, and as a matter of fact her employer provided facilities in NSW that she routinely used in performing required parts of her work.
29. There is no gloss placed on s 36B(3)(a) which compels the Court only to consider where a worker is "required" to work. None of the factors which may aid a resolution

of where an employee usually works found in s 36B(6) deal with an employer's requirements. For current purposes the relevant guide most usefully discerned from s 36B(6) is subparagraph (a)(i), which refers to "the worker's work history with the employer over the previous 12 months". References to employer requirements contained in examples referred to in the explanatory memorandum to which the Chief Justice referred cannot detract from the plain meaning of s 36B(3)(a) of the ACT Act.

30. We have no doubt that Ms Falls was required to do the work that she happened to do in NSW, but that she was not required to do it in NSW. We also have no doubt that a requirement or the absence of a requirement as to where work is performed is not relevant; the test is where the work is done, rather than where it is required to be done or whether it is required to be done anywhere in particular.
31. In the current case the worker, as a matter of fact, usually worked in the Australian Capital Territory and also usually worked in New South Wales.

**Where was Ms Falls usually based?**

32. As no single Territory or State is identified in this case by s 36B(3)(a) of the ACT Act, the Court is required by s 36B(3)(b) to attempt to identify where Ms Falls was usually based for the purposes of her employment. The evidence before the Court shows no particular usual base. The fact that Ms Falls did some work from home does not necessarily constitute that place as her base for the purposes of her employment. Something more than a convenient place for part of her duties to be carried out is required before it can be said that her residence was her base in an employment sense. In the same way it might be said that while working in her sales district in the ACT her vehicle was her base. What would have particular relevance is the provision by the employer of a place from which the employee is expected to

operate. Accordingly s 36B(3)(b) does not appear to answer the question of what is the State or Territory of connection in the case of Ms Falls.

**Where was the employer's principal place of business?**

33. Section 36B(3)(c) of the ACT Act requires the Court to identify where Avon's principal place of business is located in Australia. As conceded by counsel for Ms Falls before the Chief Justice, under s 36B(3)(c) New South Wales is the relevant State of connection. That is because the head office of Avon and its principal place of business are located in Brookvale in suburban Sydney, New South Wales.

**Conclusions**

34. Having regard to the foregoing analysis, the Chief Justice, like the Special Magistrate before him, erred in considering that the Australian Capital Territory was the Territory of connection in respect of Ms Falls' employment with Avon by finding that the place where a person was **required** to perform duties was the place where the person usually worked. The legislation under consideration does not pose the question as to where work is required to be performed. It raises the question of where work is usually performed as a matter of fact and then, if necessary, where the worker is usually based and finally, if it remains necessary, where the employer's principal place of business is located.
35. Accordingly leave to appeal should be granted and the appeal allowed. The orders that have been made are set aside and the Court determines that New South Wales is the appropriate State of connection.

36. Avon did not seek any order for its costs before the Chief Justice or the Court of Appeal.

I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate: *Keegantle*

Date: 31 August 2010

Counsel for the Applicant:	Mr R Crowe SC
Solicitor for the Applicant:	Sparke Helmore
Counsel for the Respondent:	Mr W L Sharwood
Solicitor for the Respondent:	Maurice Blackburn
Date of hearing:	4 August 2010
Date of judgment:	31 August 2010