SUPREME COURT OF QUEENSLAND

CITATION:	*Bauer Equipment Australia Pty Ltd v ACN 153 866 114 Pty Ltd & Anor* [2016] QSC 76
PARTIES:	**BAUER EQUIPMENT AUSTRALIA PTY LTD** (plaintiff) **v** **ACN 153 866 114 PTY LTD** (first defendant) **DARREN JOHN VARDY AND JASON LLOYD PORTER (IN THEIR CAPACITY AS ADMINISTRATORS OF ACN 153 866 114 PTY LTD)** (second defendants)
FILE NO/S:	SC No 1250 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application for transfer
DELIVERED ON:	7 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	29 March 2016
JUDGE:	Bond J
ORDER:	**The order of the court is that Supreme Court of Queensland proceeding 1250/16 be transferred to the Supreme Court of New South Wales pursuant to s 1337H of the *Corporations Act 2001* (Cth).**
CATCHWORDS:	COURTS AND JUDGES - COURTS - JURISDICTION AND POWERS - CONCURRENT JURISDICTION OF DIFFERENT COURTS - TRANSFER OF PROCEEDINGS UNDER CROSS-VESTING LEGISLATION - GENERALLY - where plaintiffs and first defendant entered into a lease agreement in respect of certain equipment - where second defendants were appointed as administrators of the first defendants - where plaintiff claims monies owed under that agreement and the return of equipment - where second defendants apply to transfer proceeding to New South Wales - where plaintiff opposes the application - where plaintiff intends to bring a summary judgment application - where plaintiff submits summary judgment application should be determined by this Court before transfer application - where plaintiff submits transfer will result in delay - where plaintiff submits transfer will result in additional legal costs - where first and second defendants' principal place of business is in New South Wales - where equipment is located in New South Wales - where all witnesses likely to be called are located in New South Wales - whether, having regard to the interests of

justice, it is more appropriate to transfer the relevant proceeding to New South Wales

Corporations Act 2001 (Cth), s 1337H

Tryam Pty Ltd v Grainco Australia Ltd [2003] NSWSC 812, cited

COUNSEL: P P McQuade QC, with M J May, for the plaintiff
R N Traves QC, with N Mirzai, for the first and second defendants

SOLICITORS: Cooper Grace Ward for the plaintiff
Scoglio Law for the first and second defendants

[1] The plaintiff commenced this proceeding on 4 February 2016. Its case is as follows:

(a) in about late 2013 or January 2014, the plaintiff and the first defendant entered into a lease agreement in respect of a BG28 piling drilling rig and BCM19 gear box system (together, "the Rig");

(b) on 17 June 2015 the plaintiff registered a financing statement relating to the Rig in the Personal Property Securities Register under the *Personal Property Securities Act 2009* (Cth) ("PPSA");

(c) on 29 September 2015 the plaintiff validly terminated the lease agreement consequent upon persistent failures by the first defendant to pay monies owed under the lease and demanded the return of the Rig;

(d) on 1 December 2015 the second defendants were appointed as administrators of the first defendant;

(e) the second defendants had contended that –

(i) on 1 December 2015 the plaintiff had a PPSA security interest in the Rig, being the interest of lessor in the goods under a Personal Property Securities lease;

(ii) the plaintiff had not registered the PPSA security interest in the Personal Property Securities Register within 6 months of the date of appointment of the administrators;

(iii) accordingly, the PPSA security interest vested in the first defendant upon the appointment of the administrators by operation of s 588FL(4) of the *Corporations Act 2001* (Cth) ("Corporations Act");

(f) that contention should not be accepted because the better view of the facts and the law is that at the time the administrators were appointed as there was no PPSA security interest in the Rig in favour of the plaintiff which was capable of vesting by operation of s 588FL(4) of the Corporations Act;

(g) alternatively, there should be an order under s 588FM of the Corporations Act fixing the time for the purposes of s 588FL(2)(b)(iv) as 17 June 2015; and

(h) the first and second defendants should be ordered to deliver up to the plaintiff possession of the Rig.

[2] At the time it commenced the proceeding the plaintiff was already on notice that the defendants contended that the appropriate forum was New South Wales, that assertion having first been made on 4 January 2016. The defendants filed an application to transfer the proceeding to the Supreme Court of New South Wales on 18 February 2016.

[3] The proceeding was first reviewed by me on 22 February 2016. I directed –

(a) the defendants to file a defence by 11 March 2016;

(b) the plaintiff to file material responding to the transfer application by 18 March 2016; and

(c) the transfer application to be heard before me on 29 March 2016.

[4] The defence was filed on 15 March 2016. It was clear that the filing of the defence was not to be interpreted as a submission to the jurisdiction of this Court.

[5] The defendants deny the plaintiff's claim to the relief which it has sought. Amongst other things, the defendants' case is as follows:

(a) a proper examination of the relevant dealings between the plaintiff and the first defendant reveals that the agreement between them is not to be characterised as a lease as contended by the plaintiff, but is to be characterised as an agreement for hire purchase or conditional sale which was entered into in the context of other arrangements between them in respect of other pieces of equipment;

(b) the plaintiff, through its agents, made particular representations in respect of dealings with the Rig which the plaintiff is estopped from now denying, namely that the first defendant had hired the Rig with an exclusive option to purchase and on a crediting arrangement in which a proportion of the hire costs would be credited to the purchase price depending on when the purchase took place;

(c) the plaintiff, through its agents, made particular representations as to the particular equipment transactions to which payments which the first defendant was willing to make should be directed (namely that payments be made in respect of the two other equipment transactions before payments in respect of the Rig agreement) and the first defendant acted on those representations to its detriment with the result that the plaintiff should not be permitted to change its position and to terminate the Rig transaction and repossess the Rig; and

(d) the application of s 588FL(4) of the Corporations Act and the operation of the PPSA to the circumstances is such that, upon the appointment of administrators, the plaintiff's interest in the Rig vested in the first defendant immediately before the appointment of the second defendant.

[6] Having reviewed the defence filed on 11 March 2016, the plaintiff flagged an intention to bring an application for summary judgment. As to this:

(a) The plaintiff contends that on a summary judgment application a Court would conclude –

(i) the defendants' argument that the plaintiff is estopped from contending that it terminated the Rig agreement has no prospects of success;

(ii) accordingly, it would not matter whether the agreement was regarded as taking the form pleaded by the plaintiff or as pleaded by the defendants, because on either view the plaintiff would have been entitled to terminate and in fact did terminate;

(iii) the completing positions as to the application of s 588FL(4) of the Corporations Act and the operation of the PPSA would then be properly resolved in the plaintiff's favour.

(b) The plaintiff submitted that the summary judgment application would only take half a day to argue. I think that is an underestimate. If I were to proceed to list a summary judgment application for argument before me I would list it for 1 day.

[7] It is common ground that the question before me is whether I should order the transfer of the proceeding to the Supreme Court of New South Wales pursuant to s 1337H of the Corporations Act. Section 1337H(2) provides that where, having regard to the interests of justice, it is more appropriate for a proceeding or application to be determined in another court then a court may transfer the relevant proceeding or application to that court.

[8] Section 1337H requires me to have regard to certain specific considerations, namely -

(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,

but otherwise the application requires an open-textured exercise of discretion similar to that which is exercised in cross-vesting applications under the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth). I must have regard to the evidence and take into account the interests of justice as between all parties to the proceeding.

[9] The following considerations favour making an order that the proceeding be transferred to New South Wales –

(a) all parties to the proceeding carry on business in New South Wales;

(b) the principal place of business of the first defendant is in New South Wales and all its business records are found there;

(c) the relevant natural persons directing the corporate parties to the proceeding reside in New South Wales;

(d) the location of the Rig is, and was at all material times, in New South Wales and it was a term of the contractual arrangements on which the plaintiff relies that the Rig be used only in New South Wales;

(e) the location of all witnesses likely to be called in this proceeding is New South Wales; and

(f) the first defendant is presently in voluntary administration, the administrators reside in New South Wales and they have already approached the Supreme Court of New South Wales for orders in connection with the conduct of the administration.

[10] In expressing the view which I have in [9] concerning the matter mentioned in [9](e), I have not overlooked the plaintiff's expression of willingness to undertake to pay $1000 per witness (that sum representing a reasonable estimate of additional transport and accommodation costs for travelling to Queensland). Cost is not the only relevant consideration. Trials do not always proceed in perfectly predictable fashion. If the witnesses reside in the same location as the trial, that will give the trial judge and the parties greater flexibility to cope with any of the myriad of difficulties which might eventuate. Notwithstanding the plaintiff's proposed undertaking I remain of the view I expressed.

[11] The plaintiff's primary submission is that the transfer application should be dismissed or adjourned on the basis that it is premature to determine the application prior to the determination of its summary judgment application. In this regard, the plaintiff relies on

the decision of Palmer J in *Tryam Pty Ltd v Grainco Australia Ltd* [2003] NSWSC 812 at [18] to [21] to suggest that as a general rule if any application for summary disposition of a proceeding is to be made that application should be made and determined prior to any application for transfer. I do not accept that there is such a general rule, particularly, where, as here, it could not be suggested that the transfer application was an attempt to "forum shop". It seems to me that the significance of the foreshadowed summary judgment application is simply that this case is one in which one party suggests that there is a quick and simple means of resolution of the dispute and the other parties reject that suggestion. That is simply one consideration to be borne in mind when exercising the judgment called for by s 1337H.

[12] The plaintiff next contends that acceding to the transfer application might lead to more delay in the time taken for resolution of the proceeding than would be the case if the matter was not transferred. As to this:

(a) The plaintiff suggests that the Commercial List in Queensland has practical advantages for it over the equivalent lists in New South Wales because it would be able to have its proceeding (particularly its summary judgment application) determined earlier in Queensland than in New South Wales. I am not persuaded that that is so.

(b) I am satisfied that the Supreme Court of New South Wales is just as able as this Court to bring on and dispose of swiftly (and even summarily if that truly is appropriate) a commercial matter which has a legitimate claim to urgent attention.

(c) Whilst it is true that the mechanics of transfer would inevitably create some delay, the reality of my list is that it is presently uncertain whether I could allocate to the plaintiff the day needed to dispose of the summary judgment application before the second half of this year.

(d) In light of the evidence before me that a matter in the Commercial List of the Equity Division of the Supreme Court of New South Wales confined to an estimate of a one day hearing could be listed within 7 days in circumstances where all evidence was complete, it may even be that the matter could be brought on more quickly in New South Wales than it can in Queensland.

(e) As things stand presently, I think that the best assessment I can make of the significance of delay is that it is a prejudice which might accrue to the plaintiff if the matter is transferred, but the likelihood of delay occurring and the extent which might occur if it does is impossible to evaluate on the material before me.

[13] The plaintiff also points to the fact that it has had Brisbane-based legal advice in connection to this transaction since July 2015 and it will suffer increased costs if it has to engage solicitors in New South Wales to act as town agents and if its advisers have to travel to Sydney than it would if the matter stayed in this Court. Whilst considerations of the location of a party's preferred legal adviser are relevant, it seems to me that in the present case they tend to cut both ways. The defendants seeking transfer would no doubt prefer to have New South Wales based legal advisers assisting them. That proposition is not necessarily negated by the fact that they have Queensland practitioners representing them on this occasion. I agree with the defendants' submission that the question of choice of legal advisers and related costs is likely to be essentially neutral.

[14] One consideration which should be addressed distinctly is the exclusive jurisdiction clause. As to this:

(a) It was also a term of the contractual arrangements on which the plaintiff relies that:

> …the place of performance and exclusive place of jurisdiction for both parties and for all claims – also for actions in summary procedures … - is the head office of the [plaintiff] or – at its choice – the domicile of its branch office which concluded the contract. The [plaintiff] may also bring action at the place of general jurisdiction of the [first defendant].

(b) The clause should be interpreted against the following:

(i) the contractual arrangements had earlier provided (by cll 1.3 and 4.1) that the first defendant could only use the Rig in New South Wales; and

(ii) at the time the contractual arrangements were entered into, the head office of the plaintiff was in New South Wales as was the branch office which concluded the contract.

(c) The clause is part of a standard form and intended to give the plaintiff a default position which suits the plaintiff (by the references to its head office or its branch office), but then to enable it to pick the jurisdiction called up by the final sentence if that course suited it. As to that possibility, I would interpret the reference to "the place of general jurisdiction of the [first defendant]" as a reference to the court of plenary (as opposed to limited) jurisdiction in the place where the first defendant carries on business. In this case that would be the Supreme Court of New South Wales.

(d) That means that it was a term of the contractual arrangements on which the plaintiff relies that the parties expressed a preference that actions including summary procedures be brought in New South Wales.

(e) The plaintiff contended that the weight which I should give that expression of preference in this case is diminished because –

(i) on the defendant's case they are not bound by the document containing the clause;

(ii) such clauses may have less weight in circumstances where they are contained within a standard form as opposed to a contract specifically negotiated between the parties; and

(iii) clauses which do not specifically nominate a jurisdiction may have less significance than clauses which do expressly nominate a jurisdiction.

(f) However even accepting all of that, it does seem to me that the existence of the clause should be given some weight and insofar as it is given weight, it tends to support making an order that the proceeding be transferred to New South Wales.

[15] To my mind the considerations identified in [9], [10] and [14] outweigh the considerations identified in [12] and [13]. My evaluation of the relevant considerations leads me to conclude that, having regard to the interests of justice, it is more appropriate that the proceeding should be transferred to the Supreme Court of New South Wales. Accordingly I will order that Supreme Court of Queensland proceeding 1250/16 be transferred to the Supreme Court of New South Wales pursuant to s 1337H of the *Corporations Act 2001* (Cth).

[16] I will hear the parties on costs.