SUPREME COURT OF QUEENSLAND

CITATION:	*Geoscience Resource Recovery LLC v Central Petroleum Limited* [2018] QCA 216
PARTIES:	**GEOSCIENCE RESOURCE RECOVERY LLC** (appellant) **v** **CENTRAL PETROLEUM LIMITED** ACN 083 254 308 (respondent)
FILE NO/S:	Appeal No 11706 of 2017 SC No 12118 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 223
DELIVERED ON:	14 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	12 April 2018
JUDGES:	Gotterson and McMurdo JJA and Mullins J
ORDERS:	**1. Appeal dismissed.** **2. The appellant is to pay the respondent's costs of and incidental to the appeal on the standard basis.**
CATCHWORDS:	PRIVATE INTERNATIONAL LAW – SERVICE OUT OF JURISDICTION – UNDER OTHER LEGISLATION AND RULES OF COURT – CONTRACT MADE WITHIN JURISDICTION – where the respondent commenced a proceeding in the Supreme Court of Queensland against the appellant – where the respondent served a claim on the appellant in the United States of America without leave of the Supreme Court of Queensland – where r 124(1)(g) of the *Uniform Civil Procedure Rules* 1999 (Qld) permits service on a person outside Australia if the originating process is for "a proceeding relating to a contract … made by 1 or more parties carrying on business or residing in Queensland" – where the respondent carried on business in Queensland – where the appellant filed an application for the claim to be dismissed – where the learned primary judge dismissed the application – whether the proceeding is one "relating to a contract made" by the respondent *Uniform Civil Procedure Rules* 1999 (Qld) r 124(1)(g),

r 124(1)(x)

Boss Group Ltd v Boss France SA [1997] 1 WLR 351, approved
DR Insurance Co v Central National Insurance Co of Omaha [1996] 1 Lloyd's Rep 74, cited
Finnish Marine Insurance Co Ltd v Protective National Insurance Co [1990] 1 QB 1078, not applied
Oceanic Life Ltd v Chief Commissioner of Stamp Duties (1999) 154 FLR 129; [1999] NSWCA 416, cited
Royal & Sun Alliance Insurance plc v MK Digital FZE (Cyprus) Ltd [2006] 2 Lloyd's Rep 110; [2006] EWCA Civ 629, cited
Tesam Distribution Ltd v Schuh Mode Team GmbH [1990] ILPr 149, cited

COUNSEL: J D Byrnes for the appellant
R Traves QC, with D J Butler, for the respondent

SOLICITORS: Clayton Utz for the appellant
Allens for the respondent

[1] **GOTTERSON JA:** On 21 November 2016, Central Petroleum Limited ("CTP") commenced a proceeding in the Supreme Court of Queensland against Geoscience Resource Recovery LLC ("GRR"). The latter is a Nevada corporation. It has no presence in Queensland or elsewhere in Australia. The claim and statement of claim were served on it in the United States without leave of the Supreme Court of Queensland.

[2] The principal relief sought by CTP in the proceeding is declaratory in nature; firstly, a declaration that it did not enter into, and is not bound by, a contract between it and GRR on terms contained in a document titled "Success Fee and Retainer Fee Agreement" dated 26 February 2012; and, secondly, declarations that it is not liable to pay a fee or any other sum to GRR in relation to the entry by CTP and Merlin Energy Pty Ltd into an agreement with Total GLNG Australia ("Total") on or about 6 November 2012 titled "Farmout Agreement Total Central Petroleum Joint Operations" ("the Total Transaction"), and that it is not liable to pay GRR any damages by reason of its not having paid a fee or other sum to GRR in relation to the Total Transaction.[1]

[3] Upon service of the originating process, GRR duly filed a conditional notice of intention to defend on 24 March 2017.[2] In it, GRR disputed the jurisdiction of the Supreme Court to entertain CTP's claim without its consent, and contended that the proceeding was irregularly commenced, was an abuse of process, and sought remedies that lacked utility.

[4] At the same time, GRR filed an application in which it claimed by way of substantive relief a range of orders in the alternative: that the claim be set aside pursuant to rules 16(e) and 367 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") or the court's inherent jurisdiction; alternatively, that the proceeding be stayed in

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1 First Amended Statement of Claim ("FASC"): AB510-511, filed 16 May 2017.
2 AB497-498.

exercise of any of those jurisdictions; and further or alternatively, that the statement of claim be struck out pursuant to rules 16(i), 171 or 367 of the UCPR or the inherent jurisdiction.[3]

[5] This application was heard by a judge of the Trial Division in September 2017. On 12 October 2017, her Honour dismissed the application and ordered GRR to pay CTP's costs of it.[4] Reasons for the dismissal were published at the same time.

[6] On 8 November 2017, GRR filed a notice of appeal against those orders.[5]

The parties and the alleged agreements between them

[7] GRR carries on business as a petroleum engineering consultant with particular expertise in unconventional modes of exploration of oil and gas reserves. It provides professional advice for mergers and acquisitions and joint ventures.

[8] CTP's registered office and principal place of business is in Queensland. It has 12 subsidiaries, all of which are incorporated in Australia and have registered offices in Queensland. Either directly or through its subsidiaries, CTP owns interests in petroleum tenements in Australia. It does not own any property outside Australia.

[9] It is common ground that following negotiations during 2011, CTP and GRR entered into an agreement by which the latter undertook to assist the former in finding a partner (known as a "farm-in partner") to invest in the development of CTP's petroleum tenements in exchange for an interest in them ("2011 Agreement"). This agreement was governed by, and to be construed under, the laws of Western Australia.[6]

[10] The 2011 Agreement was in the form of a letter on GRR's letterhead dated 5 September 2011 addressed to CTP at its postal address in Perth.[7] The letter was headed "RE: Monthly Retainer Fee Agreement Between [GRR and CTP]". The terms of the agreement followed. The letter was signed for GRR on 5 September 2011 by Mr Niraj Pande as Petroleum Engineer and Principal. It was signed for CTP on 6 September 2011 by Mr John Heugh as Managing Director.

[11] The term of the 2011 Agreement was stated to be from 1 May 2011 to 31 December 2011, at which time it was to terminate unless otherwise mutually agreed.[8] CTP was obliged to pay GRR a monthly fee of AUD$10,000.[9] Acknowledgment was given to freedom on GRR's part to negotiate a commission fee of up to two per cent to be paid by a potential farm-in partner.[10] Provision was also made for CTP to pay GRR a discretionary non-binding *ex gratia* bonus for properly performed work of material benefit to CTP.[11] Guidance was given to what the quantum of the bonus

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3 AB499-500.
4 AB516.
5 AB544-546.
6 Clause 28(i).
7 AB253-261.
8 Clause 9.
9 Clause 8.
10 Clause 12. Clause 12 contained an express provision that CTP had no liability or obligation whatsoever to pay a commission fee.
11 Clause 22.

might be in the event that GRR had been unable to negotiate a commission fee in any given case.[12] Clause 26 expressly released and discharged CTP from any claims for bonus payments or commission fees.

[12] The parties are, however, at odds as to whether a second agreement was concluded between them. GRR contends that a contract was agreed between them in February 2012 ("Disputed Agreement"). It contends that the terms of the Disputed Agreement are contained in a typed two-page document titled "Success Fee and Retainer Fee Agreement (26 February 2012)".[13]

[13] This document records that the 2011 Agreement had terminated on 31 December 2011 and that "this agreement" is to "supersede" it. It also records that CTP's Board of Directors had "appointed Trevor Shortt to be directly responsible for negotiating all terms of the farm-out process". As well, it contains the statement that "the previous agreement is unrealistic as CTP recognizes that no major company shall pay a success fee, thus CTP shall pay the success fee that is due upon the close of any transaction that GRR brings to the table subject to CTP's approval to contact the specific company".

[14] That statement is followed by a provision in the following terms which is broadly consistent with it:

> "CTP shall continue to pay GRR its' (sic) monthly retainer previously agreed to until 31 December 2012 or until CTP has farmed-out 33% of its acreage holdings, whichever occurs first. CTP through its BOD shall present a formal agreement regarding the % percentage success fee that GRR will earn if a farm-out or joint venture is consummated between CTP and a company GRR introduces CTP's farm-out opportunity by 15 April 2012. Should CTP not present a formal agreement through its BOD by 15 April 2012, then GRR shall still be entitled to earn its success fee and retainer under fee's (sic) that are usual and customary in the energy industry that investment banking firms and petroleum engineering firms charge for the services that GRR is providing on a gross basis. This will include any structure that CTP will benefit from such as drill to earn, sharing of venture transportation facilities and gas liquefaction facilities for any farm-out."

The document contains provision for it to be signed by Mr Shortt on behalf of CTP and Mr Pande on behalf of GRR.

[15] GRR contends that the Disputed Agreement became contractually binding in the following circumstances:

(a) on 15 February 2012, Mr Heugh notified GRR that its Exploration Manager, Mr Shortt, had been given " all responsibility for farm-outs";

(b) on 16 February 2012, Mr Shortt sent GRR an email stating that he had been appointed by CTP's Board to be "directly responsible for farm-outs" and that he was "authorised to negotiate terms for the Board of Directors"; and the email was copied to the members of CTP's Board who sat on its "Farm-out Committee"; and

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12 Clauses 24, 25.

13 AB262-263.

(c) on or about 27 February 2012, Mr Shortt met with representatives of GRR in Houston, Texas and signed the agreement.

[16] I mention at this point that in an affidavit sworn by Mr Shortt in this proceeding on 4 July 2017,[14] he denies that he signed the document in question or any similar document.[15] He also swears that he was never given authority to sign such a document.[16] No such document signed by Mr Shortt (or copy thereof) has been adduced in this proceeding.

The Total Transaction

[17] It is also common ground that a contractual document titled "Farmout Agreement Total Central Petroleum Joint Operations" was executed by Merlin Energy Pty Ltd as "Owner", Total as "Farmee" and CTP as "Operator", on or about 6 November 2012,[17] thereby giving binding effect to the Total Transaction.

[18] GRR contends that it is entitled to payment by CTP of a success fee pursuant to the Disputed Agreement. The entitlement is claimed on the basis that it introduced Total to CTP, that introduction having led to a significant investment by Total towards the development of CTP's petroleum assets.

The Texas proceeding

[19] In July 2015, GRR commenced a proceeding by way of petition against CTP in the District Court of Harris County, Houston, Texas ("Texas proceeding").[18] The petition pleads by way of fact that GRR and CTP entered into the Disputed Agreement, Mr Pande and Mr Shortt having executed it on behalf of their respective companies. It also pleads that GRR "brought Total to CTP for a Successful Agreement". The substantive relief claimed in the petition is principally monetary in nature. It includes:

(a) a contractual claim for a success fee on the Total Transaction payable pursuant to the terms of the Disputed Agreement;

(b) in the alternative, a quantum meruit claim for a reasonable sum for services rendered to CTP, culminating in the agreement for the Total Transaction; and

(c) in the further alternative, damages for fraudulent misrepresentation in that CTP knowingly made a false representation to GRR that the former would pay a success fee.

[20] CTP has appealed against a ruling of the District Court that it has jurisdiction to hear and determine the petition. A trial of the petition which had been scheduled to begin on 19 June 2017 has been deferred until the Texan appeal has been determined.

The decision at first instance

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14 AB406-428.
15 At [49].
16 At [50].
17 AB264-367.
18 AB377-395.

[21] At first instance, GRR accepted that if the originating process, the claim, was validly served on it, then the Supreme Court of Queensland has jurisdiction to hear and determine the proceeding.[19] The learned primary judge addressed first the question whether the claim was validly served.[20] Having determined that it was, she then addressed the question whether the Queensland proceeding should be stayed having regard to the pending Texas proceeding.[21] Her answer was that the Queensland proceeding ought not be stayed. Accordingly, GRR's application was dismissed.

[22] It is the answer given to the first question that is of relevance for this appeal. Whether the claim was validly served on GRR in Texas depends upon whether the proceeding originated by the claim is a proceeding that falls within at least one of the categories listed in r 124(1) of the UCPR. That rule regulates when the originating process for a proceeding commenced in the Supreme Court of Queensland may be served outside Australia. It does so by reference to categories of proceedings for which such service is permitted without the leave of the court. UCPR r 127 allows service of an originating process outside Australia with the leave of the court if service of it is not authorised under r 124.

[23] Relevantly, r 124(1)(g)(ii) permits service on a person outside Australia where the originating process is for "a proceeding relating to a contract … made by 1 or more parties carrying on business or residing in Queensland". Clearly, CTP is a party that carries on business in Queensland. Thus, the issue that was contested before the learned primary judge was whether CTP's proceeding is one "relating to a contract".

[24] In her reasons for judgment, her Honour outlined the allegations in CTP's statement of claim. She noted that it pleads:

(a) material terms of the 2011 Agreement;[22]

(b) that GRR had introduced Total to CTP as a prospective farm-in partner;

(c) that the introduction was a "service" as defined in the 2011 Agreement and that GRR had performed it pursuant to that agreement;[23]

(d) that CTP and GRR had agreed in writing, or by their conduct, that the 2011 Agreement would continue beyond 31 December 2011;

(e) that on or about 13 April 2012, CTP instructed GRR to cease performing services for it;[24]

(f) that the Total Transaction was entered into in November 2012;

(g) that the 2011 Agreement governed whether a fee or other sum was payable by CTP to GRR in relation to the Total Transaction;

(h) that under the 2011 Agreement, no fee or other sum was so payable;[25]

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19 Reasons at [9].
20 Reasons at [10]-[32].
21 Reasons at [34]-[81].
22 Reasons at [14]. I have summarised these terms in these reasons.
23 Reasons at [15].
24 Reasons at [16].
25 Reasons at [17].

(i) that GRR has alleged in the Texas proceeding that it and CTP entered into the Disputed Agreement and that it is entitled to be paid a success fee under it for the Total Transaction;

(j) that CTP never entered into the Disputed Agreement; Mr Shortt never signed it; he was never authorised to sign it;

(k) that, accordingly, it is not liable to pay GRR a fee or other sum under the Disputed Agreement or damages for not paying a fee under it;[26] and

(l) that by virtue of the release and discharge in clause 26 of the 2011 Agreement, CTP is not liable to pay GRR bonus payments, commission fees or any other similar type of payment.[27]

On the basis of these allegations, CTP claims the declaratory relief to which I have referred.

[25] The learned primary judge referred to GRR's reliance on the decision in *Finnish Marine Insurance Co Ltd v Protective National Insurance Co*[28] for its principal contention that CTP's proceeding does not relate to a contract made by the parties because it is premised upon an allegation that the parties did not make the Disputed Agreement. Her Honour noted that, on the other hand, CTP relied on authorities, including *Boss Group Ltd v Boss France SA*[29] for the proposition that a proceeding is one "relating to a contract" where the plaintiff denies the existence of a contract which the defendant claims exists.

[26] Her Honour gave the following analysis of the authorities to which she had been referred:[30]

> "[26] *Boss Group v Boss France SA* concerned the meaning of the phrase "matters relating to a contract" in article 5(1) of the Brussels Convention on Jurisdiction, incorporated into English law under the *Civil Jurisdiction and Judgments Act 1982*. The Court of Appeal (comprising Russell, Saville and Otton LJJ) said it was "well settled that it is no answer to a claim for jurisdiction under this article that the respondent is asserting that no contract ever came into existence", referring to *Effer v Kantner* [1982] ECR 825 (at 974). Lord Justice Saville, delivering the reasons of the Court, observed at 356 that:
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> > "There is a lively dispute between the parties as to whether there is a contract between them under which the defendants are the exclusive distributors for the plaintiffs in France. It is true that the plaintiffs, who seek to sue here, are asserting that no such contract exists, but equally the defendants are asserting the contrary. In my judgment, the fact that it is this way round does not make the Article inapplicable. Article 5(1) is not confined to actions to enforce a contract or to

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26 Reasons at [18].
27 Reasons at [19].
28 [1990] 1 QB 1078.
29 [1997] 1 WLR 351.
30 Her Honour's references to "the alleged 2012 agreement" are references to the Disputed Agreement.

> obtain recompense for its breach, but refers generally to 'matters relating to a contract'.
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> ... in a case such as the present, the plaintiffs establish a 'good arguable case' that there is a matter relating to a contract by relying on the fact that this is what the defendants are contending against them."

[27] The *Boss Group* decision was referred to with approval by Clyde LJ in *Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 AC 153 at 182, his Honour noting that "[o]nce there is a dispute as to the existence of a contract the performance of which the one party is seeking to enforce or for the non-performance of which he is seeking a remedy, then it should not matter whether procedurally it is the defendant or the plaintiff who raises the issue of the existence of the contract".

[28] In both *Boss Group* and *Kleinwort Benson*, *Finnish Marine* is listed amongst the cases cited or referred to in argument; but is not mentioned in either court's decision. It was referred to in *DR Insurance Co v Central National Insurance Co of Omaha* [1996] 1 Lloyds Reports 74, but expressly not followed, it being held in that case that the policy which underlies the equivalent English rule is to enable all disputes about the existence or effect of contractual rights and liabilities falling within the scope of [the rule] to be brought before the English courts (at 79-80).

[29] In *Finnish Marine* there was apparently no opposing contention as to the existence of a contract;[31] whereas in *Boss Group* the contradiction inherent in the defendant seeking to assert that there is a contract that the plaintiff has broken (in the foreign proceedings) whilst simultaneously contending the contrary (on the basis of the plaintiffs claim for a negative declaration) in the domestic proceedings was a matter taken into account in the reasoning process. As Saville LJ said, "[o]nce one has removed the self-contradictory stance taken up by the defendants, it seems to me that it is self-evident that there are matters 'relating to a contract' between the parties".[32]

[30] The English authorities, *Boss Group* and *Kleinwort Benson*, are persuasive, and consistent with the High Court's approach in *Tana v Baxter* (1986) 160 CLR 572 at 580, as to the width of meaning of the equivalent phrase, "otherwise affecting such contract", as including practical as well as legal effects. In the face of the positive assertion as to the existence of the alleged

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31 In addition to a summons seeking to set aside service on it abroad, the defendant had also brought a summons seeking a stay on the basis of an arbitration clause in the putative contract, but sought to withdraw that summons at the hearing: *Finnish Marine* at 1081 and 1084.

32 *Boss Group* at 357. See also *Youell v La Reunion Aerienne* [2008] EWHC 2493; [2009] 1 All ER (Comm) 301 at [17], where Tomlinson J observed that the decision of the Court of Appeal in *Boss Group* "shows that the English market establishes a good arguable case that there is a matter relating to a contract by relying on the fact that that is what the French market is contending against it in Paris".

> 2012 agreement by Geoscience in the Texas proceeding, Central's claim for a negative declaration in the proceeding in this court will have practical as well as legal effects on the legal relationship between the parties in so far as it concerns the 2011 agreement and the alleged 2012 agreement. *Finnish Marine* has not been followed in England, and I am not persuaded that its reasoning ought to be applied here. There are good policy reasons why this dispute ought to be permitted to be litigated in an Australian court, given that (as discussed below): (i) it is strongly arguable Australian law is the proper law to be applied to determine whether the 2012 agreement was entered into; and (ii) the need for an Australian court to determine for itself whether the Texas court has jurisdiction, in the international sense, over Central (which in the present case involves a determination whether Central entered into the 2012 agreement)."

[27] Consistently with this analysis, the learned primary judge held that CTP's proceeding relates to both the 2011 Agreement and the Disputed Agreement and that, therefore, it falls within the scope of r 124(1)(g)(ii).[33] Her Honour noted for completeness that even if she had taken a different view of the Disputed Agreement, the proceeding would still properly be described as one that relates, in part, to the 2011 Agreement and within the scope of r 124(1)(g)(ii) by virtue of r 124(1)(x).[34]

The grounds of appeal

[28] GRR has appealed on the basis that the learned primary judge erred in finding that it had been validly served with CTP's originating process. There are several grounds of appeal. They are that CTP's "claim" does not fall within the scope of:

(a) r 124(1)(g)(ii) because the basis upon which the "claim" is made:

  (i) does not relate, with respect to the Disputed Agreement, to a contract that was made between the parties; and

  (ii) does not involve any claim for relief with respect to the 2011 Agreement; and

(b) r 124(1)(x) because no relief is sought in respect of the 2011 Agreement and thus no part of the "claim" falls partly within r 124.

[29] The orders sought by GRR on appeal are that the order made on 12 October 2017 be set aside and that CTP's proceeding be dismissed for want of jurisdiction.

[30] In Ground (a), GRR advances separate contentions for the non-application of r 124(1)(g)(ii) to the Disputed Agreement and to the 2011 Agreement. As to the former, (i), the argument is that the Disputed Agreement is not a contract made between the parties; as to the latter, (ii), it is that no claim for relief is made by CTP in respect of the 2011 Agreement. It is convenient to consider each contention separately.

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33 Reasons at [31].

34 Reasons at [32]. The category of proceeding in r 124(1)(x) is "a proceeding, so far as it concerns the person, falling partly within 1 or more of paragraphs (a) to (w)".

Ground (a)(i)

[31] **GRR's submissions:** GRR observed that in order to qualify under r 124(1)(g)(ii), a proceeding must be one that relates to a **contract made** by one or more parties carrying on business or residing in Queensland. It argued that since, under the rule, the contract which is related to the claim must be one that is made, it must be a "fully-formed contract".[35] If, as CTP has alleged in its claim, the Disputed Agreement was not made by the parties, then this rule cannot apply to the proceeding.[36]

[32] In oral submissions, GRR referred to observations in *Agar v Hyde*[37] and *Borch v Answer Products Inc*[38] to the effect that in applying service of process rules which speak of a proceeding of a particular kind, attention is focused upon the nature of the claim that is made in the proceeding. Here, the claim alleged that a contract had not been made; it did not allege that one had been made.

[33] GRR noted that art 5(1) of the *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* 1968, which was applicable to the litigation in *Boss Group*, was differently worded. It permitted a person domiciled in a Contracting State to be sued in another Contracting State "in matters relating to a contract, in the courts for the place of performance of the obligation in question".[39] GRR argued that, on the proper construction of art 5(1), for there to be obligations arising out of a contract, there must have been a contract in the first place.[40]

[34] It is GRR's submission that the Court of Appeal (England and Wales) in *Boss Group* erred in holding to the contrary and that the error was contributed to by a failure to have had regard for the decision in *Finnish Marine*.[41] Further, in adopting as correct the erroneous reasoning in *Boss Group*, the learned primary judge misled herself into error.

[35] GRR also submitted that surer guidance as to the interpretation and application of r 124(1)(g)(ii) is given by cases concerning the former O 11 r 2(g)(ii) of the *Rules of the Supreme Court of Queensland* ("RSCQ") and its analogues.[42] At the time of the replacement of the RSCQ by the UCPR in 1999, that rule permitted service outside Australia of a proceeding "to enforce, rescind, rectify, annul or otherwise affect, or to recover damages or other relief in relation to the breach of, a contract that was made by 1 or more parties carrying on business or resident in Queensland".

[36] The rule under consideration in *Finnish Marine*[43] was similarly worded except for the reference to Queensland. GRR suggested that the stature of that decision was enhanced by its having been subsequently applied by the Court of Appeal (England and Wales) in *DVA v Voest Alpine*.[44]

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35 Appellant's Outline of Submissions ("AOS") at [18].
36 Ibid.
37 (2000) 210 CLR 552; [2000] HCA 41 per Gaudron, McHugh, Gummow and Hayne JJ at [50].
38 [2000] QSC 379 at [9], [10].
39 The defendant to the litigation commenced by Boss Group in the United Kingdom was a company registered in France, which is also a Contracting State.
40 AOS at [23].
41 Ibid at [24].
42 AOS at [20].
43 O 11 r 1(d)(ii) of the *Rules of the Supreme Court* (England and Wales) ("RSCEW").
44 [1997] 2 Lloyd's Rep 279.

[37] **CTP's submissions:** CTP submitted by way of preliminary matters: first, that GRR bore the onus of establishing that the proceeding fell outside the scope of r 124;[45] and, secondly, that the focus is on the nature of the claim which is made.[46] CTP also submitted that the enquiry, so focused, involves an examination of the pleadings and additional material relied on by the plaintiff, but not an assessment of the strength of the plaintiff's claim.[47]

[38] Drawing on Mr Shortt's affidavit and the contrary factual allegations in the petition in the Texas proceeding, CTP observed that there was a dispute between it and GRR as to whether the Disputed Agreement had been entered into by them. Its principal submission was that it is sufficient for a proceeding to be one "relating to" a contract if one party contends that it was entered into and the other contends that it was not.[48]

[39] CTP referred to a series of cases in support of this submission. Several cases early in the series concerned analogues of O 11 r 2(g)(ii) in both Australia and the United Kingdom.

[40] In 1976, Kerr J held in *BP Exploration Co (Libya) Ltd v Hunt*[49] that a claim for a declaration that a contract had been frustrated was a claim that "otherwise affected" a contract and was within the rule. Then, in 1986, the High Court held in *Tana v Baxter*[50] that a claim for an order declaring a contract void "affected" the contract for the purposes of the statutory provision in question.

[41] As to *Finnish Marine*, decided in 1989, CTP noted, first, that the proposition in it, namely, that for a claim to "affect" a contract, it was necessary that there be an existing legally binding contract, was disapproved in 1995 in *DR Insurance Co v Central National Insurance Co of Omaha*[51] by a Deputy Judge of the High Court (UK) who preferred the approach taken in *BP Exploration*. In *DR Insurance*, the plaintiff had alleged that no contract with the defendant had ever come into existence. Secondly, CTP argued that the endorsement of *Finnish Marine* in *DVA* was limited to the concept that for the rule to apply, the parties to the contract must be parties to the litigation. That concept is not in issue here.

[42] CTP submitted that the learned primary judge was correct in regarding decisions concerning art 5(1), namely, *Boss Group* and *Kleinwort Benson*, as persuasive in favouring jurisdiction when the existence of a contract is an issue. In the latter case, that interpretation had been approved not only by Lord Clyde, who specifically referred with approval to *Boss Group*, but also by Lord Hutton[52] and by the minority, Lord Mustill and Lord Nicholls.[53]

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45 Citing *Borch* at [8] where Holmes J observed that the incidence of the onus was unlikely to be of much moment, given that resolution of the issue did not involve evidential findings or the exercise of a discretion.

46 Citing *Agar* at [50]-[52] and *Borch* at [9], [10].

47 Ibid.

48 Respondent's Outline of Submissions ("ROS") at [23].

49 [1976] 3 All ER 879 concerning O 11 r (1)(f) of the RSCEW.

50 (1986) 160 CLR 592 at 580 concerning s 11(1) of the *Service and Execution of Process Act* 1901 (Cth).

51 [1996] 1 Lloyd's Rep 74 at 79.

52 At 194.

53 At 172, 173 respectively.

[43] Further, CTP noted that the decision in *Effer v Kantner*, on which reliance had been placed in *Boss Group*, was accepted as authoritative in the 1989 decision of the Court of Appeal (UK) in *Tesam Distribution Ltd v Schuh Mode Team GmbH*.[54] As well, the decision in *Boss Group* had been referred to in 2006 by the Court of Appeal (England and Wales) in *Royal & Sun Alliance Insurance plc v MK Digital FZE (Cyprus) Ltd*[55] without criticism.

[44] **Discussion:** I preface this discussion with the observation that there is a genuine dispute between the parties as to whether they entered into a legally binding agreement in February 2012 in terms of the Disputed Agreement. That they did is pleaded by GRR in the Texas proceeding.[56] The substance of the case as pleaded by GRR is summarised in CTP's Further Amended Statement of Claim in this proceeding.[57] That pleading alleges that the Disputed Agreement was never entered into by CTP.[58] As noted, Mr Shortt's affidavit attests that CTP did not enter into it. This dispute is central to the claim made by CTP in its proceeding.

[45] The question for resolution here is whether CTP's proceeding, centred as it is on that dispute, is one "relating to a contract made by" CTP, being a party carrying on business in Queensland. Resolving that question requires consideration of the meaning of the expression "proceeding relating to a contract made by" an eligible party carrying on business or residing in Queensland.

[46] I would accept that the qualifying phrase "relating to" is, on its face, of general and far-reaching application. Notwithstanding, as Fitzgerald JA observed in *Oceanic Life Ltd v Chief Commissioner of Stamp Duties*,[59] the judicially adopted position has been that the operation of the phrase is determined by statutory context and purpose. However, in my view, determination of the meaning that that phrase has in context, does not, of itself, answer the question for resolution.

[47] To my mind, the critical interpretational issue presented by the parties' submissions on the contention in Ground (a)(i) arises from the words "contract made by" in the expression. The issue is whether or not the word "made" requires, as an undisputed anterior circumstance for the operation of the rule, the fact that there is, or was, in existence a contract to which the proceeding relates. Put another way, the issue is whether or not a proceeding may relate to a contract made by a party so as to engage the rule, when the proceeding itself requires resolution of a dispute between the parties over whether there is, or was, a contract between them.

[48] This rule does not, of course, expressly state that an undisputed anterior circumstance of that kind is required for its operation. Do the words "contract made by" imply that it is? I would answer that question in the negative for the following reasons.

[49] First, there is no apparent logical reason why a service rule of this kind would discriminate between proceedings where there is no dispute as to whether an enforceable contract had been made, on the one hand; and one in which one party to

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54 [1990] ILPr 149 per Nicholls LJ at [21] and Stocker LJ at [41].

55 [2006] 2 Lloyd's Rep 110 at [101] per Rix LJ (Maurice Kay and Auld LJJ agreeing).

56 Especially in the Petition at Facts C: AB381-383, and Causes of Action A: AB391-392, and in the verifying Declaration of Mr Pande paragraph 9: AB398.

57 At paragraph 3M: AB506.

58 At paragraphs 10A-10E: AB507-508.

59 (1999) 154 FLR 129; [1999] NSWCA 416 at [56].

a proceeding asserts that such a contract had been made and the other party denies that it had, on the other.

[50] Secondly, other categories in r 124(1) do not have a like requirement. For example, category (a), "a proceeding based on a cause of action arising in Queensland", is obviously not limited to a proceeding brought in circumstances where it is undisputed that the plaintiff has a viable cause of action against the defendant. Nor is category (j), "a proceeding for the recovery of an amount payable under an Act to an entity in Queensland", limited to a proceeding brought in circumstances where it is undisputed that the amount is payable. The former accommodates a proceeding in which the availability of the cause of action is disputed, and the latter accommodates a proceeding in which the defendant disputes that the amount is payable. To infer an exceptional requirement in the case of category (g) would disrupt a consistent interpretation and application of the rule.

[51] Thirdly, having regard to the first two considerations, I attribute to the word "made" in r 124(1)(g)(ii), a limited role intended to require that the contract to which the proceeding relates must be one which at least one of the parties to the proceeding alleges was made. It does not have an additional, and significantly restricting, role of requiring that the making of the contract must be an undisputed anterior circumstance to the operation of the rule.

[52] Fourthly, in a submission by way of reply, counsel for GRR drew attention to r 127 and submitted that the interpretation for which his client contended would not necessarily prevent service outside Australia of the originating process in this case; it might be so served with the leave of the court under that rule. In my view, the potential availability of a more onerous route of that kind is not a factor of any significance for the interpretation of r 124(1).

[53] Accordingly, I consider that the interpretation of r 124(1)(g)(ii) adopted by the learned primary judge is correct. As her Honour explained, it is an interpretation that is consistent with the interpretations that have been given by courts in the United Kingdom to the analogous service provisions in art 5(1) and O 11 r 1. I would respectfully adopt her Honour's analysis of those decisions and make the following brief observations.

[54] The first is that CTP is correct in submitting that the sole case cited by GRR in support of the interpretation urged by it, *Finnish Marine*, was not endorsed on this point by the Court of Appeal (England and Wales) in *DVA*. The second is that CTP is also correct in its submission with respect to the decisions of the Court of Appeal (England and Wales) in *Tesam* and *Royal & Sun Alliance* as they concerned *Boss Group*. The third is that in *DR Insurance*, in which *Finnish Marine* was expressly disapproved on this point, the plaintiff sought declarations that certain contracts were void, relief similar to that sought by CTP in its proceeding.

[55] For these reasons, I conclude that the contention in Ground (a)(i) has not been made out. CTP's proceeding clearly relates to the Disputed Agreement. Further, the Disputed Agreement is a contract made by one or more parties carrying on business in Queensland within the meaning of r 124(1)(g)(ii). Hence it is a proceeding within the ambit of that rule.

[56] In light of this conclusion, it is unnecessary to decide Ground (a)(ii) or Ground (b). I do however wish to make some observations with respect to the first of those grounds.

Ground (a)(ii)

[57] It is implicit in the formulation of this ground that GRR contends that in order for a proceeding to be one relating to a contract, it is necessary that the proceeding contain a claim for relief that relates to the contract. I would accept that that is so.

[58] To my mind, both the context within which r 124(1)(g) is placed and its purpose suggest that in order for a proceeding to relate to a contract, the plane of relevant relationship required is that relief sought in the proceeding include relief in respect of it in some way or other. Hence, it would be insufficient for a proceeding to relate to a contract within the meaning of the rule, for the proceeding merely to refer by way of historical narrative to the contract, but not to claim any relief in respect of it.

[59] In the present case, the Further Amended Statement of Claim pleads that the 2011 Agreement was entered into in writing on 5 September 2011 by GRR and CTP.[60] Material terms of it are also pleaded;[61] as is its alleged continuation until April 2012.[62]

[60] At that point, the document then pleads the Total Transaction.[63] Significantly for present purposes, it further pleads that, in the premises; firstly, the 2011 Agreement governed whether a fee was payable by CTP to GRR in relation to that transaction,[64] and; secondly, pursuant to the terms of the 2011 Agreement, CTP was not liable to pay a fee to GRR in respect of the transaction.[65]

[61] Pleadings, to which I have referred, of the allegations made by GRR concerning the Disputed Agreement and of CTP's denial that it entered into that agreement, follow. CTP pleads that, in the premises, it is not liable to pay GRR a fee, or damages for not paying a fee, under the Disputed Agreement in relation to the Total Transaction.[66] CTP pleads in the alternative that clause 26 of the 2011 Agreement released and discharged it from any liability to pay a fee or any other sum to GRR in respect of that transaction.[67]

[62] As to relief, paragraph 1 seeks a declaration to the effect that CTP did not enter into, and is not bound by, the Disputed Agreement. The other substantive relief sought is in paragraph 2. It seeks further declaratory relief in two respects. The first is that it is not liable to pay GRR a success fee or any other sum in relation to the Total Transaction; the second is that it is not liable to pay GRR any damages by reason of not having paid such a fee or other sum.

[63] Paragraph 2 of the relief is not expressly limited to liability under the Disputed Agreement. In the context of the entirety of the pleading, including clause 26 of the 2011 Agreement, the paragraph is properly understood as applying to liability to pay sourced in either the Disputed Agreement or the 2011 Agreement. That GRR may not have alleged in the Texas proceeding a liability on CTP's part to pay a

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60 Paragraph 3D: AB502-503.
61 Paragraph 3E: AB503-504.
62 Paragraph 3I: AB505.
63 Paragraph 3J: AB505-506.
64 Paragraph 3K: AB506.
65 Paragraph 3L: AB506.
66 Paragraph 10E: AB508.
67 Paragraphs 28, 29: AB510.

success fee under the 2011 Agreement does not, by implication, confine the ambit of relief sought in paragraph 2.

[64] Accordingly, I consider that CTP's proceeding is also one in relation to the 2011 Agreement. Hence, in my view, Ground (a)(ii) is not made out.

Disposition

[65] The failure of Ground (a) has the consequence that this appeal must be dismissed. GRR ought to pay CTP's costs of the appeal on the standard basis.

Orders

[66] I would propose the following orders:

1. Appeal dismissed.
2. The appellant is to pay the respondent's costs of and incidental to the appeal on the standard basis.

[67] **McMURDO JA:** I agree with the reasons given by Gotterson JA in concluding that, in the terms of r 124(1)(g)(ii), this is a proceeding relating to what the appellant alleges was a contract made in 2012. Consequently, the principal reason for the orders of the primary judge was correct and the appeal must be dismissed with costs. I find it unnecessary to comment upon the alternative basis for her Honour's decision, namely that this is a proceeding relating to the 2011 contract.

[68] **MULLINS J:** I agree with Gotterson JA.