SUPREME COURT OF QUEENSLAND

CITATION:	*Bartolo v Sunshine Coast Hospital and Health Service* [2020] QSC 213
PARTIES:	**JODY MARK BARTOLO** (plaintiff/respondent) **v** **SUNSHINE COAST HOSPITAL AND HEALTH SERVICE** (defendant/applicant)
FILE NO/S:	No 905 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	17 July 2020
DELIVERED AT:	Rockhampton
HEARING DATE:	13 July 2020
JUDGE:	Crow J
ORDER:	**1. The application is dismissed**
CATCHWORDS:	COURTS AND JUDGES – COURTS – JURISDICTION AND POWERS – TRANSFER OF PROCEEDINGS TO OR FROM HIGHER COURT AND BETWEEN COURTS – TO A LOWER COURT – where defendant seeks to have matter remitted to the District Court at Maroochydore pursuant to s 25(2) of the *Civil Proceedings Act* 2011 (Qld) – where claim exceeds jurisdiction of the District Court – where defendant proposed to consent to extend the jurisdiction of the District Court pursuant to s 72 of the *District Court of Queensland Act* 1967 (Qld) - where plaintiff had not given consent to extend the jurisdiction – where requirements to provide memorandum under s 72 of the *District Court of Queensland Act* 1967 (Qld) not complied with – whether proposed consent to enlarge District Court jurisdiction is a relevant consideration - whether discretion to transfer under s 25(2) of the *Civil Proceedings Act* 2011 (Qld) is enlivened PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – TRIAL – TIME AND PLACE – where proceedings commenced in Supreme Court central registry – where the cause of action arose in the Sunshine Coast – where the defendant seeks to transfer the proceedings to the Supreme Court at Brisbane – whether on the balance of the relevant factors the proceedings ought be transferred

Civil Proceedings Act 2011 (Qld), s 25
District Court of Queensland Act 1967 (Qld), s 72
Uniform Civil Procedure Rules 1999 (Qld), r 39

Clark v Ernest Henry Mining Pty Ltd [2019] 3 Qd R 136; [2018] QSC 253, followed
Eyres v Butt [1986] 2 Qd R 243, cited
Frasson v Frasson [2020] QSC 171, followed

COUNSEL: P Cullinane QC for the plaintiff/respondent
A S Mellick for the defendant/applicant

SOLICITORS: Macrossan & Amiet Solicitors for the plaintiff/respondent
McInnes Wilson Lawyers for the defendant/applicant

[1] By application filed 25 June 2020, the defendant seeks an order transferring the proceeding from the Supreme Court at Rockhampton to the District Court at Maroochydore, or, alternatively, that the proceeding be transferred from the Supreme Court at Rockhampton to the Supreme Court at Brisbane.

Transfer to District Court

[2] Section 25(2) of the *Civil Proceedings Act* 2011 (Qld) states:

> "(2) The Supreme Court may order that a proceeding pending in the Supreme Court for which the District Court, or a Magistrates Court, has jurisdiction be transferred to a court having jurisdiction."

[3] The plaintiff claims damages in the sum of $762,638.39, this is calculated as gross damages of $813,084.49 less a refund to WorkCover Queensland of $50,446.10.[1]

[4] In the present case, the difficulty facing the applicant is that s 25(2) is not satisfied; the discretion to transfer is only enlivened where the transfer is to an inferior court which "has jurisdiction". As per the Further Amended Statement of Claim ("FASOC"), the claim is not within the jurisdiction of the District Court.

[5] The affidavit filed in support of the application sought to argue that the proper assessment of quantum is well within the monetary jurisdiction of the District Court and in particular that the claim for damages for loss of economic capacity "is bold".[2]

[6] However, the test required, to enliven the discretion under s 25(2), is not whether the plaintiff's claim is bold or ambitious, but rather that the claim, as made, is within the jurisdiction of the inferior court; it is not.

[7] A further complicating factor is that the applicant has instructed its solicitor that "it will consent to the District Court having jurisdiction to hear and determine this proceeding."[3]

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1 Further Amended Statement of Claim filed 3 July 2020.
2 Paragraph 13(a) of the affidavit of Scott Falvey filed 25 June 2020.
3 Paragraph 14 of the affidavit of Scott Falvey filed 25 June 2020.

[8] Reference to such consent is made in light of s 72 of the *District Court of Queensland Act* 1967 (Qld) which provides:

> **"72 Consent jurisdiction**
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> (1) If both parties agree, by a memorandum signed by them or by their lawyers, that the District Court sitting in a particular district shall have jurisdiction to try any action which might be brought or any counterclaim which might be made in the Supreme Court, the District Court sitting at that place shall have jurisdiction to try the action or counterclaim, or both.
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> (2) The memorandum shall state that the parties signing it know that the action or as the occasion shall require, the counterclaim, is not within the jurisdiction of the District Court without such consent, and shall be filed with a registrar in the case of an action at the time when the plaint is entered and in the case of a counterclaim, at the time the defence and counterclaim is filed or at such later time as a judge on application made in that behalf, may allow."

[9] In *Eyres v Butt*,[4] Connolly J, with whom de Jersey J agreed, said:

> "To say, in a case such as this, that jurisdiction cannot be conferred by consent is apt to confuse the nature of the problem. Enlarged jurisdiction can indeed be conferred by consent because the statute so provides. The true question here is whether, the parties having consented in fact and the learned trial judge having approved their consent, and the action having thereafter been tried to judgment on the footing of that consent, the appellants are not estopped by their conduct from denying that s. 73 was strictly complied with…There is no question here of extending the jurisdiction of the District Court beyond that provided by the Act of Parliament by which it is constituted. That jurisdiction extends, if the parties agree, to any action which might be brought in the Supreme Court."

[10] In *Eyres v Butt*, the parties agreed to extend the jurisdiction of the District Court to $80,000 at a time when its limit was $40,000. At the commencement of the trial, counsel for the plaintiff and the defendant, after announcing their appearances, informed the trial judge that the parties had agreed to extend the jurisdiction of the District Court to $80,000, however the parties did not do so "by a memorandum signed by them or their solicitors". As such there was no compliance with s 73 of the Act.[5]

[11] In the present case, no memorandum in compliance with s 72 of the *District Court of Queensland Act* 1967 (Qld) has been provided or filed. Further, the applicant simply deposes that they *would* consent to a extending the jurisdiction of the

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4 [1986] 2 Qd R 243 at 250.

5 At that time s 73 of the *District Court of Queensland Act* 1967 (Qld) dealt with extending jurisdiction by consent. This is now dealt with by s 72.

District Court,[6] not that the parties had agreed to extending the jurisdiction. The respondent gave no indication that they would consent to have the District Court jurisdiction enlarged. Given the absence of a compliant memorandum and, in any event, the unlikeliness of the respondent's consent to such an enlargement, s 72 is irrelevant.

[12] Therefore, as the claim does not fall into the jurisdiction of the District Court, s 25(2) of the *Civil Proceedings Act* 2011 (Qld) is not enlivened. Accordingly, the application, insofar as the order sought for the transfer of the matter to the District Court at Maroochydore, is dismissed.

Transfer to Supreme Court at Brisbane

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

> **"39 Change of venue by court order**
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> (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.
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> (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."

[14] Recently, in *Frasson v Frasson* [2020] QSC 171, I said:

> "[37] Part 6 of the UCPR has been amended on several occasions, but particularly by amendments in 2010 and 2012. It may be seen from a combination of r 33 'a proceeding in a court may be started in any central registry of the court' and rr 34 and 35, that the requirement is imposed on a plaintiff or applicant to institute proceedings in a district registry with which the cause of action has close connection does not apply to a regional registry.
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> [38] Pursuant to s 65 of the *Supreme Court Act* 1991 (Qld), there is only one Supreme Court registry in Queensland, however, it has regional registries in Brisbane, Rockhampton, Townsville and Cairns, and district registries in other places where the Supreme Court sits. Accordingly, despite the change in both legislation and the UCPR, it remains correct to conclude, as de Jersey CJ and Thomas JA did in *Newman v Nilsen* that a plaintiff has a right to choose to commence his proceedings in a Brisbane, Rockhampton, Townsville or Cairns.
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> [39] At the time when Thomas JA published his reasons in *Newman v Nilsen*, concluding that 'the right of initial nomination has little intrinsic weight', r 49 provided that:
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> > 'The Court as constituted by judge or registrar may order the transfer of a proceeding to another registry.'

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6 Paragraph 14 of the affidavit of Scott Falvey filed 25 June 2020.

> [40] In the 2012 amendments to the *Uniform Civil Procedure Rules* 1999 (Qld), rules 42 to 49 of the UCPR were repealed. The new division 4 'Objection to and Change of Venue' consists of only four rules. Relevantly, r 48, provides for objection to venue for cases started at registries 'other than a central registry of the court' and r 39 which empowers the court to transfer the proceedings. The right of a plaintiff to choose the place to commence proceedings is enforced by r 38(1) of the UCPR.
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> …
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> [43] It can be observed that the broad and unfettered discretion pursuant to the former r 49 differs markedly from the provisions of r 39. Formerly under r 49, the court or a registrar had an unfettered discretion to transfer a proceedings to another registry. Under the current r 39(2), the court (not the registrar) has the discretion to order proceedings be transferred to another place, but only if the court 'is satisfied a proceeding can be more conveniently or fairly heard or dealt with at a place which the court is held other than the place at which the proceeding is pending'. The required satisfaction of the court casts an onus upon an applicant for transfer to positively persuade the court that the proceeding can be more conveniently or fairly heard or dealt with at another place.
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> [44] In *Kember v Carl & Anor* [2020] QSC 105, I said:
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> '[10] With reference to the decision of the full Federal Court in *National Mutual Holdings Pty Ltd & Ors v Sentry Corporation & Anor*, I said recently in *Clark v Ernest Henry Mining Pty Ltd*:
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> "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."'"
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> (Footnotes omitted.)

[15] As I noted in *Frasson v Frasson*,[7] a proceeding may be commenced in any central registry of the court. It is not necessary for a proceeding to have a "close connection" to the regional registry in which it is commenced. However, the location of the cause of action is a necessary consideration in exercising the discretion to transfer proceedings.[8]

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7 *Frasson v Frasson* [2020] QSC 171 at [37].

8 *Clark v Ernest Henry Mining Pty Ltd* [2019] 3 Qd R 136 at 139.

[16] Turning to the matters which ought be considered in transferring a matter,[9] and dealing with the relevant factors in reverse order, the convenience to the court itself is neutral in the present case. The proceeding is not sufficiently advanced so as to be ready for trial and there is no evidence as to whether a trial could be heard earlier in Rockhampton or in Brisbane.

[17] With regard to the cause of action, it arose at the Sunshine Coast, which is in the Southern Region,[10] which supports the application for transfer to Brisbane.

[18] As to the residence of the parties, the plaintiff currently resides in Airlie Beach and works at the Goonyella Riverside Mine at Moranbah; this supports the retention of the proceeding in Rockhampton. The defendant is located at Birtinya in the Sunshine Coast; this, conversely, supports transfer to Brisbane.

[19] The affidavit of Mr Paterson,[11] lists the witnesses which the respondent proposes to call. They are, *inter alia*:

(a) the plaintiff, who resides at Airlie Beach;

(b) the plaintiff's partner, who resides at Airlie Beach and cares for two young children;

(c) Tina Marree Pethebridge, a patient services attendant who lives and works in Mackay; and

(d) three personal service attendants who work at the Sunshine Coast University Hospital.

Mr Paterson deposes that he hopes the three personal service attendants from the Sunshine Coast University Hospital would give evidence by telephone or video link.[12]

[20] The respondent further proposes to call three experts in its case: Brendan McDougall, Constantino Giriat, and Dr Tony Ganko. All three will be required to give their evidence via telephone or video link. Mr Paterson also deposes that further evidence from witnesses is sought with respect to the maintenance and repair of "Select Patient Care trolleys", such trolleys being the device involved in the injury sustained by the plaintiff.

[21] Mr Falvey, for the applicant, sets out names of ten prospective witnesses that work at the Sunshine Coast University Hospital.[13] Each of the ten nominated witnesses are or appear to be employees of the defendant or independent persons employed by contractors. There is no reason to think that there would be a challenge to the credit of any of the ten potential nominated witnesses. Mr Paterson confirms that the plaintiff has no objection to any of the witnesses identified by Mr Falvey's giving evidence by telephone or video link.[14]

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9 *Clark v Ernest Henry Mining Pty Ltd* [2019] 3 Qd R 136 at 139.

10 *Supreme Court of Queensland Act* 1991 (Qld) s 53(3).

11 Paragraph 20 of the affidavit of Gene Christopher Paterson filed 13 July 2020.

12 *Evidence Act* 1977 (Qld) s 39R; Paragraph 20 of the affidavit of Gene Christopher Paterson filed 13 July 2020.

13 Paragraph 29 of the affidavit of Scott Falvey filed 25 June 2020.

14 Paragraph 22 of the affidavit of Gene Christopher Paterson filed 13 July 2020.

[22] The witnesses identified by Mr Falvey's affidavit are identified by name, occupation, and there is a brief description of the type of evidence likely to be sworn to by each witness.[15] It would appear that the evidence mostly, if not entirely, is uncontroversial. Accordingly, I conclude there is a high prospect that the vast majority, if not all, of the witnesses identified by Mr Falvey[16] will be called to give evidence by telephone. This conclusion is supported by the undertaking given to the court by the parties to proceed expeditiously[17] and aligns with the purpose of the UCPR to facilitate the just and expeditious resolution of the real issues in the proceeding at a minimum of expense.[18]

[23] Therefore, particularly in view of r 392 of the UCPR and s 39R of the *Evidence Act* 1977 (Qld), it is likely that the majority witnesses to be called by both the plaintiff and defendant will give their evidence remotely. This has the effect of rendering the residence of witnesses and any inconvenience imposed on them a matter of little consequence.

[24] However, this does not hold true for the evidence to be given by the plaintiff and his partner, Ms Swanton. The applicant has emphasised that the plaintiff's credit is in issue, particularly in relation to his pre and post-injury health status, accordingly, the plaintiff and Ms Swanton will need to give their evidence in person.

[25] Given that, it is my view that, with regard to the plaintiff and Ms Swanton (who cares for two young children), it is more convenient and less costly for them to travel from their residence at Airlie Beach to Rockhampton for the hearing of the trial. Therefore, on the issue of convenience and cost, I conclude it is more favourable to retain the matter in the Supreme Court at Rockhampton.

[26] In conclusion, I consider the relevant factor in the respondent's favour, to be that it is more convenient to the plaintiff and Ms Swanton, who are likely the only witnesses required in person, that the trial be held in the Supreme Court at Rockhampton as opposed to in Brisbane. Conversely, in the applicant's favour the cause of action did arise on the Sunshine Coast, in the Southern Region.

[27] On the balance of these factors, I conclude that the factors in favour of the respondent outweigh those in favour of the applicant.

[28] Accordingly, the application is dismissed.

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15 Paragraph 29 of the affidavit of Scott Falvey filed 25 June 2020.
16 Paragraph 29 of the affidavit of Scott Falvey filed 25 June 2020.
17 *Uniform Civil Procedure Rules* 1999 (Qld) r 5(3).
18 *Uniform Civil Procedure Rules* 1999 (Qld) r 5(1).