DISTRICT COURT OF QUEENSLAND

CITATION:	*Medcan Australia Pty Ltd v Cann Global Limited* [2022] QDC 264
PARTIES:	**MEDCAN AUSTRALIA PTY LTD** **(ACN 615 734 220)** (plaintiff) **v** **CANN GLOBAL LIMITED** **(ACN 124 873 507)** (defendant)
FILE NO/S:	1639/22
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court of Queensland
DELIVERED ON:	28 November 2022
DELIVERED AT:	Brisbane
HEARING DATE:	6 October 2022
JUDGES:	Jarro DCJ
ORDER:	**The application is dismissed.**
CATCHWORDS:	PRACTICE AND PROCEDURE - whether a court of another State with jurisdiction to determine the dispute is the appropriate court - whether proceedings should be stayed.
COUNSEL:	P B Le Plastrier for the applicant B Kidston for the respondent
SOLICITORS:	Birchall Legal for the applicant Ellem Warren Lawyers for the respondent

[1] Pursuant to s 20(3) of the *Service and Execution of Process Act* (Cth) 1992 ("SEPA"), the defendant, after having filed a conditional notice of intention to defend, has applied to stay the proceedings in favour of the courts of New South Wales.

[2] The plaintiff opposes the order sought, submitting that the appropriate court to determine the matters in dispute is the District Court of Queensland, or alternatively, at best, the defendant's case, it was contended, rises no higher than establishing that the District Court of New South Wales "is about as appropriate" as this State's court. The plaintiff has conceded that all the matters in issue between the parties can be determined by the District Court of New South Wales, as well as

this court. It has been submitted however, that either way, the applicant has failed to discharge the onus and the application should be dismissed.

[3] Under s 20(3) of SEPA, the court may stay a proceeding so long as it is satisfied that another State court, having jurisdiction to determine "all the matters in issue between the parties", is the "appropriate court" to determine those matters. In *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 241, Deane J stated:

> "[A] party who has regularly invoked the jurisdiction of a competent court has prima facie right to insist on its exercise and to have his claim heard and determined."

[4] The parties rely upon the authority of *St George Bank Ltd v McTaggart* [2003] 2 Qd R 568 where McPherson JA (with whom Davies JA and Philippides J agreed), identified that within the meaning of s 20 of SEPA, "the appropriate court" was the one with which the proceeding had the most real and substantial connection, and which could therefore be regarded as the natural forum.

[5] It was also highlighted to me on behalf of the defendant that a similar concept appears in *Joshan v Pizza Pan Group Pty Ltd* [2021] NSWCA 219, [115] being: the "centre of gravity of the dispute".

[6] The defendant is required to discharge the onus of satisfying the court on the balance of probabilities that the proceedings ought to be stayed, leaving it to the courts of New South Wales as the appropriate forum to determine all matters in issue between them and the plaintiff.[1]

[7] Subsections 20(3) and (4) of SEPA provide as follows:

> "**Stay of proceedings**
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> …
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> (3) The court may order that the proceeding be stayed if it 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.
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> (4) The matters that the court is to take into account in determining whether that court of another State is the appropriate court for the proceeding include:
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> (a) the places of residence of the parties and of the witnesses likely to be called in the proceeding; and
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> (b) the place where the subject matter of the proceeding is situated; and
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> (c) the financial circumstances of the parties, so far as the court is aware of them; and

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1 *St George Bank Ltd v McTaggart* [2003] 2 Qd R 568, [17].

(d) any agreement between the parties about the court or place in which the proceeding should be instituted; and

(e) the law that would be most appropriate to apply in the proceeding; and

(f) whether a related or similar proceeding has been commenced against the person served or another person.

but do not include the fact that the proceeding was commenced in the place of issue"

[8] In the past it has been stated that subsection 20(4) sets out a non-exhaustive list of the matters and regard can be had to other matters relevant to determining the appropriate court in the circumstances.[2] Before considering the non-exhaustive matters in s 20(4), it is first necessary to identify the matters in issue between the parties.

Issues in Dispute Between the Parties

[9] At present, the plaintiff seeks damages against the defendant for payment by way of debt or damages in respect of a contract. The plaintiff is licenced to import, sell, cultivate and manufacture medicinal cannabis products ("the plaintiff's activities"). Its business is conducted from premises located at Heathwood, Queensland. The various licences and permits held by the plaintiff restrict the plaintiff to carry out its activities from its Queensland location.

[10] In March 2019, the plaintiff entered into a Facilitation Agreement with the defendant, who is a public ASX company based in Sydney. The plaintiff's obligations under the Facilitation Agreement are set out at clause 2.1, whereas the defendant's obligations for payment are set out at clause 3.

[11] On 3 April 2020, the parties entered into a Deed of Variation by which they varied the Facilitation Agreement to reflect some of their relevant obligations.

[12] The pleadings assert that the defendant failed to pay the plaintiff the amount it was due under the Facilitation Agreement as varied. On 28 February 2022, the plaintiff served on the defendant a notice requiring the breaches to be remedied. They were not. On 19 April 2022, the plaintiff gave notice to the defendant of its termination of the Facilitation Agreement as varied.

[13] In July 2022, the plaintiff commenced proceedings against the defendant for payment by way of debt or damages payable under the Facilitation Agreement as varied and alternatively, damages for breach of contract.

[14] No defence has been filed because one is not required at present. The affidavit material before me however, on behalf of the defendant, has identified that the defence will focus on allegations that:

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2 See for instance *Conveyer & General Engineering Pty Ltd v T&F All States Pty Ltd* [2007] QDC 197, [30].

(a) the Facilitation Agreement as varied had already terminated; and,

(b) the plaintiff substantially or wholly did not perform the contract in accordance with its terms, or at all.

[15] Further, the affidavit material indicates that the defendant intends to file a counterclaim, which will plead the same facts as the defendant intends to plead in its defence. The draft counterclaim will principally plead the following causes of action:

(a) the plaintiff made misleading or deceptive representations ("the representations") in trade or commerce in contravention of section 18 of the *Australian Consumer Law 2010* (Cth) ("ACL"); and,

(b) the plaintiff committed various breaches of the Contract (the "Long Form Facilitation Agreement").

[16] Regarding the defendant's claim for misleading or deceptive conduct in contravention of the ACL, there is a proposed allegation by the defendant that the plaintiff made representations to it that were in fact false, misleading and deceptive at the time they were made. It is asserted that the representations were made by the plaintiff's directors (Mr Cochran and Mr Ball) in person at a meeting with representatives of the defendant at the defendant's offices in Sydney on 28 January 2019. At the conclusion of the meeting, the parties signed a document called "the Short Form Facilitation Agreement", which led to the eventual signing of the Contract (i.e., the Long Form Facilitation Agreement). It is asserted that the representations made at the meeting induced the defendant to enter into the Contract.

[17] Regarding the defendant's claim for various breaches of the Contract, it is alleged that in return for the money that the defendant paid to it, the plaintiff substantially or wholly did not perform the Contract in accordance with its terms or at all.

[18] It has been highlighted to me that this case arises from the Long Form Facilitation Agreement, which was executed by the defendant in Sydney; and was deemed to be executed by all parties in New South Wales because of clause 11.2 of the Contract which provided as follows:

> "This Agreement shall be governed by the laws of the State of New South Wales and is deemed to be executed and to be performed in the State of New South Wales".

[19] Under the draft counterclaim, the defendant will seek to claim the following loss and damage:

(a) the defendant's giving of a release in favour of the plaintiff worth $478,901 arising from monies loaned by the defendant to the plaintiff by way of paying the plaintiff's expenses as requested, the payments being executed from Sydney;

(b) the defendant's making of cash payments to the plaintiff under the Contract, the payments being executed from Sydney;

(c) the defendant's issuing of shares in itself occurred on instructions given from Sydney;

(d) the defendant's loss of a joint venture agreement with an entity known as Pharmocann Ltd, which was executed in Sydney. The joint venture agreement makes repeated provision for the manufacture of cannabis products at Bio Health Pharmaceuticals, being a *'facility located in Silverwater, New South Wales'*, being the same manufacturer of products as was referred to in clause 2.1(b) of the Contract. Pursuant to clause 2.2 of the joint venture agreement, the defendant and Pharmocann agreed to create a special purpose vehicle called 'Pharmocann Global Pty Ltd' which was registered in New South Wales, has its principal place of business and registered office in Sydney, and Mr Feldman as its director.

[20] On the other hand, the plaintiff has contended that upon review of the draft counterclaim, it should quickly become apparent that:

(a) the ACL and breach of contract claims "are built upon nothing more than a series of generic, vague, unparticularised and embarrassing allegations";

(b) the damages and loss claimed are "vague, grossly exaggerated and obviously lacking in causation"; and,

(c) if filed, the draft counterclaim would be liable to being struck out.

[21] It was submitted that notably the allegations of breach and contravention at the heart of the draft counterclaim (or any of them) were unsupported by any evidence (presumably by design) and were inherently unbelievable. Further, that all of the alleged representations were made orally and at a single meeting in May 2018 and then relied on in March 2019 was also inherently unbelievable. That was especially so where the parties, on the defendant's case, were dealing with each other throughout the intervening period. It was submitted that perhaps even more remarkable was that in identifying the witnesses that the defendant proposes to call, the defendant had failed to identify those persons that work at its Brisbane office, seem to have had the most involvement with the plaintiff and would likely be able to give the most relevant evidence in respect of the defendant's alleged shortcomings in the plaintiff's performance. It was submitted that the court should therefore conclude that the draft counterclaim:

(a) was a device to justify a challenge to this court's jurisdiction; or,

(b) was so vague, unparticularised and embarrassing and unsupported by evidence;

that the claims articulated in it are not genuine or real disputes to which regard needs be had for the purpose of s 20 of SEPA.

[22] Whilst perhaps there are some current pleading deficiencies with the draft counterclaim, I proceed on the basis that the defendant has a prima facie claim against the plaintiff which it is entitled to litigate. Beyond the plaintiff's claim, one of the main contests will lie of course in the representations alleged to have been made by the plaintiff's directors to a number of the defendant's representatives which caused the defendant to enter into the Contract and resulted in asserted loss and damage to the defendant in New South Wales. Matters of credit will be a

relevant feature for the determination of the issues in dispute between the parties. I am disinclined to accept the submissions raised by the plaintiff that the draft counterclaim is nothing more than an attempt to justify a challenge to the court's jurisdiction or is so vague, unparticularised or embarrassing to the point which warrants little, if any, consideration of the defendant's position. I will now consider the non-exhaustive factors identified in s 20(4) of the SEPA to assist me in determining the place with the most real and substantial connection to the issues in order to decide the appropriate court.

Subsection 20(4)(a) – Places of Residences of the Parties and of the Witnesses Likely to be Called

[23] Much more is required than a mere headcount of witnesses. It is necessary to be realistic about the true role of each witness having regard to the issues in dispute.[3]

[24] The plaintiff is incorporated in Queensland and its principal place of business is located at Heathwood, Queensland. The defendant is incorporated in New South Wales and its principal place of business is located in Sydney. However, from at least April 2022, the defendant established an office in Brisbane.

[25] Credit will be in issue at trial and it follows that, more likely than not, witnesses will be required to give evidence in person.

[26] The defendant has identified that it will likely call the following witnesses who are resident in New South Wales:

(a) Eli Levy who was the Chief Financial Officer of Medical Cannabis Ltd, a subsidiary of the defendant, when the defendant entered into the Contract. Mr Levy was a party to the negotiations with the plaintiff. He lives in Sydney. It is anticipated that he would give evidence as to the alleged representations, the defendant's asserted reliance upon them and the defendant's decision to enter into those agreements. His evidence in my view is likely to be relevant.

(b) Neil Sweeny who is a disability pensioner who sought to obtain and fulfil a prescription for Canntab medicinal cannabis products ("Canntab products"). It is said that Mr Sweeny will give evidence as to the falsity of the representations and breach of the Contract. Mr Sweeny is a resident of Sydney. I consider his evidence minimal.

(c) David Austin who was a director of the defendant when the defendant entered into the Contract. Mr Austin was a party to internal discussions about whether or not to enter into the Contract and will give evidence as to the defendant's reliance on the representations made by the plaintiff, by its directors. Mr Austin resides in Sydney. His evidence in my view is likely to be useful.

(d) Tim Wearne is the Chief Operating Officer of Keeping Company, the defendant's external bookkeeper, accountant and 'external CFO' service

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3 *Joshan v Pizza Pan Group Pty Ltd* [2021] NSWCA 219, [56] – [57].

provider. He attended a meeting with Mr Cochran during which Mr Cochran and Mr Ball indicated that the plaintiff wished to acquire the defendant and thereby become publicly listed, as opposed to performing the Contract. He will give evidence of that meeting. Mr Wearne is a resident of Sydney. Despite being the external bookkeeper for the defendant and where it is anticipated that Mr Levy will give evidence probably about some of the same issues, Mr Wearne's evidence is likely to be useful in my view as to his recollection of the representations made by the plaintiff.

(e) Ryan Miller is the Chief Executive Officer of Keeping Company. He attended the same meeting as Mr Wearne. He will give evidence of that meeting. Mr Miller is a resident of Sydney. I put his evidence on par with Mr Wearne.

(f) Pnina Feldman was the director and chairperson at the time that the defendant entered the Short Form Facilitation Agreement and Long Form Facilitation Agreement. She was a party to the negotiations with the plaintiff and executed each of those documents. It is anticipated that principally, she will give evidence as to the representations, as well the defendant's reliance on them and decision to enter into those agreements. Mrs Feldman is also a resident of Sydney. Mrs Feldman's evidence will be highly relevant in my view.

(g) Sholom Feldman was the executive director of the defendant with day-to-day carriage of all aspects of the arrangements between the defendant, the plaintiff and Pharmocann. Mr Feldman will give evidence across all of the lay matters in issue. He resides in both Sydney and Los Angeles, California and shares his time approximately equally in both locations. The plaintiff highlighted that it is just as easy for both Feldmans to fly to Brisbane to give evidence at the trial of this matter because if Mr and Mrs Feldman are capable of flying between the USA and Sydney, they are capable of attending a trial in Brisbane. I accept that suggestion insofar as it might apply to Mr Feldman, but not to his mother Mrs Feldman because Mrs Feldman is elderly and more importantly the fulltime carer for another one of her sons who has Down's Syndrome and requires daily care and attention. In any event, Mr Feldman's evidence will be crucial for the defendant.

[27] It was contended on behalf of the plaintiff that "a more nuanced approach" should be adopted. 17 witnesses have been identified from Queensland as follows:

(a) The agreements in both the claim and the draft counterclaim (save in respect of the Canntab products) are in writing and appear to be admitted. If they need be proved, it was submitted that it can be done by Mr Cochran, who is in Queensland.

(b) The Short Form Facilitation Agreement can be disregarded because it was almost immediately superseded by the Long Form Facilitation Agreement i.e. the Contract. No witness is required in relation to this issue.

(c) In respect of the issues of the issuance and non-payment of the invoices in the claim, it was submitted that these can be proved by Mr Cochran, who is in Queensland.

(d) As to the alleged making of the representations in the draft counterclaim, these are alleged to have been made by Mr Cochran and Mr Ball.

(e) As to the alleged falsity of the representations in the draft counterclaim, they are alleged to have been false at the time of their making, in the sense that they were factually untrue and that the relevant intention was not held by the plaintiff. It is said that the plaintiff will need to call Mr Cochran and Mr Ball.

(f) As to the matters alleged to constitute the breach of contract in the draft counterclaim, it is submitted that these are so vaguely pleaded that it is difficult to tease out what evidence will be required. The plaintiff says that it apprehends that the following witnesses will be required to dispute a claim that the plaintiff did not perform its obligations under the Contract:

(i) Mr Cochrane;

(ii) Mr Ball;

(iii) Dr Ikenasio, senior pharmaceutical consultant who is in Queensland;

(iv) Dr Sharma, former quality assurance officer who is in Queensland;

(v) Dr Kemp, head of Medical of Cann I Help Pty Ltd (Cann I Help), a subsidiary of the plaintiff, who is in Queensland;

(vi) Mr Ratcliffe, former cultivator for the plaintiff, who is in Queensland;

(vii) Ms Testrow, a nurse with Cann I Help, who is in Queensland;

(viii) Ms Carlton, head of finance for the plaintiff, who is in Queensland;

(ix) Ms Moylan, finance controller for the plaintiff, who is in Queensland;

(x) Mr Peter Edwards, product developer of T12 Holdings Pty Ltd (T12 Holdings), a subsidiary of the defendant, who is in Queensland;

(xi) Mr Samuel Edwards, director of T12 Holdings, who is in Queensland;

(xii) Mr Sebastian Edwards, director of T12 Holdings, who is in Queensland;

(xiii) Ms Lesaffre, the defendant's chief operating officer, who is in Queensland;

(xiv) Mr Bachagherouni, the defendant's (former) supply chain manager, who is in Queensland;

(xv) Mr Zovner, the defendant's (former) director of sales and marketing, who is in Queensland;

(xvi) Ms Cohen, the defendant's marketing manager, who is in Queensland.

(g) As to the alleged loan in the draft counterclaim, it is submitted that there are no particulars that enable the identification of relevant witnesses, save perhaps for the directors already mentioned above.

(h) As to the joint venture agreement in the draft counterclaim, this is an agreement between the defendant and another party. It is submitted, at best, it

is a particular of loss and is unnecessary and has a tendency to prejudice or delay the fair trial of the proceeding and is liable to be struck out.

(i) As to the alleged agreement in relation to the Canntab products in the draft counterclaim, there are no particulars that enable the identification of relevant witnesses, save perhaps for the directors already mentioned above.

(j) The loss of "substantial profits, or any profits", and alleged loss of market capitalisation of "approximately $100 million" (said to be an obviously dubious claim) if not struck out, will necessitate the engagement of expert accountants. While such an expert has not yet been engaged, a very many number of conferences will be required (given the claims). It is said that it makes sense for the plaintiff to engage a Brisbane based expert accountant.

[28] It is my assessment that, as indicated, the main contest includes a detailed consideration of the representations made by the plaintiff's directors to a number of the defendant's representatives at a meeting in New South Wales. Overall, I find this factor, as part of the non-exhaustive list under s 20(4) of SEPA, to be finely balanced because at first glance, there will probably be more people who reside in New South Wales who will give evidence about the representations made at the meeting in Sydney with the plaintiff's directors. Yet on the other hand, it will be necessary for the plaintiff's directors and others to disprove the falsity or otherwise of the alleged misrepresentations, such that more court time will be allotted to their evidence. Narrowly however it is my impression at this stage of the proceeding that this factor is probably resolved in the plaintiff's favour because even despite the number of witnesses, the plaintiff's witnesses are probably the ones who are likely to give evidence of substantial relevance given they are more central to the issues in dispute between the parties. Further given the nature of the evidence, the plaintiff's witnesses will probably necessitate them giving more extensive evidence than the defendant's witnesses and, unlike, the defendant, the plaintiff has furnished evidence before me about the costs of flights and accommodation should the matter be stayed in Queensland and the proceeding litigated in New South Wales.

Subsection 20(4)(b) - The Place Where the Subject Matter of the Proceeding is Situated

[29] Competing views have been raised by the parties.

[30] For the plaintiff it was argued that this factor requires an analysis of where the causes of action the subject of the proceeding arose. The plaintiff's claim is for liquidated sums payable under a contract i.e., a debt. The debts were required to be paid to the plaintiff in Queensland. As to the damages for breach of contract claim, contracts are concluded upon acceptance of the offer being communicated and in the case of instantaneous communication methods, such as facsimiles, telephone conversations and emails, acceptance is communicated where it is received by the recipient.[4] The Contract was in fact signed by the plaintiff in Brisbane. The breach in fact occurred by the defendant failing to make payment to the plaintiff in Queensland. The loss was suffered by the plaintiff in Queensland.

[31] It was also highlighted for the plaintiff that as to the alleged ACL claim in the draft counterclaim the representations were allegedly made at a meeting in Sydney and

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4 *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] AC 34 (House of Lords).

the representations were allegedly falsified by the performance or lack of it in Queensland. As to the alleged breach of contract claim in the draft counterclaim, the work was in fact performed in Queensland, as was required by law and the breaches variously relate to how the plaintiff carried out or failed to carry out its obligations under the Contract largely occurred at and were otherwise co-ordinated from Heathwood in Queensland. As to the alleged conversion claim in the draft counterclaim, it arises out of goods delivered into the possession of the plaintiff at Heathwood, Queensland which the plaintiff is alleged to have wrongfully detained and thereby converted.

[32] Nevertheless the defendant has emphasised clause 11.2 of the Contract, that is that the parties have relevantly agreed that their agreement "is deemed to be executed and to be performed in the State of New South Wales". The defendant has submitted that clause 11.2 of the Contract operates as a contractual estoppel in relation to where the contract executed and performed.[5] This concept was explained in *Peekay* as follows at [56]:

> "… parties to a contract [may] agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contracted self and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rises to an estoppel."

[33] It was submitted that clause 11.2 therefore precludes the "subsequent denial" by one of the plaintiff's directors, Mr Cochran, that the contract was executed and performed in New South Wales (as opposed to Queensland). It was highlighted that consistently with the contractual estoppel, payments were made electronically from Sydney, New South Wales. Further, in *St George*, fraud, nuisance and misleading or deceptive conduct that occurred in Queensland were the issues. McPherson JA held at [20]:

> "I entertain no doubt that the Queensland court is the appropriate court. It was this State in which the alleged fraud, negligence or trade practices contravention was perpetrated. The representations were made and were acted upon here; money was paid over and the loss was sustained here."

[34] In *Burnan Pty Ltd v Bolton & Ors* [2008] QDC 32, the issues were breaches of contract and misleading and deceptive conduct that occurred in Queensland. Nase DCJ held at [23]:

> "In my view the places of residence of the parties and witnesses, and the financial and personal circumstances of the parties largely

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5 *Prime Sight Ltd v Lavarello* [2014] AC 436, [47]; *Wallace Trading Inc v Air Tanzania Company Ltd & Ors* [2020] EWHC 339 (Comm), [79]; *Peekay Intermark v Australia and New Zealand Banking Group Limited* [2006] EWCA Civ 386, [56]-[57]; *Colchester Borough Council v Smith* [1991] Ch 448.

> balance one another out. Nonetheless, the facts the agreement (or agreements) and the alleged representations were entered or made in Brisbane, and that the agreement was performed in Brisbane (and therefore any breach occurred in Brisbane) point to Queensland as the natural forum for the proceedings."

[35] It was submitted by the defendant that consistently with *St George* and *Burnan*, it is clear that the place where the defendant's ACL claim arises is Sydney, New South Wales, being the place where the representations were made and relied upon and where the loss and damage was suffered. Consistently with *Burnan*, clause 11.2 and the contractual estoppel, it is equally clear it was submitted that if the plaintiff's causes of actions in debt and breach of contract arise at all, they arise in Sydney. Likewise, the defendant's cause of action for breach of contract arises in Sydney and its loss and damage has been sustained in Sydney.

[36] The plaintiff has argued that is a contractual device to ensure that New South Wales courts have jurisdiction in relation to disputes that arise out of the agreement and that the clause has no work to do here because the plaintiff accepts that the District Court of New South Wales also has jurisdiction to determine the disputes the subject of this proceeding. Moreover, it was contended that the parties cannot, of course, contract out of SEPA. It is said that upon an analysis of the various causes of action, the result is mixed with no one jurisdiction materially ahead of the other.

[37] It is of course trite that the parties cannot contract out of SEPA but by agreeing to the clause, it places a heavier reliance on New South Wales. My overall impression is that this non-exhaustive factor favours New South Wales.

Subsection 20(4)(c) – Financial Circumstances of the Parties

[38] The plaintiff has argued that the defendant is a publicly listed company with international directors, whereas the plaintiff is a private company and therefore it might tentatively be inferred that the defendant is in a better financial position than the plaintiff to meet any costs associated with litigating interstate.

[39] There is no sufficient evidence before me about the financial circumstances of the parties to come to an appropriately informed view about this factor.

Subsection 20(4)(d) - Any Agreement Between the Parties About the Court or Place in Which the Proceeding Should be Instituted

[40] Clause 11.2 of the Contract is not an exclusive jurisdiction clause and I accept, as the plaintiff has submitted, that that there is no such agreement between the parties about the court or place in which the proceeding should be instituted. For present purposes this consideration is irrelevant.

Subsection 20(4)(e) - Law That Would be Most Appropriate to Apply

[41] This factor is not applicable either because the claim and the draft counterclaim include claims for debt, breach of contract, contravention of the ACL and conversion. The ACL is a federal statute applied uniformly in Queensland and New South Wales and the common law in relation to debt, breach of contract and

conversion (insofar as it relates to the issues at hand) is the same in Queensland and New South Wales.

Subsection 20(f) - Whether There are Related or Similar Proceedings

[42] There are no related or similar proceedings on foot. As such, for present purposes, this consideration is irrelevant.

Other Considerations

[43] Both parties have identified a number of other matters relevant to the exercise of discretion.

[44] Insofar as the defendant is concerned, three matters were highlighted to me. First, registry facilities were an appropriate consideration in that should the matter proceed in the courts of Queensland, a town agent will need to be engaged and instructed on behalf of the defendant for all filings of documents. The cost of that is between $90 to $180 per filing, plus printing charges and GST. It is estimated that the costs of filing documents in the Brisbane registry for the duration of the proceedings is likely to be between $1,500 and $2,500 plus GST. This is not a determinative issue in my view because the converse equally applies if I granted the stay and proceedings were instituted in New South Wales.

[45] Secondly, the defendant has instructions to transfer the claim to the Supreme Court. Regardless of whether the matter is to be litigated in the courts of New South Wales or Queensland, the defendant will make an application for the matter to be heard in the Supreme Court of the relevant State. The basis for those instructions is that the quantum of loss and damage claimed by the defendant under the counterclaim is in many millions of dollars. In support of this proposition, I was referred to the decision in *Willabrae Pty Ltd & Ors v Bridgestone Australia Limited* [2007] QDC 007, where the defendant intended to set off its debts against a damages claim in an amount that would have exceeded the monetary jurisdiction of this Court. Kingham DCJ, as her Honour then was, regarded this factor as "important" in favouring the granting of the stay. It was submitted on the defendant's behalf that if the stay is not granted, and the matter is transferred to the Supreme Court of Queensland, an application under the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 will likely be filed. This would mean that the same or similar issues will be ventilated again. This is insufficient. It is a far better use of resources to simply stay the proceedings now. In my view, this is a factor which, when taken with the other non-exhaustive factors, might sway towards staying the proceeding in Queensland.

[46] The defendant also relies upon what has been described as "an open offer of compromise" namely that on or around 25 August 2020, an open offer to compromise the application was issued by the defendant to the plaintiff, to which no reply was ever received. I do not consider this factor relevant.

[47] The plaintiff has identified four matters. First, this is a commercial dispute suitable for this court's Commercial List. The active judicial management of the proceeding by an experienced commercial judge with the corresponding savings of time and costs weighs in favour of this court. It was suggested that if the proceeding remains in this court and the draft counterclaim is filed and the proceeding transferred to the Supreme Court of Queensland, the proceeding would be suitable for that court's

Commercial List or Supervised Case List. That too will result in active judicial management of the proceeding by an experienced commercial judge with the corresponding savings of time and costs. There is no evidence of any similar case management that might be available to the parties were the proceeding commenced in the District Court of New South Wales. The availability of the said lists are matters which weigh in favour of this court. I consider this feature relevant in militating against a stay.

[48] Second, the court and the District Court of NSW have the same monetary jurisdiction of $750,000. It was highlighted that if the proceeding remains in this court and the draft counterclaim is filed, the parties need not incur the trouble and expense of making an application to transfer the proceeding to the Supreme Court of Queensland. A counterclaim beyond the monetary jurisdiction of this court will, without more, be brought within the jurisdiction of the court, by operation of subsection 29(5) of the *Civil Proceedings Act* 2011. There is no equivalent mechanism in the District Court of New South Wales.[6] This mechanism for accommodating a counterclaim beyond the monetary jurisdiction of the court weighs in favour of this court. I am not overly persuaded by this submission, on its own, to dismiss the application.

[49] Third, the draft counterclaim is, on its face, "shadowy". It raises claims never previously raised. It appears to be an attempt to justify the defendant's failure to pay debts owed to the plaintiff. Were this proceeding stayed, there is a real risk that the draft counterclaim would not be filed (at least not promptly) and a proceeding commenced in the Supreme Court of New South Wales. The defendant has offered no undertaking to promptly file the draft counterclaim in a court in New South Wales. On the other hand, it might be worse if it did, as filing the draft counterclaim will inevitably be met with a strike out application and/or a request for particulars and the parties will delayed with those applications and the amendments that will follow. It was submitted that if the defendant is genuine about pursuing the claims the subject of its draft counterclaim, it will need to substantially amend its proposed pleading. That will take some time and further delay the plaintiff's attempts to recover the debts owed to it. This is a further matter that weighs in favour of this court. I tend to agree.

[50] Fourth, while it is not clear from the vague allegations in the draft counterclaim, it appears likely that questions about the plaintiff's facilities at Heathwood, Queensland will arise. It may be necessary for expert(s) to inspect the plaintiff's premises. This is a further matter that weighs in favour of this court. Like the second matter raised by the plaintiff, I am not entirely persuaded by the weight of this submission.

Determination

[51] Attempting to weigh the various matters prescribed by section 20 of SEPA is a finely balanced exercise. The location of the witnesses, the substance of their evidence, the place where the matter of the proceeding is situated and the law to be applied demonstrate in my assessment that both Queensland and New South Wales are appropriate. Both states have jurisdiction to determine all the matters in issue between the parties and both seem appropriate to determine those matters. However

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6 Section 51 of the *District Court Act* 1973 (NSW).

at this very early stage of the litigation process, I am not sufficiently persuaded that the application should be allowed such that the present proceedings be stayed. There is nothing preventing the defendant, as it has foreshadowed, to file its proposed pleading, transfer this matter to the Supreme Court of Queensland and then apply under the cross-vesting legislation. By then, it should become more readily noticeable as to the appropriate forum. Should I accede to the application, the plaintiff will be further delayed from pursuing its litigation. As has been pointed out by the plaintiff, no undertaking has been given by the defendant to file a defence and counterclaim (in its current form) to commence proceedings in the Supreme Court of New South Wales. Whereupon a consideration of the factors in s 20 of SEPA are finely balanced to me, I am not inclined to allow the application and potentially deny the plaintiff who has filed a proceeding in this court on the supposition that the proceedings will be litigated in New South Wales. The situation may of course change when a defence and counterclaim are filed in due course, but at this point in time, I am of the view that the applicant has failed to discharge the onus to the requisite standard. Accordingly, the application is dismissed.

[52] I will hear from the parties as to costs.