SUPREME COURT OF QUEENSLAND

CITATION:	*Clark v Ernest Henry Mining Pty Ltd* [2018] QSC 253
PARTIES:	**RICHARD JOHN CLARK** (applicant/respondent) **v** **ERNEST HENRY MINING PTY LTD (ACN 008 495 574)** (respondent/applicant)
FILE NO/S:	No 601 of 2018
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	7 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 2018
JUDGE:	Crow J
ORDER:	**1. Application filed by the plaintiff on 3 October 2018 be dismissed.** **2. Application filed by the defendant on 15 October 2018 be dismissed.** **3. Trial is set for the civil sittings in the Rockhampton Supreme Court commencing 18 March 2019.** **4. Liberty to apply.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – JURISDICTION – CENTRAL REGION – where the plaintiff suffered a personal injury in the course of employment 38 kilometres north-east of Cloncurry – where the plaintiff filed a claim in the Supreme Court of Queensland in the Central Registry of Rockhampton – where the plaintiff does not live in Rockhampton – where the accident did not occur in the Central Region – whether the Rockhampton Supreme Court is the appropriate venue for the hearing of this matter *Evidence Act* 1977 (Qld) *Supreme Court of Queensland Act* 1991 (Qld) s 54(6) *Uniform Civil Procedure Rules* 1999 (Qld) r 5, r 39 *Workers' Compensation and Rehabilitation Act* 2003 (Qld) *Anderson v Kenny* [2002] QSC 99, considered *National Mutual Holdings Pty Ltd & Ors v The Sentry Corporation & Anor* (1988) 19 FCR 155, considered

COUNSEL: M Horvath, with S Lamb for the applicant/respondent
R J Douglas QC for the respondent/applicant

SOLICITORS: Quinn & Scattini Lawyers for the applicant/respondent
Barry Nilsson Lawyers for the respondent/applicant

[1] On 27 November 2014, Mr Clark suffered personal injury in the course of his employment at the Ernest Henry Mine. The Ernest Henry Mine is an underground copper and gold mine located approximately 38 kilometres north-east of Cloncurry in north-west Queensland.

[2] It is apparent that Mr Clark has sustained a serious injury and has undergone lower back surgery on two occasions, 26 February 2016 and 13 April 2016. In addition to his physical injuries, Mr Clark has suffered from a psychological injury. As a worker, Mr Clark was required to and has complied with the pre-court processes pursuant to the *Workers' Compensation and Rehabilitation Act* 2003 (Qld). Pursuant to that regime, on 30 June 2018, a compulsory conference was attended, however the matter did not resolve.

[3] On 2 August 2018 Mr Clark filed a claim in the Supreme Court of Queensland in the Central Registry of Rockhampton. Mr Clark does not live in Rockhampton, his accident did not occur in the Central Region, and he, nor any of the witnesses anticipated to be called in the trial have any connection with the Central Region.

[4] By application filed 3 October 2018 Mr Clark seeks a declaration that the Rockhampton Supreme Court is the appropriate venue for the hearing of this matter. By cross-application filed by the defendant on 15 October 2018, the defendant applied for transfer of the matter from Rockhampton to Brisbane.

[5] Rule 39 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides:

39 Change of venue by court order

(1) This rule applies if at any time a court is satisfied a proceeding can be more conveniently or fairly heard or dealt with at a place at which the court is held other than the place in which the proceeding is pending.

(2) The court may, on its own initiative or on the application of a party to the proceeding, order that the proceeding be transferred to the other place.

[6] In *National Mutual Holdings Pty Ltd & Ors v The Sentry Corporation & Anor*[1] the Full Federal Court said:[2]

> "The factors which the Court is entitled to take into account in considering whether one city is more appropriate than another for interlocutory hearings or for the trial itself are numerous. The Court must weigh those factors in each case. Residence of parties and of witnesses, expense to parties, the place where the cause of action arose

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1 (1988) 19 FCR 155.
2 At 162.

and the convenience of the Court itself are some of the factors that may be relevant in particular circumstances.

The balance of convenience will generally be a relevant consideration, but not necessarily determinative of each case. A party commences a proceeding by filing an application in a particular registry of the Court. If that party or another party wishes to have the proceeding conducted or continued in another place he may apply to the Court for an order under s 48 or O 10, r 1(2)(f) or O 30, r 6 as the case may be. There is no onus of proof in the strict sense to be discharged by the party seeking to conduct or continue the proceedings elsewhere. It should be noted that the Court may exercise its powers under O 30, r 6 either on the application of a party or of its own motion. The Court must, however, be satisfied, after considering all relevant matters, that there is sound reason to direct that the proceeding be conducted or continued elsewhere. Its starting point is that the proceeding has been commenced at a particular place. Why should it be changed? On the one hand, if the party who commenced the proceeding chose that place capriciously the Court would be justified in giving no weight to the choice of place. At the other end of the scale, a proceeding may have continued for some time at the place of commencement with many steps having been taken there, for example, filing of pleadings and affidavits, discovery and inspection. Due weight would be given by the Court to such matters before directing that the proceeding should continue at a different place.

The balance of convenience is important, but its weight must vary from case to case. Ultimately the test is: where can the case be conducted or continued most suitably bearing in mind the interests of all the parties, the ends of justice in the determination of the issues between them, and the most efficient administration of the Court. It cannot and should not, in our opinion, be defined more closely or precisely."

[7] In *Anderson v Kenny*[3] Cullinane J said:[4]

"As to the appropriate venue, I think a fair statement of the position revealed by the evidence and summarised in the written outline of the applicant is as follows:

(a) All of the liability witnesses live in North Queensland except for the applicant, who of course seeks to have the matters heard in Townsville.

(b) There are a large number of medical witnesses in the actions. These are based both in North Queensland and in Brisbane. I think it likely that the evidence of at least some of these would be taken by telephone, as is becoming an increasingly common practice. I do not think there is any decisive preponderance one way or the other in this respect.

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3 [2002] QSC 99.

4 At [17] – [18].

> (c) It is clear that wherever the actions are heard, a number of people will have to travel and there will be some dislocation involved.
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> (d) Those opposing the application to transfer represent the Nominal defendant. I think, as was contended by those supporting it, that it is an important consideration that any additional costs associated with the action being heard in Townsville would impose less of a burden on a statutory defendant than the additional costs of litigation in Brisbane would have on the lay defendants who reside in North Queensland. The applicant, of course, would have some additional costs if the matter is heard in Townsville, but he seeks an order having that effect.
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> I regard this last mentioned consideration, that is, the burden which the lay defendants would have to bear if the matter was heard in Brisbane as a particularly important one in the present case. When I balance the various considerations I am satisfied that the most appropriate course to take is to order the transfer of the two Brisbane actions to Townsville, make the order for consolidation sought and order that all actions be heard together."

[8] In the present case, the correct starting point is to consider that the proceeding has been commenced in the Central Registry at Rockhampton and accordingly the onus is on the defendant to satisfy the Court in terms of r 39(1) that the proceeding can be more conveniently or fairly heard or dealt with in Brisbane.

[9] As the Full Federal Court pointed out, in exercising the discretion to transfer, it is necessary for an applicant to satisfy the Court that the proceeding may be more conveniently or fairly heard or dealt with in another place and that often requires consideration of the residence of the parties, the residence of witnesses, the expense to the parties, the place where the cause of action arose, and the convenience of the Court itself.

[10] As to costs, it is not disputed that the conduct of the trial in Rockhampton as opposed to Brisbane may cost each party an additional sum in the vicinity of $14,000 to $18,000. In terms of the quantum of the dispute at $2.8M, that is not a large amount. Nonetheless, it is still a relevant factor.

[11] Importantly, *Uniform Civil Procedure Rules* 1999 (Qld), r 5 provides:

> **5 Philosophy—overriding obligations of parties and court**
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> (1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
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> (2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.

(3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.

(4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.

[12] Expense to the parties, which must be minimised in accordance with r 5 favours transfer of the matter to Brisbane. With respect to convenience, no party nor any witness has any connection to Rockhampton and accordingly there is more convenience, in the general sense, to all parties and their witnesses for the matter to be conducted in Brisbane.

[13] The key point in the plaintiff's submission was the current availability and certainty of court dates in the Central Registry as opposed to the current uncertainty of court dates in the Brisbane Registry. It has been made plain upon the material that Mr Clark is suffering from severe personal and financial hardship and that it is very much in his interests to have the matter listed for trial as early as is possible. Currently there is an availability of dates, and certain dates in Rockhampton in January, February and March of 2019.

[14] The evidence in the present case[5] shows that there is current availability in Brisbane for a five day hearing in the weeks commencing 4 March, 11 March, 18 March and 1 April. The Civil List Manager in Brisbane, Mr Brittan, advises that as soon as a request for trial date is filed in Brisbane, the Resolution Registrar will invite the parties to a case management conference where trial dates will be allocated. The current availability in Brisbane may change depending upon the outcome of case management conferences in Brisbane in the next few months.

[15] Whilst there is certain and available dates in Rockhampton, there are potentially available dates in Brisbane at a point in time which may be at a similar time or several weeks later.

[16] Section 54(6) of the *Supreme Court of Queensland Act* 1991 (Qld) places upon the Central Judge the responsibility for the orderly and expeditious exercise within the Central Region of the jurisdiction of the Court in the Trial Division.

[17] Division 3 of Part 4 of the *Supreme Court of Queensland Act* 1991 (Qld) sets out the unique and historic decentralisation of the Trial Division of the Supreme Court within Queensland. It is important that the provisions of Division 3 be given their full force and effect.

[18] Currently there is only one matter listed in Rockhampton for the civil Supreme Court sittings commencing 18 February 2019 and only one matter listed in the three week civil sittings commencing 18 March 2019. There is therefore absolute certainty that the plaintiff's case may commence in the week of 18 March 2019 and judgment delivered within a matter of weeks from the hearing.

[19] There is a high workload and considerable pressure placed upon the Trial Division Supreme Court in Brisbane. The orderly and expeditious exercise within the Central

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5 See affidavit of Candice Heisler sworn 18 October 2018 exhibits CEH 43 and CEH 45.

Region of the Trial Division favours the retention of the plaintiff's case in the Central Region because there is currently an absence of civil work to fill the 18 March 2019 sittings.

[20] Presently it is more convenient for the Court to have the plaintiff's matter heard in Rockhampton rather than in Brisbane, although it is important to acknowledge that convenience to the Court in terms of the availability of dates for trial will vary considerably from time to time.

[21] With respect to costs and inconvenience occasioned to the defendants, the plaintiffs have made a number of concessions, namely that it is appropriate to use audio visual links or audio links for expert witnesses as provided for by Division 3(a) of Part 3A of the *Evidence Act* 1977 (Qld) and the utilisation of telephone video link evidence pursuant to *Uniform Civil Procedure Rules* 1999 (Qld) r 392 in respect of non-expert witnesses. That is likely to save both considerable costs and inconvenience.

[22] Furthermore, with respect to the additional costs, the plaintiff has demonstrated that although a trial in Rockhampton will cause additional costs to himself, in his precarious financial position, it is financially sound for the plaintiff to choose early trial dates in the Rockhampton Supreme Court. With respect to the defendant's additional costs, the plaintiff concedes that if the plaintiff is to succeed at trial, then any order for costs ought to be fashioned to exclude from any costs recoverable by the plaintiff, not only those additional costs incurred by the plaintiff in prosecuting his claim in Rockhampton, but also provide for a deduction for any additional costs borne by the defendant in litigating in Rockhampton rather than Brisbane.

[23] In order to provide certainty in the present case, it is appropriate that a trial date be set pursuant to *Uniform Civil Procedure Rules* 1999 (Qld) r 466 for the plaintiff's action to be heard in the sittings in the Supreme Court at Rockhampton commencing 18 March 2019. That is four and a half months hence, and I am assured by the parties, despite a recent amendment to the statement of claim, that the matter will be ready for trial in the new year. There ought to be no difficulty for the matter to proceed to trial in the sittings commencing 18 March 2019.

[24] The parties will have leave to apply in the event that any further court applications are required.

[25] The intent of Division 3 of Part 4 of the *Supreme Court of Queensland Act* 1991 (Qld) is that litigants will bring their proceedings in the Supreme Court region to which they or the cause of action have a close connection. The plaintiff has no connection with the Central Region and his cause of action occurred a little to the north of the Central Region at the Ernest Henry Mine. It would seem that ordinarily such an action would be transferred to the Brisbane or Northern Regions. However, it is a combination of the plaintiff's dire financial circumstances, the current definite trial dates in Rockhampton in the sittings commencing 18 March 2019 as well as the convenience to the Court which, on balance, favours the retention of the plaintiff's case in the Central Region.

[26] In terms of *Uniform Civil Procedure Rules* 1999 (Qld) r 39 and in the concessions made by the plaintiff, I am satisfied that, on the currently available information, Mr Clark's proceedings can be more fairly dealt with at Rockhampton. That does not infer that the plaintiff ought to have brought his application. As the above authorities make clear, it is

for a defendant who wishes to move a matter from a regional registry to bring an appropriate application. It is not for a plaintiff to bring a pre-emptory declaratory application. The plaintiff's application is dismissed as is the defendant's.

[27] With respect to the issue of costs, the plaintiff has shown that he is under financial hardship and had brought his proceeding in the Central Registry in order to obtain the earliest possible trial date. Whether the plaintiff would have obtained a comparably early date in Brisbane could only be determined following the forwarding of the request for trial date and the case conference with the Resolution Registrar in Brisbane. When the trial dates for other matters are set by the Resolution Registrar, it will then be known whether in fact the plaintiff would have received an earlier trial date in Rockhampton or Brisbane, an important factual matter relevant to costs. That the dismissal of both applications, the late concessions made by the plaintiff and the potential application of Part 12, Division 3 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), suggests in the present case that costs be reserved. I will receive submissions from the parties as to costs.

[28] I make the following orders:

1. Application filed by the plaintiff on 3 October 2018 be dismissed.

2. Application filed by the defendant on 15 October 2018 be dismissed.

3. Trial is set for the civil sittings in the Rockhampton Supreme Court commencing 18 March 2019.

4. Liberty to apply.