SUPREME COURT OF QUEENSLAND

CITATION:	*Busst v Lotsirb Nominees P/L* [2002] QCA 296
PARTIES:	**ELAINE VERITY BUSST** (plaintiff/respondent) v **LOTSIRB NOMINEES PTY LTD** ACN 005 043 336 trading as Bristol Decorator Centre (defendant/applicant)
FILE NO/S:	Appeal No 3575 of 2002 DC No 349 of 1995
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	16 August 2002
DELIVERED AT:	Brisbane
HEARING DATE:	5 August 2002
JUDGES:	Davies and Williams JJA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal dismissed.** **2. Applicant to pay the respondent's costs.**
CATCHWORDS:	PRIVATE INTERNATIONAL LAW - CHOICE OF LAW - CONTRACTS - PROPER LAW OF THE CONTRACT - PARTICULAR CONTRACTS - where contract of employment between the plaintiff and defendant - where plaintiff suffered an injury in the course of employment - where plaintiff commenced employment in Queensland - where contract varied when the plaintiff's place of employment became New South Wales - where injury was suffered in New South Wales - whether the proper law of the contract was the law of Queensland *Bonython v Commonwealth* [1951] AC 201, applied *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, applied *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, considered *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 1 QB 728, applied *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93, applied

COUNSEL: P D McMurdo QC, with P D Corkery, for the applicant
R A I Myers for the respondent

SOLICITORS: Deacons for the applicant
Grants Lawyers (Mermaid Beach) for the respondent

[1] **DAVIES JA:** This is an application for leave to appeal to this Court from an interlocutory decision of the District Court given on 22 March 2002. That decision was one given on questions ordered to be tried separately from another question before the trial of the proceedings between the parties. Those questions were:

1. whether the substantive law to be applied in the plaintiff's case is the law of New South Wales;
2. if the substantive law to be applied in the plaintiff's case is the law of New South Wales, is the plaintiff prevented from bringing this action by the operation of the *Workers Compensation Act* 1987 (NSW).

[2] The decision on this question was complicated by the fact that, because there were relevantly two causes of action which the plaintiff brought together against the defendant, two separate answers to each question were necessary. This arose because of the facts of the case. The plaintiff was at all material times employed by the defendant, a company incorporated in Victoria but carrying on business in Queensland, and also it appears in New South Wales, as a paint supplier. The plaintiff suffered injury, allegedly in the course of her employment at the defendant's store at Tweed Heads in New South Wales. She sued the defendant, as is common in such cases, both in contract and in tort.

[3] The learned primary judge held that, as to the plaintiff's cause of action in tort, the applicable substantive law was the law of New South Wales, and that that included the *Workers Compensation Act* 1987 (NSW). There is no issue about that in this application. However he also held that, in respect of the cause of action in contract, the applicable substantive law was the law of Queensland. It is from this decision that the defendant, the present applicant, seeks leave to appeal.

[4] The plaintiff commenced employment with the defendant at its store at Southport in the State of Queensland in September 1988. At that time, and at all material times since, the plaintiff was resident in Queensland. Her salary was to be paid into her bank account in Queensland and the whole of her employment was to be carried out at the defendant's store in Queensland. I do not think that there could have been any argument against a conclusion that, when that contract was made, its proper law was the law of Queensland. She was apparently later transferred to the defendant's store at Burleigh Heads but all other conditions of her employment remained the same.

[5] In 1993 a vacancy occurred in the position of manager of the defendant's store at Tweed Heads in New South Wales. This was apparently a higher position than that which the plaintiff already held. She applied for it and she was successful. It was conceded by Mr McMurdo QC for the defendant that her application was made and accepted in Queensland whilst the plaintiff was working in the Burleigh Heads store.

[6] As a result of that acceptance there were four changes in her employment. The first was that thereafter she would carry out all of her work at the Tweed Heads store rather than at the Burleigh Heads store. The second was that she was to be a store

manager though there was no evidence about the extent to which, if at all, her duties would differ from those that she had previously performed. The third was that she would receive a higher income. And the fourth was that it would be calculated at a weekly rather than, as it had previously been, at an hourly rate.

[7] It seems to me proper to describe what took place as a variation in the contract of employment which continued rather than a rescission of the old and the making of a new contract of employment. This will always be a question of degree but here, I think, it affected the content of the plaintiff's obligations rather than terminated those obligations and created new ones.[1]

[8] It may be accepted that a change in contractual relations between parties, whatever terminology is used to describe it, may lead to a change in the proper law of the contract.[2] But again the question is one of degree. In this case, on the above facts, the variation was made in Queensland by the plaintiff, a resident in Queensland, and the defendant, a company carrying on business in Queensland, to be performed by the plaintiff in New South Wales and by the defendant substantially, by payment of the plaintiff's salary, in Queensland. It is true that the defendant had an obligation, in New South Wales, under the contract as varied, to provide a safe place and system of work but this was, in content, much the same obligation as it had under the contract before variation, the only difference being that it was to be performed in New South Wales instead of in Queensland. The only significant change affected by the variation is, therefore, to the place of performance of the contract by the plaintiff.

[9] The question in this case is with which system of law has the contract, as varied, its closest and most real connection.[3] There is no doubt that the contract of employment made between the parties in 1998 had its closest and most real connection with Queensland. The question is whether a variation to the place of performance by the plaintiff but not, in substance, by the defendant was sufficient to change the proper law to New South Wales.

[10] Mr McMurdo QC submitted that the fact that, in the action in tort, New South Wales law will have to be applied[4] because, in an action in tort, the lex loci delicti must be applied as the substantive law, is a reason why, in an action in contract between the same parties arising out of the same events, the law of New South Wales should be held to be the proper law. That submission seems to reverse the correct reasoning process which is first to identify the system of law with which the contract (not some tort, even where liability for that tort arises out of the contractual relationship) has its closest and most real connection; and then to apply the law of that system as the substantive law of the contract. The submission is made in this case only because the tort and the breach of contract alleged happen to arise out of the same facts; that is, that the breach of contract alleged constitutes acts or omissions also alleged to constitute the tort. But the proper law of the contract must

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1 *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93 at 112, 113.

2 *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 1 QB 728 at 746; *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603.

3 *Bonython v Commonwealth* [1951] AC 201 at 219; (1950) 81 CLR 486 at 498.

4 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

be the same whether an action for its breach arises out of the same facts as an action in tort or arises out of, for example, a failure to pay money alleged to be owing under the contract. I do not think that the nature of the breach of contract alleged can affect the proper law of contract.

[11] On the other hand it is true that the place of performance of a contract is an important factor in the determination of this question and that, in this case, the fact that the plaintiff was required to perform the contract in New South Wales necessarily engaged New South Wales law applying to employees employed in that State. The question is whether that is sufficient to alter the proper law of the contract.

[12] Although the question might be thought to be a finely balanced one, in my opinion the learned primary judge was correct in concluding that the contract, made as it was in Queensland between a resident in Queensland and a company relevantly carrying on business in Queensland, for performance of work in Queensland and payment therefore in Queensland, varied only by, relevantly, a change in the place of performance of work to New South Wales, still retained its closest and most real connection with Queensland. I would accordingly refuse leave to appeal against his Honour's judgment.

Orders

1. Application for leave to appeal dismissed.
2. Applicant to pay the respondent's costs.

[13] **WILLIAMS JA:** The issue for determination by this court is set out in the reasons for judgment of Davies JA.

[14] As is often the case, here the question as to which law is the proper law of the contract (where the parties have not made any express provision with respect thereto) is finely balanced. There are in this case factors supporting the conclusion that either Queensland law or New South Wales law was the proper law of the relevant contract at the material time.

[15] I agree with the learned District Court judge at first instance that one system of law cannot be the proper law of a contract for one purpose and another system of law the proper law for determining other issues. Inferentially the reasoning in *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 1 QB 728 and *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 supports that conclusion.

[16] But it is equally clear that there may be a change in the proper law of a contract effected by an agreed variation of the contract. Such a conclusion is supported by observations in *Libyan Arab Foreign Bank* at 746 and *James Miller and Partners* at 603 and 615.

[17] Here the correct analysis, in my view, is that there was a variation of the original contract of employment when it was agreed that the respondent would be transferred to the position of manager of the Tweed Heads store and carry out her employment there. One consequence of that variation was that laws of New South Wales dealing with workplace safety, industrial relations, and employment applied to the respondent in carrying out her duties.

[18] But, as Davies JA has pointed out, the proper law of the original contract was clearly that of Queensland, and many of the continuing terms after the variation support the proposition that Queensland law remained the proper law of the contract. Both the original contract and the variation were made in Queensland. The respondent's superiors (those with whom any change in the contractual terms would have to be negotiated) remained in Queensland. She continued to be paid by deposit of her salary into a Queensland bank account. There was also no break in the continuity of her employment with the one employer for purposes of entitlements (if any) to annual leave, long service leave, and the like.

[19] The fact that the law of New South Wales played a significant role with respect to her employment (demonstrated by the fact that it is accepted by all parties that the respondent's claim in tort is governed by New South Wales law) is a powerful argument in favour of concluding that the variation resulted in an alteration of the proper law of the contract. But at the end of the day I am not persuaded that the learned District Court judge and Davies JA are wrong in concluding that Queensland law remained the proper law of the contract.

[20] In the circumstances I agree with the orders proposed by Davies JA.

[21] **HOLMES J:** I agree with the reasons for judgment of both Davies JA and Williams JA, and with the orders proposed by Davies JA.