SUPREME COURT OF QUEENSLAND

CITATION:	*Dobinson Holdings Pty Ltd v Total Financial Solutions Australia Limited* [2019] QSC 69
PARTIES:	**DOBINSON HOLDINGS PTY LTD** (Plaintiff) **v** **TOTAL FINANCIAL SOLUTIONS AUSTRALIA LIMITED** (Defendant)
FILE NO:	No 631 of 2018
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	15 February 2019
DELIVERED AT:	Cairns
HEARING DATE:	15 February 2019
JUDGE:	Henry J
ORDER:	**1. The application is dismissed** **2. The defendant pay the plaintiff's costs of an incidental to this application to be assessed on the standard basis.**
CATCHWORDS:	COURTS AND JUDGES – COURTS – JURISDICTION AND POWERS – TRANSFER OF PROCEEDINGS TO OR FORM HIGH COURT AND BETWEEN COURTS – OTHER MATTERS – where the claim arose out of another proceeding pending in the New South Wales Supreme Court – where there was a strong jurisdictional connection to Queensland – where the Queensland Supreme Court had jurisdiction to hear the proceeding – where the defendant's reasons for the transfer bore only upon discretionary considerations – whether the Court ought exercise its discretion to transfer the proceeding

Jurisdiction of Courts (Cross-vesting) Act 1999 s 5

BHP Bulletin Limited v Schultz (2004) 221 CLR 400

COUNSEL:	C J Eylander for the applicant defendant M A Jonsson (QC) for the respondent plaintiff
SOLICITORS:	Thomson Geer for the applicant defendant Preston Law for the respondent plaintiff

HIS HONOUR: The plaintiff filed its claim against the defendant on the 26 November 2018. The defendant filed a conditional notice of intention to defend on 21 December 2018. On the same date, it filed the application now before me, for the transfer of the proceeding to the New South Wales Supreme Court.

The defence conditional notice announced the defendant disputed this Court's jurisdiction to entertain the claim, and gave these four reasons:

> *(1) The claim arises out of another proceeding pending in the Supreme Court of New South Wales and it is more appropriate that the claim be determined by the Supreme Court in New South Wales.*
>
> *(2) Further, the parties have agreed to submit the laws and jurisdiction in New South Wales. The plaintiff seeks relief pursuant to an agreement in writing made on or about 1 July 2014 between the plaintiff and the defendant, being the corporate representative agreement dated 1 July 2014 ("the agreement").*
>
> *(3) Clause 9.1 of the agreement provides –*
> *"(T)his, as in this agreement is governed by and construed in accordance with the laws of New South Wales, and the parties agree to submit to the non-exclusive jurisdiction of that State".*
>
> *(4) Further, and in the alternative, it is in the interest of justice that the claim be determined by the Supreme Court of New South Wales.*

None of those reasons expose why this Court does not have jurisdiction.

As to reason (1), the fact that there may be a related proceeding in another State may be relevant in an application for interstate transfer, but does not of itself remove this Court's jurisdiction to entertain the plaintiff's claim. The claim is an action in personam, so the Court's jurisdiction flows from the defendant's susceptibility to service, which plainly enough, has occurred, and the cause of action, itself, arises materially, at least, albeit not exclusively within Queensland. This Court, plainly, does have jurisdiction.

Reason (1) in the notice had another defect. It referred to "another proceeding pending in the New South Wales Supreme Court". There was no such proceeding yet filed. It had been foreshadowed ad nauseam by the defendant's correspondence historically, it seems, since 2015, but it was not filed before the plaintiff filed its claim in this Court. It was not even filed by the time of the filing of the conditional notice and this application. In fact, it was not filed until yesterday. No explanation for this delay is forthcoming in any affidavit material filed.

As to reasons (2) and (3), which relate to clause 9.1 of the agreement, the clause does not, on its terms, preclude a dispute arising from the agreement being adjudicated outside New South Wales. At the highest, the clause bears on discretionary considerations as to the application to transfer. It does not remove this Court's jurisdiction.

Finally, reason (4) on its terms, similarly, bears only on discretionary considerations.

It follows the conditional notice identified no proper basis for its challenge to this Court's jurisdiction. It also follows, that the defendant should have filed an unconditional defence. This is a subtle point, but it has relevance in a way I will develop further. Such a course would not have prevented its present application. I might add that the filing of an unconditional defence could easily have involved the joinder of related defendants named in the New South Wales action as defendants in a counterclaim, founded on the cause or causes of action yesterday filed in New South Wales. That heralds the point that the action filed yesterday in New South Wales could just as easily have been filed here too, indeed, filed as a counterclaim in the present matter. The upshot is the conditional notice's dispute as to jurisdiction is a furphy.

The present application falls to be approached on the basis this Court does have jurisdiction to hear the matter and that the material question is whether it is in the interests of justice that this action be heard by the New South Wales Supreme Court – see s 5 *Jurisdiction of Courts (Cross-vesting) Act 1999*.

In a helpful analysis of the operation of the Court's discretion in *BHP Bulletin Limited v Schultz* [2004] 221 CLR 400, Gleeson CJ, McHugh and Heydon, observed:

> *"There is a statutory requirement to exercise the power of transfer whenever it appears that it is in the interest of justice that it should be exercised. It is not necessary that it should appear that the first court is a "clearly inappropriate" forum. It is both necessary and sufficient that, in the interests of justice, the second court is more appropriate."*

The applicant defendant here places significant weight, and understandably so, on clause 9. That the parties agreed on the appropriateness of the New South Wales jurisdiction is a weighty consideration in support of it being in the interests of justice that the New South Wales Supreme Court is the more appropriate forum.

At first blush, it appeared to also be a weighty consideration that the New South Wales action raises issues which are broader than but inclusive of the issues in the Queensland action. However, on reflection, that is an entirely illusory consideration. I make plain that it is a very significant consideration and in the interests of justice that where there is a convergence of overlapping issues, it is preferable that the same Court determine all of them. There is, though, nothing stopping a Queensland Court determining all of the issues. The mere fact that only yesterday, finally, a claim was filed in New South Wales does not alter that reality. When one thinks about the sequence of events, it tends to cloak, in fact, that what should have happened here was that an unconditional defence should have been filed.

The furphy that this Court did not have jurisdiction was relied upon to avoid doing that. Had it been done, and if the defendant applicants are serious about their

position, they could easily have included amongst the filing a counterclaim and the joining of the additional two defendants that appear to have been enjoined in the dispute in the New South Wales action.

The defendant's machinations in not properly filing here, and now calling in aid their outrageously belated filing in New South Wales, ought not strengthen their position. It does not logically do so for the reasons I have just exposed.

The desirability then of a single Court determining all matters is, ultimately, a neutral consideration in the question of whether the New South Wales Supreme Court is more appropriate.

We return then to, really, the best point for the applicant defendant, being the clause 9 point. Despite it being a very weighty consideration, it seems to me that there are other considerations that erode its force to such a degree as to, through their collective force, tell against the application for transfer. I single out four points in particular in that regard.

Firstly, the plaintiff's materials show a strong jurisdictional connection in respect of the dispute at hand. The plaintiff's business was in Queensland. Whilst it evidently operated principally in the south-east corner of the State, the evidence also shows that it had an office in Cairns. The filed evidence also shows that the overall majority of the clients in question were based in Queensland.

The second point, in contrast to the first really, is that the defendant's materials about the jurisdictional connection to New South Wales are singularly uninformative. Whilst much was made by their counsel in submissions about the links with New South Wales, when one turns to the filed affidavit evidence, there is really little particularity about that. I am left to infer it is likely that there was activity connected with this matter in New South Wales. That is, the ASIC investigation, which is said to be in some ways relevant to the dispute between the parties, and dealing with that investigation, likely involved some activity in New South Wales. But this is not the sort of case in which evidence has been laid on of any specificity of compelling connection with New South Wales, particularly in the sense of that connection giving rise to a more logical reason to favour a connection with New South Wales as distinct from Queensland. I happily conclude there is a connection with both. The bottom line is the strength of the evidence and the detail of it is more in Queensland's favour. Whether that be because of the reality or simply a failure to lay on proper affidavit evidence on that theme by the defendant is not presently to the point, for I must consider the application on the merits of the material before me.

The third point is that the defendant did not file its New South Wales claim until yesterday. As already mentioned, no real explanation is forthcoming for this. It is obviously a powerful point in the plaintiff respondent's favour.

The fourth point, perhaps of less importance standing alone, is that there is nothing to suggest that the New South Wales jurisdiction would likely dispense with all of the disputes between the parties in a more timely way than Queensland. Indeed, on the materials laid on, there is reason to infer that it would be a more prolonged process there than here. As mentioned in argument, the Supreme Court, at least so far as the

Cairns jurisdiction is concerned, has the capacity to hear matters at relatively short notice, there being presently no meaningful civil trial backlog.

When I weigh up all of those considerations against the undeniable force of the consideration given rise to by clause 9, despite the force of clause 9 the preponderance of considerations ultimately weighs in favour of the rejection of the application for transfer.

My order is the application is dismissed. I will hear the parties as to costs.

...

HIS HONOUR: My orders are:

1. **The application is dismissed.**

2. **The defendant pay the plaintiff's costs of and incidental to this application to be assessed on the standard basis.**

I have signed the amended draft order to that effect to be placed with the papers.