SUPREME COURT OF QUEENSLAND

CITATION:	*Fletcher and Ors v Fortress Credit Corporation (Australia) II Pty Limited and Ors* [2012] QSC 359
PARTIES:	**WILLIAM JOHN FLETCHER AND KATHERINE ELIZABETH BARNET AS LIQUIDATORS OF OCTAVIAR LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 107 863 436** (First Plaintiffs) **OCTAVIAR LIMITED (IN LIQUIDATION) ACN 107 863 436** (Second Plaintiff) **DAVID JOHN KERR AS LIQUIDATOR OF OCTAVIAR LIMITED (IN LIQUIDATION) ACN 107 863 436** (Third Plaintiff) v **FORTRESS CREDIT CORPORATION (AUSTRALIA) II PTY LIMITED ACN 114 624 958** (Defendant)
	WILLIAM JOHN FLETCHER AND KATHERINE ELIZABETH BARNET AS LIQUIDATORS OF OCTAVIAR ADMINISTRATION PTY LIMITED (IN LIQUIDATION) ACN 101 069 390 (First Plaintiffs) **OCTAVIAR ADMINISTRATION PTY LIMITED (IN LIQUIDATION) ACN 101 069 390** (Second Plaintiff) v **FORTRESS CREDIT CORPORATION (AUSTRALIA) II PTY LIMITED ACN 114 624 958** (First Defendant) **FORTRESS INVESTMENT GROUP (AUSTRALIA) PTY LIMITED ACN 111 940 713** (Second Defendant) **DAVID MARK ANDERSON** (Third Defendant) **CRAIG ROBERT WHITE** (Fourth Defendant)
FILE NO:	BS 3442 of 2010 BS 3135 of 2012
DIVISION:	Trial
PROCEEDING:	Civil
DELIVERED ON:	15 November 2012

DELIVERED AT:	Brisbane
HEARING DATE:	24 and 31 May 2012
JUDGE:	Fryberg J
ORDERS:	**Applications dismissed with costs.**
CATCHWORDS:	Corporations – Supervision – Courts – Jurisdiction under cross-vesting legislation and transfer proceedings – Transfer of proceedings – Interests of justice – Considerations of appropriateness – *Corporations Act 2001* (Cth), s 1337H Procedure – Courts and judges generally – Courts – Concurrent jurisdiction of different courts – Transfer of proceedings under cross-vesting legislation – In general – Exclusion by *Corporations Act 2001* (Cth), s 1337A(2) *Corporations Act 2001* (Cth), s 477(2A), s 588E, s 588FC; s 588FF, s 1337A(2), s 1337B, s 1337H *Jurisdiction of Courts (Cross-vesting) Act 1987*, s 5 *Acton Engineering Pty Ltd v Campbell* [1991] FCA 469; (1991) 31 FCR 1, followed *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* [2001] HCA 1; (2001) 204 CLR 559, considered *Bourke v State Bank of New South Wales* [1988] FCA 451 at [65]; (1988) 22 FCR 378, referred to *BP Australia Ltd v Brown & Ors* [2003] NSWCA 216; (2003) 58 NSWLR 322, referred to *Dwyer v Hindal Corporate Pty Ltd* [2005] SASC 24; (2005) 52 ACSR 335, followed *Dwyer v R-Jay Pty Ltd* [2007] SASC 115; (2007) 97 SASR 377, compared *Felton v Mulligan* [1971] HCA 39; (1971) 124 CLR 367, referred to *Greig v Stramit Corporation Pty Ltd* [2003] QCA 298; [2004] 2 Qd R 17, referred to *Hall v The Commissioner of Taxation* (2004) 51 ACSR 169; [2004] NSWSC 950, compared *Moorgate Tobacco Co Ltd v Philip Morris Ltd* [1980] HCA 32; (1980) 145 CLR 457, considered *Re Clivpee Ltd (in administration)* [2010] NSWSC 1215, considered *Ropat Pty Ltd v Scarf* [1999] 2 Qd R 102, compared *Westgate Wool Co Pty Ltd (In Liq)* [2006] SASC 372; (2006) 206 FLR 190, followed
COUNSEL:	B Coles QC and D Chesterman for the first and second plaintiffs K Downes SC and C Wilkins for the third plaintiff in BS 3442 of 2010 A Bell SC and M Luchich for the first and second defendants

SOLICITORS:	Henry Davis York for the first and second plaintiffs Thomsons for the third plaintiff in BS 3442 of 2010 Hopgood Ganim as T/A for Baker & McKenzie for the first and second defendants Dibbs Barker for the third defendant Brian Bartley and Associates for the fourth defendant

[1] **FRYBERG J:** There are two separate but closely related proceedings pending in this court. In each the corporate defendants have applied for the proceedings to be transferred to the Supreme Court of New South Wales.

The proceedings

The first proceeding

[2] Mr Fletcher and Ms Barnet ("the general purpose liquidators") are the liquidators of a company now called Octaviar Ltd ("OL"), having been appointed as such by an order of this court on 9 September 2009. They and the company (which is being wound up by this court) were the original plaintiffs in the proceeding. The defendant, Fortress Credit Corporation (Australia) II Pty Ltd ("Fortress Credit") is a secured creditor of OL. In and between May 2007 and February 2008, Fortress Credit provided a number of debt finance facilities to OL and its related companies. Four of those facilities are presently relevant.

[3] By an agreement dated 1 June 2007 Fortress Credit provided a $250 million loan facility to what is now called Octaviar Castle Pty Ltd ("OC"). OL guaranteed repayment of that loan and gave Fortress Credit a fixed and floating charge to secure its guarantee ("the OL charge"). On 29 February 2008 all monies owing under the agreement, namely $189 million, were repaid in full. Between the date of the agreement and the date of repayment, the agreement was formally amended three times.

[4] By a separate agreement dated 31 May 2007 Fortress Credit made a $53,500,000 facility available to Young Village Estates Pty Ltd, another associated company. OL guaranteed repayment under that facility ("the YVE guarantee"). As at the time of hearing over $82 million remained unpaid.

[5] By a deed dated 22 January 2008 OC and OL agreed with Fortress Credit that money owing under the YVE guarantee would be secured under the OL charge.

[6] Under an agreement dated 13 February 2008 OC paid $15 million to Fortress Credit in return for a right to participate in the latter's receipts under the YVE facility agreement and the security taken for that facility.

[7] The proceeding began with an application for a freezing order by the general purpose liquidators filed on 31 March 2010. That order was made. A statement of claim seeking relief under s 588FF of the *Corporations Act 2001* (Cth) was filed on 10 March 2011. Pleadings have closed. The issues to which the foregoing transactions give rise were summarised by counsel for Fortress Credit in these terms:

"12. The First Plaintiffs' case against Fortress is, in summary, that:

(a) Funds in the order of $20M received by Fortress were received as the result of an insolvent transaction (namely the 22 January Deed) which is said be an unfair preference and an uncommercial transaction and thus voidable pursuant to s 588FF(1) of the Corporations Act. This sum of approximately $20,000,000 comprises two payments received in December 2008 and February 2009 by receivers and manager appointed by Fortress to OL from OA (acting by its then administrators) which sum has since been held in an escrow account (**Escrow Account**) by Fortress. It is the same fund to which the liquidators of OA make claim in proceedings No. 3135 of 2012 in this Honourable Court (**OA Proceedings**);

(b) A payment of $15M in February 2008 received by Fortress was received as the result of an insolvent transaction (namely the Third Deed of Amendment and the OC FPA) which is said be an unfair preference and an uncommercial transaction and thus voidable pursuant to s 588FF(1) of the Corporations Act;

(c) Further and alternatively, funds in the order of approximately $35M received by Fortress were received as a result of an insolvent transaction (together, the 22 January Deed, the Third Deed of Amendment and the OC FPA) which is said be an unfair preference and an uncommercial transaction and thus voidable pursuant to s 588FF(1) of the Corporations Act.

13. Fortress has filed a Defence in these proceedings. Relevantly, for the purposes of this application, by that Defence it contends that:

(a) OL was not insolvent at the relevant times (24 January 2008 or February 2008);

(b) The funds in the Escrow Account were paid:

(i) As to $19,746,713.63, by the voluntary administrators of OL and, by virtue of s 451C of the Corporations Act, such payment is valid and effectual for the purposes of the Corporations Act and not liable to be set aside in the winding up of OL; and

(ii) As to $304,331.05, by the deed administrators of OL and, by virtue of s 445H of the Corporations Act, such payment having been made in accordance with the terms of the Deed of Company Arrangements for OL, the termination of the Deed of

> Company Arrangement does not affect its previous operation."

[8] Disclosure has been ordered and I assume that the orders have been complied with. On the question of solvency it was ordered that until further order it would be sufficient compliance by the plaintiffs for them to provide the documents briefed to any expert for the purposes of a solvency report. An independent expert has been retained and his report is expected soon.

[9] In December 2011, for reasons which do not presently matter, David John Kerr was appointed as a special purpose liquidator of OL, a major purpose of the appointment being to conduct these proceedings on OL's behalf. The appointment was made by the Supreme Court of New South Wales, apparently on the application of Mr Fletcher and Ms Barnet. It took Mr Kerr some time to become familiar with the matter. At the hearing on 31 May 2012 he applied to be included in the proceeding as a plaintiff and I so ordered. It remains to be determined whether Mr Fletcher and Ms Barnet should be removed from the proceeding.

[10] On 25 May Fortress Credit filed the present application for the transfer of the proceeding to the Supreme Court of New South Wales.

The second proceeding

[11] On 9 September 2009 Mr Fletcher and Ms Barnet were appointed by this court as liquidators of a subsidiary of OL, now called Octaviar Administration Pty Ltd ("OA"). That company, which is now being wound up by this court, acted as the treasury company for the Octaviar Group. On 3 April 2012 they and the company filed a claim in this court against Fortress Credit, Fortress Investment Group (Australia) Pty Ltd, David Mark Anderson and Craig Robert White. Messrs Anderson and White were directors of OA. As summarised by counsel for the Fortress companies, the proceeding involved two series of transactions.

[12] The first series related to the repayment of $189 million on 29 February 2008 already referred to. It is alleged that in and around that month OA and several other members of the group entered into a series of transactions culminating in the repayment on behalf of OC. The money is said to have come from the sale by OL of 65 per cent of its interest in an asset known as the Stella Business.

[13] The second series of transactions involved two payments totalling about $20 million received in December 2008 and February 2009 by receivers and managers appointed by Fortress Credit to OL. The money was paid by OA which at the time was under administration. It has since been held in an escrow account by Fortress Credit.

[14] The plaintiffs' claims were summarised by counsel for the corporate defendants:

> "9. The claims made in the Statement of Claim against the First and Second Defendants can be summarized as follows:
>
> (a) The first series of transactions, individually or in combination, were:
>
> (i) pursuant to s 588FB of the Corporations Act uncommercial transactions;

(ii) entered into at a time when OA was insolvent or alternatively OA became insolvent because of matters including the entry into the transaction(s); and

(iii) pursuant to s 588FE(3) and (4) was entered into during the 2 years ending on the relation-back day or, a related entity of OA was party to the transaction(s) and it was entered into during the 4 years ending on the relation-back day,

and pursuant to s 588F(1)(c) or (d) the First Defendant should pay to the First Plaintiffs the sum of approximately $189,000,000 and the monies held in the Escrow Account;

(b) The First Defendant and, or alternatively the Second Defendant:

(i) knew of breaches of duty under sections 181(1) and 182(1) of the Corporations Act by the Third and Fourth Defendants; and

(ii) were involved in contraventions of duties (or some of them) by the Third and Fourth Defendants; and

(iii) have thereby contravened s 181(1) and, or alternatively s 182(1) of the Corporations Act,

and ought pay compensation to OA under s 1317H of the Corporations Act;

(c) The First Defendant and, or alternatively the Second Defendant:

(i) Knew, or alternatively ought to have known of breaches of fiduciary duties and, or alternatively, the dishonest or fraudulent design of the Third and Fourth Defendants in executing certain documents and, or alternatively authorizing certain payments; and

(ii) Knowingly assisted in the Third and Fourth Defendants' breach of fiduciary duty and, or alternatively, dishonest or fraudulent design,

and in the premises is liable to account to OA under the second limb of *Barnes v Addy* and should pay to OA the sum of approximately $189,000,000 and the monies held in the Escrow Account;

(d) Further or in the alternative, the monies held in the Escrow Account were mistakenly paid or were paid without basis or for a consideration that wholly failed and the First Defendant is liable to make restitution of them.

10. The claims against the Third and Fourth Defendants are in respect of:

(a) breaches of duty under sections 181(1) and 182(1) of the Corporations Act; and

(b) breaches of fiduciary duties and, or alternatively, the dishonest or fraudulent design in executing certain documents and, or alternatively authorizing certain payments."

[15] For reasons which do not now matter, the corporate defendants filed a conditional notice of intention to defend. The present application for transfer was filed on 15 May 2012. On 24 May the court directed that they forthwith file an unconditional notice of intention to defend and extended time for filing defences to 15 June 2012. Presumably defences have now been filed. I am not aware whether pleadings have closed.

Jurisdiction

[16] Both proceedings involve claims brought under the *Corporations Act 2001* (Cth). Jurisdiction to entertain those claims is conferred on this court by s 1337B(2) of that Act. That jurisdiction is federal jurisdiction. It extends to the resolution of all controversies in the proceedings.[1]

The applications

[17] The applications were heard together. The plaintiffs, including Mr Kerr, opposed the transfer. Of the other defendants, Mr White supported it and Mr Anderson remained neutral. It was common ground that the applications should be decided identically, having regard to the large area of overlap of issues in the two proceedings. Indeed, the parties largely treated the matter as one application.

[18] Mr Fletcher and Ms Barnet submitted that each proceeding should be considered separately; that if either so considered would not be transferred, then neither should be transferred. I reject that approach. Once it is accepted that both proceedings must either remain in Queensland or be transferred to New South Wales, it is in my judgment necessary to adopt an overall approach, considering the merits in both proceedings at once.

[19] Both applications relied on s 1337H the *Corporations Act 2001* (Cth) as a source of the power to order transfer of the proceedings. One of them also invoked s 5 of the *Jurisdiction of Courts (Cross-vesting) Act 1987*, apparently because some of the relief claimed arose under the general law, not under the *Corporations Act*. In *Westgate Wool Co Pty Ltd (In Liq)*[2], Debelle J held that reliance on the latter legislation was "misconceived" in a case such as this; its operation was excluded by s 1337A(2) of the former Act. I agree. It is true that in many cases the outcome of a transfer application would not be different whichever legislation was invoked.[3] However the differences between the two schemes mean that identity of outcome is not inevitable. I shall proceed only under s 1337H.

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1 *Felton v Mulligan* [1971] HCA 39; (1971) 124 CLR 367*; Moorgate Tobacco Co Ltd v Philip Morris Ltd* [1980] HCA 32; (1980) 145 CLR 457; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* [2001] HCA 1; (2001) 204 CLR 559.

2 [2006] SASC 372 at [18]; (2006) 206 FLR 190 at p 194.

3 *Re Clivpee Ltd (in administration)* [2010] NSWSC 1215.

Transfer under the *Corporations Act*

[20] The Act relevantly provides:

> "**1337H Transfer of proceedings by the Federal Court and State and Territory Supreme Courts**
>
> (1) This section applies to a proceeding (the ***relevant proceeding***) in a court (the ***transferor court***) if:
>
> (a) the relevant proceeding is:
>
> (i) a proceeding with respect to a civil matter arising under the Corporations legislation; or
>
> (ii) …; and
>
> (b) the transferor court is:
>
> (i) …
>
> (ii) a State or Territory Supreme Court.
>
> (2) Subject to subsections (3), (4) and (5), if it appears to the transferor court that, having regard to the interests of justice, it is more appropriate for:
>
> (a) the relevant proceeding; or
>
> (b) …;
>
> to be determined by another court that has jurisdiction in the matters for determination in the relevant proceeding…, the transferor court may transfer the relevant proceeding or application to that other court.
>
> (3) … .
>
> (4) … .
>
> (5) … .
>
> (6) Nothing in this section confers on a court jurisdiction that the court would not otherwise have.
>
> (7) The fact that some references in this section to the interests of justice include the desirability of related proceedings being heard in the same jurisdiction does not of itself mean that other references to the interests of justice, in this section or elsewhere in this Act, do not include that matter.
>
> …
>
> **1337L Further matters for a court to consider when deciding whether to transfer a proceeding**
>
> In deciding whether to transfer under section 1337H, 1337J or 1337K a proceeding or application, a court must have regard to:
>
> (a) the principal place of business of any body corporate concerned in the proceeding or application; and
>
> (b) the place or places where the events that are the subject of the proceeding or application took place; and
>
> (c) the other courts that have jurisdiction to deal with the proceeding or application."

[21] It was common ground that the requirements of s 1337H(1) were satisfied, so that sub-s (2) applied. It was also common ground that the Supreme Court of New

South Wales is "another court that has jurisdiction in the matters for determination in the relevant proceeding".

[22] Some features of those sections should be noted. First, s 1337H(2) confers a discretion to transfer the proceedings; it does not mandate transfer.[4] Second, the existence of the discretion is conditioned upon it being "more appropriate" that the proceeding be determined by another court. Third, determination of whether it is more appropriate for that to happen requires regard to be had to the interests of justice, but that is not the only factor to which regard may be had in making the determination. Fourth, it has been held that once it has been decided that the discretion arises, regard must be had to the three factors set out in s 1337L in deciding whether to exercise it, notwithstanding the fact that those three factors are also taken into account in having regard to the interests of justice.[5] No party challenged that proposition in the present applications or suggested that consideration of them was impliedly excluded when having regard to the interests of justice.

[23] The first and most important matter to be considered is, have the applicants shown[6] that it is more appropriate for the proceedings to be determined in the Supreme Court of New South Wales than in this court.

[24] It has been held that the expression "the interests of justice" is to be interpreted broadly.[7] To a considerable extent that approach has been driven by the slightly different form of words found in the various cross-vesting Acts of the Commonwealth, the States and Territories. A wide range of factors has been embraced, many of them seemingly more closely related to convenience than doing justice. Such factors are plainly relevant to the question of whether the Supreme Court of New South Wales is a more appropriate forum. In the present context I see no need to shoehorn them into "the interests of justice". I shall refer to the factors relevant to comparative appropriateness without attempting to determine whether they should be categorised under the expression "the interests of justice". To that extent I reject the submission on behalf of Mr Fletcher and Ms Barnet that the outcome of the applications depends on whether the interests of justice require the proceedings to be transferred.

Factors relevant to appropriateness

[25] The various factors relied on by the parties may be identified broadly in the order in which they were addressed by the applicants.

Registered offices and principal places of business of corporate parties

[26] The registered offices of the two corporate defendants and their principal place of business are in Sydney. The registered offices of OL and OA are in Southport. Being in liquidation, they no longer carry on business.

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4 *Dwyer v Hindal Corporate Pty Ltd* [2005] SASC 24 at [14]; (2005) 52 ACSR 335 at p 339; contrast s 5(2) of the *Jurisdiction of Courts (Cross-vesting) Act 1987*.

5 *Ibid* at [16], p 339.

6 Compare *Ropat Pty Ltd v Scarf* [1999] 2 Qd R 102.

7 *Acton Engineering Pty Ltd v Campbell* [1991] FCA 469; (1991) 31 FCR 1; *Bourke v State Bank of New South Wales* [1988] FCA 451 at [65]; (1988) 22 FCR 378 p394.

Places of residence of parties who are natural persons

[27] Mr Fletcher resides in Brisbane. Ms Barnet and Mr Kerr reside in Sydney but nonetheless wish the proceedings to remain in this court. Mr Anderson resides at Gold Coast. Mr White resides in Brisbane but nonetheless wishes the proceedings to be transferred.

Location of creditors

[28] The general purpose liquidators have identified 21 unsecured creditors of OL. Ten of these, with debts totalling more than $1.628 billion are in Queensland and four, with debts exceeding $5 million are in New South Wales. The committee of inspection (which foreseeably could have a role to play in the litigation[8]) is based in Queensland. The creditors in Queensland include the petitioning creditor, the Public Trustee of Queensland. The Public Trustee (who was originally named as a person to be served with the application in the first proceeding) strongly opposes the transfer, so do the liquidators of related companies which are creditors admittedly owed $465 million by OA and over $921 million by OL, and so does Wellington Capital Ltd, a creditor claiming over $206 million. Those creditors are among the 10 in Queensland. None of the four New South Wales creditors has expressed a view about transfer in the evidence.

Where events took place

[29] Many of the relevant documents referred to in the statement of claim were executed by the Fortress defendants in Sydney; correspondence from and to those defendants was sent and received by them in Sydney; and at least some payments were received in Sydney. On the other hand it may be inferred that companies in the Octaviar Group executed documents in Gold Coast, correspondence from and to those companies was sent and received in the same city and that is where relevant payments were instigated.

Related proceedings – application for an extension of time for the second proceeding

[30] An essential element of the cause of action under s 588FF in the second proceeding is the establishment of the relation-back day. The plaintiffs allege that date to be 3 October 2008. If that be correct then time for commencing the second proceeding would have expired on 3 October 2011. To overcome that difficulty, the general purpose liquidators successfully applied to the Supreme Court of New South Wales on 19 September 2011 for an extension of time until 3 April 2012. The second proceeding was commenced on the latter date. The defendants have applied to the Supreme Court of New South Wales to discharge the order in so far as it applies to them.

[31] For present purposes it may be assumed that the application will not be successful unless appealed to the High Court. It appears that the Fortress defendants are prepared to take that course:

> "What is significant, your Honour, is not simply the fact that the extensions of time were sought in New South Wales and what the

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8 *Corporations Act 2001*, s 477(2A).

> general purpose liquidator said to the Supreme Court on that occasion, but what's also significant is there is a challenge to the extension-----
>
> HIS HONOUR: Yes, I was-----
>
> MR BELL: -----which will be heard in New South Wales, and that picks up the-----
>
> HIS HONOUR: And which I think is likely to go to the High Court, I was told last time.
>
> MR BELL: That's so. So that-----
>
> HIS HONOUR: But that will delay things wherever the matter is heard.
>
> MR BELL: Well, quite, and if - quite. But it points to, in a sense, the - for reasons entirely dictated by the general purpose liquidator's decision to make that application in New South Wales, the fate of the grant of the extension and an important aspect of the OA proceedings will be determined in New South Wales. Ultimately that will go up the line.
>
> HIS HONOUR: Well, I mean I gather from what I was told last week that it depends upon a resolution of the differential views of the-----
>
> MR BELL: That's so.
>
> HIS HONOUR: -----Court of Appeal there and here.
>
> MR BELL: That's so."[9]

That submission is probably correct. It means that the trial of the combined proceedings is likely to be substantially delayed, wherever they may be heard.

[32] The general purpose liquidators' conduct in making the application in the Supreme Court of New South Wales demonstrates their willingness to litigate in that forum when they perceive an advantage in doing so.

Related proceedings – other proceedings alleging voidable transactions

[33] In early April 2012, Mr Fletcher and Ms Barnet commenced 15 proceedings in the Supreme Court of New South Wales against persons unrelated to the Fortress defendants, alleging that those persons were beneficiaries of voidable transactions entered into by either or both OA and OL. In each of those proceedings the plaintiffs have alleged that OA and/or OL was insolvent on dates ranging from 8 January 2008 through to 13 May 2008. The evidence does not disclose whether those allegations were denied. However two of those proceedings have already been discontinued and there are ongoing negotiations for the settlement of five others. The likelihood that the remainder will proceed to a contested hearing is unknown; the parties might be prepared to follow the outcome in the present proceedings since all of the proceedings are smaller in scale, value and complexity than the present proceedings. No steps have been taken in the Supreme Court of New South Wales for having the cases managed in any coordinated or amalgamated fashion.

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[9] The cases cited by counsel were *Greig v Stramit Corporation Pty Ltd* [2003] QCA 298; [2004] 2 Qd R 17 and *BP Australia Ltd v Brown & Ors* [2003] NSWCA 216; (2003) 58 NSWLR 322.

[34] In the present proceedings insolvency on 24 January 2008 and in February 2008 is in issue.

[35] There is no evidence as to whether the defendants in the 13 remaining proceedings would prefer *those* proceedings to be heard in Brisbane or Sydney if they proceed to trial; nor does the evidence disclose enough about those proceedings to form a view on whether they should be transferred to the Supreme Court of Queensland. In terms of where they carry on business, that question is fairly evenly balanced.[10] Three are against national firms of solicitors or accountants and one is against the Commissioner of Taxation. Three are against what seem like relatively small Queensland companies, two of which claim to be creditors. One of those two, Wellington Capital Ltd, opposes the transfer of the present proceedings to Sydney. One is against a Sydney company (Mirvac Funds Management Ltd). One is against a New Zealand company. The evidence does not disclose where the remaining four carry on business, although two of them, affiliates of Grant Samuel and JP Morgan respectively, have well-known names.

[36] The Fortress defendants submitted that there would be a high degree of commonality in the evidence considered in the present proceedings and that considered in the other proceedings. They submitted that, assuming solvency was in issue in the proceedings, it would be desirable for a single common hearing to take place on the solvency issue. They pointed out that Ms Barnet had made the same submission on the application for an extension of time, and in that application, it had been accepted by the court. On the other hand, the general purpose liquidators submitted that the evidence did not demonstrate the existence of any genuinely related proceedings; that the absence of any freezing order in the New South Wales proceedings meant that they would probably proceed at a more leisurely pace than the existing proceedings in Queensland; and that the number of parties and proceedings might well impose serious logistical difficulties in managing the cases together. The present proceedings would be resolved more quickly if they were not co-managed with the New South Wales proceedings. As to the suggestion that there be a common hearing on the insolvency issue, they submitted that once insolvency was proved in one proceeding, s 558E(8) of the Act would obviate the need to prove it in other proceedings even if it were in issue.

The litigation funding application and the application to appoint Mr Kerr

[37] In February and March 2011 Mr Fletcher and Ms Barnet applied to the Federal Court in Sydney for approval of certain litigation funding arrangements which were likely to extend for more than three months. In December 2011, they applied to the Supreme Court of New South Wales for the appointment of Mr Kerr as a special purpose liquidator. Again, the Fortress defendants submitted, they had no difficulty litigating in Sydney when it suited them.

Oral examinations

[38] A considerable number of witnesses residence in New South Wales have been orally examined in Sydney at the instigation of Mr Fletcher and Ms Barnet. The examinations were conducted by counsel not engaged in the present proceedings.

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[10] See ex JBD1, p 5 and ex BEH-2, pp 187-191.

Residence of witnesses

[39] It is difficult at this early stage to identify who might be required as witnesses at the trial. The Fortress defendants have identified as best they can some 15 non-expert witnesses who are regarded as potential witnesses of fact. Seven of them reside in Sydney and three in or near Brisbane. Travel between Brisbane and Sydney is, of course, simple. Other potential witnesses reside in neither city. The expense involved in travel and accommodation for witnesses is unlikely to be large by comparison with other costs incurred in the litigation, in whichever city the trial occurs.

Location of documents

[40] The documents of OL and OA are kept at a document management company in Brisbane. Those of the Fortress defendants are held by their solicitors in Sydney. Both sides maintain electronic databases of the documents.

Location of legal representatives

[41] The solicitors for Mr Fletcher and Ms Barnet work in the Sydney office of a firm which has a presence in both Sydney and Brisbane. Their counsel come from both the Sydney and Brisbane bars. The solicitors for the Fortress defendants are only in Sydney, but the firm is a large multinational firm. Their senior counsel comes from Sydney and junior counsel from Brisbane, but that is a recent development; until recently they have been represented by senior counsel from Brisbane. The Fortress defendants' interest in having the proceedings transferred to Sydney appears to coincide with their engagement of senior counsel from Sydney. The solicitor for Mr Kerr works in the Brisbane office of a firm which operates in both Sydney and Brisbane. Mr Kerr's counsel come from the Brisbane bar and his senior counsel has been associated with the proceedings for a long time. Her familiarity with the matters is of some importance, given Mr Kerr's limited involvement. Both Mr Anderson and Mr White have Queensland solicitors; neither has yet engaged counsel.

The more natural forum

[42] The general purpose liquidators submitted that the venue for which they contended was the more natural forum for the proceedings. They based that submission on the proposition that the proceedings have a greater profile in and connection with Queensland than with New South Wales.

Forensic advantage or disadvantage

[43] No party submitted that the choice of venue would confer any forensic advantage or disadvantage on any litigant, apart from the question of the freezing order[11]. Counsel for the Fortress defendants seemed at one point inclined to extol the virtues of the *Evidence Act 1995* (NSW), but upon reflection abandoned that approach.

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11 Paragraph [36].

Evaluation of factors

[44] It is trite to observe that the weight to be given to the various factors referred to above depends upon how those factors affect the particular case. The two proceedings the subject of the applications before me seek to recover very large amounts of money. Experienced (and no doubt expensive) commercial lawyers are acting for the corporate parties and the liquidators. The trial is likely to take weeks rather than days. Plainly it will be expensive, even if it is run with the maximum of efficiency and care. Factors affecting cost need to be evaluated in that context.

Cost and convenience

[45] So far as it goes, the evidence suggests that a trial in Brisbane may require a few more witnesses from Sydney then a trial in Sydney would require from Brisbane. Whether any of those witnesses could appear by video link is unclear. At this early stage, the position is understandably uncertain. The number of such witnesses will be relatively small and it is not unreasonable to assume that accommodation costs in Brisbane will be lower than those in Sydney for those who must appear in person. Travel and accommodation costs are likely to be small by comparison with the total costs of the litigation. To my mind witness costs are a minor factor.

[46] The cost of having lawyers attend away from their home city is likely to be rather greater, but again is likely to be reflected in travel and accommodation expenses. It is understandable that the major parties to the litigation do not wish to change solicitors, given that the existing solicitors are familiar with much of the material. (I include the solicitors for Mr Kerr in this, although obviously they have been involved for a shorter time than the solicitors for the general purpose liquidators and for the Fortress defendants.) However the firms are either national or multinational firms which I assume are experienced in litigating in numerous different jurisdictions. It is true that the solicitors for the Fortress defendants do not have an office in Brisbane, but this has not hitherto been seen as a problem. Counsel are even less of a problem. Once a venue is determined, it is open to the parties to engage local counsel. Both Sydney and Brisbane have adequate numbers of experienced commercial barristers quite capable of handling these proceedings. The matter has not reached the stage where the barristers have prepared for trial. In the context of this litigation it seems to me that the issues of expense of and convenience to the lawyers are of minor weight, and cut both ways.

[47] As far as expenses of and convenience to the parties is concerned, the balance favours a trial in Sydney. The general purpose liquidators have shown that they are quite ready to litigate in the Supreme Court of New South Wales when it suits them.

[48] The documents of OL and OA are kept in Brisbane and those of the Fortress defendants in Sydney. No issue was identified on the pleadings which required the production of original documents. Both sides maintain electronic databases of the documents and it is reasonable to assume that these will be employed in the trial. The location of documents is therefore neutral.

Related proceedings

[49] At the forefront of the submissions on behalf of the Fortress defendants was that referring to the existence of the 15 other recovery proceedings commenced in the

Supreme Court of New South Wales in April this year. The parties' submissions are outlined above.[12] At the heart of the Fortress submissions was the proposition that if the present proceedings were transferred to Sydney a common hearing could take place for the resolution of the issue of insolvency in them and the other New South Wales proceedings. That, it was said, would save much time and expense.

[50] I am not persuaded that such a common hearing is shown to be needed. Experience teaches that many defendants in these sorts of proceedings are content to let other litigants make the running on the expensive question of solvency. Even assuming that question will be in issue in those of the New South Wales proceedings, if any, which go to trial, that might be the attitude adopted by the defendants, having regard to the value and complexity of the claims against them.

[51] It is however foreseeable that a common hearing *might* become necessary. Such a hearing might be required not so much to save time and expense as to afford natural justice to persons affected by any finding in the present proceedings; or to defendants in the present proceedings who might be affected by any finding in one of the New South Wales proceedings. It must be remembered that insolvency is not determined in the abstract; it is determined as on a particular date. That date will vary among different proceedings depending upon when a voidable transaction is alleged to have taken place. It is strongly arguable that if insolvency as at a particular date is found in one recovery proceeding, a rebuttable presumption in terms of that finding applies by operation of law in all subsequent recovery proceedings.[13]

[52] That argument might apply in the present case in this way. The earliest date of insolvency alleged in relation to OL is 29 January 2008. Most of the dates alleged in the New South Wales proceedings are after that date, and on the evidence it seems most unlikely that OL ever recovered solvency once it became insolvent. Consequently a finding in the present proceedings of insolvency on 29 January 2008 might adversely affect the positions of those defendants who were parties to transactions occurring after that date, by effectively reversing the onus of proof of solvency. Consequently it is arguable that they should be given the right to be heard.[14]

[53] It would in my judgment be wrong to decide the present applications on the basis that such a situation will probably arise. On the contrary, as the evidence stands it seems unlikely to do so. Nor is it evident that if the situation does arise, the best solution is to transfer the present proceedings to the Supreme Court of New South Wales. If, as the Fortress defendants submit, it is desirable to have a separate, common hearing on the question of insolvency, that hearing could take place in either the Supreme Court of New South Wales or the Supreme Court of Queensland without having to transfer anything. It may be assumed that a judge seised of the matter in either court would ensure that proper notice and a right of audience was given to all affected parties. It would, of course, be incumbent on the liquidators to inform the judge of the identities of any such parties. Failure to do so might expose any finding to challenge.

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12 Paragraph [36].

13 *Corporations Act 2001*, ss 588E(1), (8); 588FC; 588FF.

14 Compare *Hall v The Commissioner of Taxation* [2004] NSWSC 950; (2004) 51 ACSR 169; *Dwyer v R-Jay Pty Ltd* [2007] SASC 115; (2007) 97 SASR 377.

[54] Finally on this point, even if it be the case that the proceedings should all be in the same court, I am not persuaded on the evidence that it has been shown to be more appropriate for the present proceedings to be heard in the Supreme Court of New South Wales simply because of the existence of the other proceedings in that court. When the matter is examined in detail it might emerge that it is more appropriate for those proceedings to be transferred to the Supreme Court of Queensland.

[55] The Fortress defendants also relied upon the conduct of Mr Fletcher and Ms Barnet in making their *ex parte* application for an extension of time to commence proceedings in the Supreme Court of New South Wales. That proceeding is not yet complete, in that there is pending an application by the Fortress defendants to set aside the order insofar as it relates to them. That proceeding is preliminary and subsidiary to the second proceeding in this court. Its existence does not in my judgment provide a reason why it is more appropriate for the two Queensland proceedings to be determined by the Supreme Court of New South Wales. To approach the matter in that way would be to make the tail wag the dog.

[56] Nonetheless I have some sympathy for the Fortress defendants. If the second proceeding were within the contemplation of the general purpose liquidators in September 2011, they should have made a specific application in this court, and served it on the Fortress defendants. I am not prepared to criticise the course which they adopted, since I do not know what they contemplated at that time. Moreover it is not appropriate that I express an opinion, since conceivably the defendants might yet apply to the Supreme Court of New South Wales to transfer the extension of time proceedings to Queensland, particularly if they perceive some forensic advantage in doing so.

[57] In my judgment the fact that a considerable number of witnesses resident in New South Wales were orally examined in Sydney has no bearing on the present application. Likewise the facts that the litigation funding application was made to the Federal Court in Sydney, and the application to appoint Mr Kerr as special purpose liquidator to the Supreme Court of New South Wales, serve only to show that the general purpose liquidators are prepared to litigate in Sydney when it suits them. I do not think these matters otherwise bear upon the question of whether the Supreme Court of New South Wales is a more appropriate court to determine the first and second proceedings.

The natural forum for the proceedings

[58] No question of "natural" jurisdiction arises in this case. The jurisdiction of the Supreme Court of Queensland is identical to that of the Supreme Court of New South Wales. Neither depends on matters such as the place of service of process, the residence or place of incorporation of the parties, their principal place of business or the location of their registered offices. These matters, like the place where the events giving rise to the cause of action took place, form part of the background which connects the litigation to one jurisdiction or the other. However, given the nature of the case and the parties, they are of marginal weight in determining the question before me.

[59] Of more importance in my judgment are the location and wishes of the unsecured creditors. These are the persons who stand to benefit from the litigation. They are the ones who are most likely to wish to attend court for the hearing or to read or

view reports in the local media. It may be expected that such reports will be fuller in the city where the case is heard. Many more creditors, both by number and massively by value, are located in Queensland, and some of the largest have expressed a wish for the hearing to be in Brisbane. The committee of inspection is in Brisbane. In my judgment these factors tend to make it less appropriate for the matter to be heard in the Supreme Court of New South Wales than in the Supreme Court of Queensland.

Conclusion

[60] Balancing the foregoing matters, I find that it is not more appropriate for the proceedings the subject of the present applications to be determined in the Supreme Court of New South Wales. The discretion conferred by s 1337H(2) of the *Corporations Act 2001* has not been enlivened.

Exercise of discretion

[61] In case the foregoing be wrong, I should indicate how I would have exercised the discretion had I held that it arose.

[62] The Supreme Court of New South Wales is a court well capable of determining the two proceedings. It has jurisdiction to do so within the meaning of s 1337L(c) of the Act. If I had held that it was a more appropriate court than the Supreme Court of Queensland to determine the proceedings, I would have ordered that they be transferred to it. Neither the former principal place of business of OL and OA (if that be relevant under s 1337L(a)) would have warranted a different conclusion and the principal place of business of the Fortress defendants would have supported the transfer. While the events the subject of the proceedings took place predominantly in Queensland, that factor would not have been sufficient in my judgment to warrant a different exercise of discretion.

Order

[63] In each matter the application to transfer the proceeding to the Supreme Court of New South Wales is dismissed with costs.