DISTRICT COURT OF QUEENSLAND

CITATION: *Remote Logic Pty Ltd v DC Corporation Australia Pty Ltd & Ors* [2006] QDC 096

PARTIES:

REMOTE LOGIC PTY LTD — Plaintiff

V

DC CORPORATION AUSTRALIA PTY LTD — First Defendant

AND

RON BOULDER — Second Defendant

AND

OLIVER BANOVEC — Third Defendant

FILE NO/S: D4527/05

DIVISION:

PROCEEDING: Application

ORIGINATING COURT: District Court, Brisbane

DELIVERED ON: 27 February 2006

DELIVERED AT: Brisbane

HEARING DATE: 27 February 2006

JUDGE: McGill DCJ

ORDER: Application dismissed with costs

CATCHWORDS:

PRACTICE - Service out of the jurisdiction - stay of proceeding - whether court of another state the appropriate court - effect of contract

Service and Execution of Process Act 1992 (C'wth) s.20

Rick Cobby Pty Ltd v Podesta Transport Pty Ltd (1997) 139 FLR 54 - followed

Valkama v Jamieson (1994) 11 SR (WA) 246 - followed

World Fire Fighters Games (Brisbane) v World Fire Fighters Games (Western Australia) Inc [2001] QSC 164 - followed

COUNSEL: T.C. Somers for the plaintiff
L.J. Nevison for the first and third defendants
SOLICITORS: B.O. Nordland (solicitor) for the second defendant

DISTRICT COURT No 4527 of 2005

CIVIL JURISDICTION

JUDGE McGILL SC

REMOTE LOGIC PTY LTD ABN 81 080 124 929 Plaintiff

and

DC CORPORATION AUSTRALIA PTY LIMITED ACN 094 797 618 First Defendant

and

RON BOULDER Second Defendant

and

OLIVER BANOVEC Third Defendant

BRISBANE

..DATE 27/02/2006

ORDER

HIS HONOUR: This is an application under Section 20 of the Service and Execution of Process Act to stay a proceeding which was commenced in this Court, on the ground that the court of another State is the appropriate court to determine the matters in issue in the action.

A preliminary point was taken that the application was not made within the time limited by Rule 144(3) of the UCPR, but that rule refers to a time for making an application under the UCPR. The application under the Service and Execution of Process Act is not in terms subject to any time limit and, in my opinion, it is not competent for the UCPR to restrict the right of a party to apply under Section 20 or the power of the Court to give relief under Section 20 of the Commonwealth legislation. The application is therefore competent.

The situation is that when an application is made, the approach to such an application appears to be that the applicant bears the onus, of demonstrating a clear and compelling basis for relief. That I think follows from the approach adopted in *Rick Cobby Pty Ltd* v. *Podesta Transport Pty Ltd* (1997) 139 FLR 54 where Olssen J seems to have regarded the approach as being similar to the approach at common law in terms of the standard to be shown. I also note that the section refers to “the appropriate Court.” So that the issue is whether a particular Court can be regarded as the natural forum for the dispute. See *Valkama* v. *Jamieson* (1994) 11 SR(WA) 246.

One difference from the common law position is that the Court is required to take into account the matters set out in sub-section (4) but not to take into account the fact that the proceeding was commenced in, relevantly, Queensland.

In relation to paragraph (a), there are three defendants, two of whom are natural persons and who live in Sydney, the third is a corporation which has its registered office in Sydney but the corporation is no longer trading. The affidavit of the third defendant refers to two other people who were involved but their involvement was simply in sending emails as personal assistants of the second and third defendants and although they reside in Sydney, it is difficult to believe they would actually be called as witnesses.

The plaintiff is a company, a Queensland company, and has two natural people involved in the process which is relevant to this action, and they live in Queensland. They also foreshadow giving evidence from other franchisees in Queensland in support of the case. There is some authority for the admission of similar fact evidence in this area and I note that the statement of claim alleges that one of the documents provided by the first defendant identified seven other Queensland franchisees. There, therefore, may well be other Queensland witnesses. No other potential witnesses are referred to in the material as far as I can see.

In relation to paragraph (b), there is not a subject matter of the proceeding as such except to the extent that the part of the relief sought is the avoiding under Section 87 of the Trade Practices Act of a franchise agreement which was entered into in Sydney. However, that is not something which can be said now to have any particular location.

As to the place where the causes of action arose, representations are relied on which fall into three categories: written representations which were provided to the plaintiff in Queensland, oral representations which were made to the plaintiff in Queensland by the second defendant, and oral representations made to the

plaintiff in New South Wales by the second and third defendants. On the basis of the statement of claim the process was initiated by an advertisement in a Queensland newspaper and there were meetings at the Queensland office of the first defendant. That office is said now to have been closed but the statement of claim alleges meetings there and that documents were provided which contained representations which are relied on as being in breach of the Trade Practices Act.

It seems to me that predominantly the cause of action relied on arose in Queensland. In relation to the financial circumstances of the parties, all that is known about these is that the first defendant is no longer trading and, presumably, therefore, has no significant financial backing and the first plaintiff is a corporation which is carrying on business in Queensland. It has a profitable business, apparently, with reasonable financial standing, though no doubt the additional costs involved in conducting litigation in New South Wales, on the basis of what I have been told about its financial position, would be a heavy burden.

There is no other information about the financial circumstances of the parties although I note that the second defendant who is represented by a solicitor today adopted the approach of not opposing the application of the first and third defendants, though he did not specifically support it and did not provide any material in support of it. The second defendant has filed a notice of intention to defend and is not taking any point about the location of the proceedings.

Paragraph (d) refers to an agreement between the parties about the Court or place of which the proceeding should be instituted. There was a provision in the franchise agreement that any litigation in relation to the franchise agreement would be under the exclusive jurisdiction of the Courts of New South Wales. That provision does not deprive the Queensland Court of jurisdiction. It is a provision which has been regarded as being important in this area, although I note that Justice Philippides in *World Firefighters Games*

(Brisbane) v. *World Firefighters Games (Western Australia) Inc* [2001] QSC 164 at [14] said that:

> "It seems that the bias in favour of exclusive jurisdiction clauses may be stronger in a case having an international element than a case which involves competing intranational forums."

I have not looked at the authorities to which her Honour referred but defer to her assessment of them. There is certainly a significant bias in relation to international matters in favour of exclusive jurisdiction clauses, but it seems to me that in a case where the issue is whether the action should be tried in Queensland or New South Wales, the exclusive jurisdiction clause although still a matter of some importance is of less importance.

It also seems to me to be of some importance that the whole basis and thrust of the plaintiff's claim is that the franchise agreement which is the document containing the exclusive jurisdiction clause should be set aside under the Trade Practices Act and was procured by misleading and deceptive conduct and, indeed, by unconscionable conduct. It seems to me that where the plaintiff's claim is directly challenging the validity of the agreement which contains the exclusive jurisdiction clause, the significance of the exclusive jurisdiction clause for an application of this nature should be somewhat less. Nevertheless, it does on the authorities remain a matter of some importance.

In relation to paragraph (e), the law that it would be most appropriate to apply to the proceeding, the action is one under the Trade Practices Act and it therefore involves the application of Commonwealth law which can be applied, it seems to me, indifferently by the District Courts of either Queensland or New South Wales. In my opinion, there is nothing under paragraph (e) which provides any preference for New South Wales.

In relation to paragraph (f), there is no evidence of other similar or related proceedings having been commenced against any of the defendants. It was suggested

that other proceedings may be possible which comes, I think, close to an admission of misconduct on the part of counsel for the defendants, but I think in the circumstances I would pass over that submission.

On the whole, therefore, the balance of factors to which I have referred would clearly favour Queensland except for the consideration of the exclusive jurisdiction clause. I think that is deserving of some importance and that it would produce a balance in favour of New South Wales, but, in my opinion, it does not provide such a preponderance of considerations in favour of New South Wales for it to be said that there is a clear and compelling basis for relief, or to justify the conclusion that the District Court of New South Wales is the appropriate Court to determine these matters.

In my opinion, there is not such a preponderance of circumstances in favour of that Court as to meet the test required to satisfy Section 20(3) and, accordingly, I will not stay the proceeding in this Court under (3).

...

HIS HONOUR: This is an application for security for costs. The plaintiff is a company with limited paid up capital of more than the conventional $2. It has a surplus of assets on its balance sheet of just over $181,000 as at the 30th of June last year.

Its assets are made up chiefly by money on deposit at a bank either on term deposit or in its current account. It has some plant and equipment, some debtors, trade debtors, perhaps significantly no trade creditors and it also refers to an asset in the form of franchise fee which, I take it from the affidavit, is a reference to a franchise arrangement in relation to accounting and bookkeeping software. See paragraph 9 of the affidavit of Mr James filed the 17th of February 2006.

Mr James, who is one of the directors of the company and one of the shareholders, the other director being his wife, has said that the business of the company is the design, installation of computer software. He has a

number of clients that he does this for. It is a profitable business. The company is able to pay its bills as and when they fall due. He has no intention of shutting it down or discontinuing operations.

On the face of it, the company has comfortably sufficient assets to satisfy the costs of the defendants if they successfully defend this action. The defendants' solicitors provided an estimate of costs of about $28,000 in respect of that.

The defendants, however, make the point that the only assets, or the principal assets are cash assets or assets which could easily be readily dissipated and I take that point, but on the whole that really depends on whether there is good reason to doubt what is said in Mr James' affidavit, or good reason to be sceptical about the future of the company or to suspect that if the litigation went badly steps will be taken to attempt to frustrate an order for costs.

It seems to me that those things at the moment are really largely speculation. There is no actual evidence to support the view that any of those things is likely and the position is really no different from saying of any other company with some relatively modest assets, well, some time down the track those assets may not be there.

The position is at the moment, on the evidence before me, that there is not reason to believe that the plaintiff will be unable to pay the costs of the defendant if the defendant is successful in the action and, at the moment, in my opinion, grounds for an order for security for costs has not been made out. So that part of the application is also dismissed.

In relation to costs, the point was made that in a letter in response to a letter raising concerns about security for costs, none of this was disclosed. All that the plaintiff said really was that the plaintiff could pay its debts as they fell due and the individuals behind it were not men of straw. No offer by the individuals

behind it to stand behind the company was forthcoming at that point.

However, the letter also sought particulars, as it were, of the grounds on which the defendant had a belief that the applicant would be unable to pay the costs if the defendant was successful. In response, there was a letter sent pointing out that this response was unsatisfactory but it was sent on the same day that the application for security for costs was filed.

In those circumstances, it seems to me that if the matter had been taken further in correspondence more information about the plaintiff may well have been revealed which would have made it inappropriate, or would, at least, have meant that if the defendants made an application for security for costs then they would do so at least with their eyes fully open.

I think that the application for security for costs was really premature in those circumstances. The matter should have been explored further with correspondence and, in view of that, I think there is not a sufficient reason to depart from the ordinary rule in relation to costs.

So the application of 1st of February having been wholly unsuccessful, that application is dismissed with costs.

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HIS HONOUR: I think that on the whole it is not a reason to depart from the order that I have pronounced, so the application of the 1st of February is dismissed with costs.

...

HIS HONOUR: By consent, the other application is dismissed and order the plaintiff pay the third defendant's costs of the application to be assessed.
