DISTRICT COURT OF QUEENSLAND

CITATION:	*Cult Industries v Spuds Surf Chatswood* [2006] QDC 095
PARTIES:	**CULT INDUSTRIES PTY LTD**
	Plaintiff
	v
	SPUDS SURF CHATSWOOD PTY LTD
	First Defendant
	And
	GEORGE MIMIS
	Second Defendant
FILE NO/S:	275 Of 2005
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Southport
DELIVERED ON:	9 May 2006
DELIVERED AT:	Brisbane
HEARING DATE:	20 February 2006
JUDGE:	McLauchlan QC DCJ
ORDER:	**Application Dismissed**
CATCHWORDS:	*Application for stay; Section 20 Service and Execution of Process Act 1992.*
COUNSEL:	Mr Thornburgh for the Applicant
	Mr Shah for the Respondent
SOLICITORS:	Primrose Couper Cronin Rudkin for the Applicant
	Nicol Robinson Hallets for the Respondent

[1] This is an application, filed on 29 July 2005, for a stay of proceedings pursuant to section 20 of the Service and Execution of Process Act 1992 (Cth) (SEPA). The application also seeks a stay pursuant to rule 16g of the Uniform Civil Procedure Rules and on the ground of "forum non conveniens".

[2] The claim and statement of claim were filed in the Southport Registry of the Court on 30 May 2005. The claim against the first defendant is for the sum of $71,417.32 being monies allegedly owing by the first defendant for goods supplied by the plaintiff to the first defendant pursuant to a written agreement during the period 19 December 2004 to 1 April 2005. The claim against the second defendant is for the same amount pursuant to a guarantee in writing provided by the second defendant to the plaintiff on or about 1 November 2004.

[3] The written agreement alleged arises from an application for a trading account made to the plaintiff. The application for the trading account is alleged to have been made by or on behalf of the first defendant in writing on or about 9 November 2004. The document requests that the plaintiff open a trading account in the name of the first defendant upon the trading terms set out therein. Those terms provide that the customer (the first defendant) shall make payment for the goods within thirty days of invoice date and that monies unpaid after thirty dates from invoice date attract interest at the rate of 1.5% per month. It is further provided that the property in the goods purchased under the trading account does not pass to the customer until the customer has paid the plaintiff in full, although the risk associated with the goods passes to the customer with possession. It is also provided the customer shall not dispose of the goods without prior written consent of the plaintiff until the goods have been fully paid for and the property in the goods has passed.

[4] It is then alleged that the trading account application was accepted by the plaintiff giving rise to an agreement between the parties on the terms of the application, and that goods were supplied pursuant to that agreement and credit supplied to the first defendant as indicated above. It is alleged that goods were supplied on various dates between 19 December 2004 and 1 April 2005 amounting to $71,417.32. In the

pleading it indicates that that amount is the balance of an original sum of $84,417.32 after payment by the first defendant of a sum of $13,000.

[5] In response to the statement of claim, the defendants filed a conditional notice of intention to defend alleging that the District Court of Queensland was not the appropriate forum to hear and determine the plaintiff's claim and that the appropriate forum was the District Court of New South Wales. A draft defence is in evidence, and the nature of the defence is to be collected from that, and affidavit material filed by the first and second defendants.

[6] An affidavit filed by the second defendant by leave on 20 February 2006 alleges an agreement made with a representative of the plaintiff, in Sydney, in September and October, 2004; that is to say, prior to the date of the trading account application and the alleged agreement consequent upon its acceptance by the plaintiff.

[7] The deponent first indicates that the first defendant is a company "owned and controlled" by his sister Elizabeth Weeks, and which operates a retail shop at Westfield Shopping Centre at Chatswood. The second defendant owns and controls a further company called Spuds Surf Centre Pty Limited which operates a retail shop at Carlingford Court Shopping Centre in Sydney, from which it sold some of the product supplied by the plaintiff.

[8] Mr Mimis deposes that he met Mr Spong, a director of the plaintiff company in late 2002 or early 2003 and there was some discussion about "Surf City" a name which evidently includes the first defendant and, at the time, various other retail stores in Sydney, purchasing and reselling the surfwear and surfwear accessories produced by the Plaintiff. In September 2004 he says he met Ryan Alagarich, the plaintiff's sales representative, at the plaintiff's Sydney office at Unit 22, 96 North Steyne

Road, Manly and had a conversation with him concerning the range and terms of trade. The deponent says that he shortly thereafter met Ryan Alagarich again at the Plaintiff's Sydney office and said to him –

> "I will confirm the order to you on our Surf City order forms, along with confirmation of the terms of trade with you. I would like all the stock delivered in November, window displays, light box images and catalogues to coincide with the stock delivery. That way we can undertake fortnightly sell through reports for stock rotations on styles that have not sold. On December 24, the balance of unsold stock will be returned to you."

[9] Upon returning to his office, he sent an email to confirm the order and terms of the purchase. Exhibited to his affidavit is a copy of an email which appears to be consistent with that account. He says that thereafter he had a telephone conversation with Alagarich who stated that the order and terms were acceptable. He states that in about October 2004 Alagarich telephoned him to say that Surf City had just submitted a credit application and that he would leave a copy in his letter box for him to complete. He then completed the credit application on behalf of the first defendant. He signed the guarantee and sent the signed document to the plaintiff's head office in Burleigh Heads.

[10] On or about 28 October 2004 he sent an email to Alagarich with the "men's order" for Winter 2005 and terms and conditions, and a copy of that email is also exhibited to the affidavit.

[11] Both emails refer to "remaining stock to be returned to Cult on 24 December 2004 and 30 June 2005 respectively".

[12] Finally, in relation to this aspect of the matter, the deponent says that according to his information, stock was delivered to the first defendant's warehouse at Chatswood in Sydney, being the summer 2004 stock and subsequently the winter 2005 stock. He deposes that there were was no change to the terms of the

agreement. However, after delivery of the stock the Plaintiff demanded, contrary to the terms of the agreement, full payment of its invoice after thirty days.

[13] It is not in dispute that Mr Alagarich resides in Sydney and did so at the time and manages the plaintiff's office in Sydney. The above affidavit material raises the issue that the arrangement between the plaintiff and the defendant's was what has been called a "consignment agreement" as distinct from the plaintiff's allegation of a "trading account agreement".

[14] In response to that Mr Alagarich has sworn an affidavit in which he acknowledges having dealt with the second defendant on a number of occasions concerning the sale and supply of the plaintiff's stock to the first defendant, and having taken orders for stock from the second defendant on several occasions. He denies however making a deal with the second defendant or the first defendant that payment for the plaintiff's stock would be made at the end of each season to coincide with the return of stock that had not been sold. He deposes that he does not have the plaintiff's authority to enter into any negotiations with the plaintiff's customers regarding the terms of trade between the plaintiff and its customers.

[15] Other evidence relevant to this issue is contained in an affidavit sworn by Steve Barrett who is the General Manager of the Plaintiff. He recalls meeting Ms Elizabeth Mimis–Weeks representing the first defendant at the viewing of the plaintiff's summer 2005 range of products on the Gold Coast but denies informing Ms Mimis-Weeks, as she alleges, that all goods ordered could be returned if not sold. He denies agreeing on behalf of the plaintiff to supply stock to the first defendant or any other customer of the plaintiff on a consignment basis. He further recalls that the plaintiff did accept the return of summer 2004 stock from the first defendant, as deposed to by Ms Mimis-Weeks. However he states that that did not

occur pursuant to any agreement between the plaintiff and the first defendant that stock be supplied on a consignment basis because no such agreement existed between the parties. He says that the Plaintiff accepted the return of stock for the benefit of an ongoing commercial relationship with the first defendant and he secured an order for winter stock from the first defendant.

[16] An affidavit of Mr Craig Busfield, the Chief Financial Officer of the plaintiff, deposes that at all material times the plaintiff carried on business in Queensland at Burleigh Heads, and that payments made by the first defendant pursuant to the trading account were received by electronic funds transfer into the plaintiff's bank account held with the Commonwealth Bank of Australia at its branch located at Burleigh Heads. All stock was supplied by the plaintiff to the first defendant pursuant to the trading account from stock stored at its warehouse located at 7-9 Dover Drive, Burleigh Heads. He further deposes that he is informed by the plaintiff solicitors that potential witnesses for the plaintiff in these proceedings include himself, Steve Barrett, Doug Spong and Ryan Alagarich. Steve Barrett, Doug Spong and he all live in the Gold Coast area in the State of Queensland "close to Southport District Court." Ryan Alagarich resides in Manly, Sydney in the State of New South Wales.

[17] In an affidavit sworn by Elizabeth Mimis-Weeks and filed on 19 January 2006 the deponent swears that the second defendant did not have the authority to pledge the credit of the first defendant at the time when he signed the trading account application. She says that the terms on which the plaintiff supplied goods to the first defendant were as follows:

a) the plaintiff would supply goods ordered by each of the Surf City retail outlets on consignment;

b) goods supplied by the plaintiff that remained unsold would be returned by each Surf City retail outlet;

c) all goods supplied by the plaintiff to the first defendant that remained unsold at the date agreed between the plaintiff and the second defendant would be returned to the plaintiff;

d) relevantly the date agreed by the plaintiff and the second defendant was:

    1) For summer stock 24 December 2004;

    2) For winter stock 30 June 2005.

e) the first defendant was only liable to pay the plaintiff for goods sold by the first defendant;

f) payment was to be made within 90 days of receipt of the goods or when unsold goods were returned to the plaintiff.

[18] This version of the events is repeated in the draft defence earlier referred to.

[19] Ms Mimis-Weeks swore a further affidavit on 26 January 2006 dealing with circumstances surrounding and relevant to the question whether the contractual arrangement between the parties was an agreement arising out of and upon the terms of the trading account, or was on the other hand a consignment agreement as alleged by the defendants.

[20] I agree with the submission of the respondent that the issue to be determined in this application is whether the New South Wales District Court has jurisdiction to determine all matters in issue between the parties and whether, on the balance of probabilities, having regard to the factors set out in section 24 (SEPA), that court is

the court with which the proceeding has the most real and substantial connection and which could therefore be regarded as the natural forum. It is also correct to say, as submitted, that the defendants bear the onus of proof, and that identifying the matters in issue is a pre-requisite to determining which court is the appropriate court: see *St George Bank Limited v McTaggart* 2003 (2) QD. R. 568.

[21] I further agree that the principal issues in the proceedings are firstly, the terms of the agreement made between the Plaintiff and the First Defendant and in particular, the basis upon which and when payment for goods supplied was to be made in terms of that agreement. Secondly, it is in contention whether or not the second defendant had authority to bind the first defendant to the alleged trading account agreement, and there is also a further issue as to whether all the relevant goods supplied were ordered by and delivered to the first defendant.

[22] It is not argued that the District Court of New South Wales does not have jurisdiction to determine all the matters in issue between the parties. With reference to the matters to be considered pursuant to section 20 (SEPA), the applicant company carries on business in New South Wales and the two relevant witnesses for the applicant, George Mimis and Elizabeth Mimis-Weeks both reside in Sydney. Furthermore a critical witness for the plaintiff, Ryan Alagarich works in Sydney in the employ of the respondent, and resides in Manly. The plaintiff carries on business at Burleigh Heads and the three important witnesses namely Messrs Spong, Barrett and Busfield all reside in the Gold Coast area in Queensland. The respondent urges that the agreement between the parties was made in Queensland, whereas the applicant would place the formation of the contract in New South Wales. Alternatively, it may be that the contract was entered into partly in New South Wales and partly in Queensland. The evidence of all the proposed witnesses

in the action is relevant to this issue. So far as performance of the contract is concerned it would appear that payment for goods supplied is made in Queensland, but on the other hand delivery of goods pursuant to the contract is made to the applicants' warehouse in Sydney.

[23] Nothing in the material goes to the financial circumstances of the parties or to any agreement between the parties about the court or place in which the proceeding should be instituted. Nor does it appear that a related or similar proceeding has been commenced against the applicant or another person.

[24] There is nothing to indicate that there is any relevant difference between the law of Queensland and the law of New South Wales to the extent that it will be applicable in the determination of the issues in this case. The fact that the proceeding was issued in Queensland is irrelevant to the question before the court.

[25] The fact that the guarantee incorporated in the body of the trading account application was signed in Sydney is of little moment, since its coming into effect depended upon the acceptance of the application by or on behalf of the plaintiff, and it would appear from one of the affidavits of Craig Busfield that that occurred by conduct of the plaintiff, in processing orders submitted by the defendants, and that that conduct occurred in Queensland.

[26] The court may take into account matters other than those referred to in section 20 by reason of the use of the word "include" in the opening words of that section. Moreover the section does not affect the court's power to stay a proceeding on a ground other than the ground mentioned in sub section (3) that is to say that the court is satisfied that a court of another state that has jurisdiction to determine all

the matters in issue between the parties is the appropriate court to determine those matters.

[27] No doubt pursuant to that provision application has been made, not only under section 20 SEPA, but also under rule 16(g) of the Uniform Civil Procedure Rules (Queensland) and on the basis, available at common law, known as "forum non conveniens". Neither of these other bases for the application however, in my opinion, enhances the applicants' prospects in this matter. In the end I am not aware of any factor which to any material degree tips the scales in favour of either court as constituting the appropriate court for the proceeding. It follows that I am not satisfied that the District Court of New South Wales can be so described, as between it and the District Court of Queensland.

[28] The application therefore fails.