

# FEDERAL CIRCUIT COURT OF AUSTRALIA

*CRAWFORD v MAS AUSTRALASIA PTY LTD*

[2018] FCCA 850

## Catchwords:

PRACTICE AND PROCEDURE – Application in a Case – proposed transfer of proceedings from Sydney to Perth – issues of convenience and cost – applicant resident in rural Queensland – respondent based in Perth – witnesses employed in Darwin – consideration of flexible hearing procedures as an alternative to transfer.

## Legislation:

*Federal Circuit Court of Australia Act 1999* (Cth), ss.3, 52  
*Federal Circuit Court Rules 2001* (Cth)

## Cases cited:

*Australian Steel Company (Operations) Pty Ltd v Steel Foundations Ltd & Anor* [2003] FCA 374; (2003) 58 IPR 69  
*CNH Capital Australia Pty Ltd v Pratley (No 2)* [2009] FMCA 455  
*Comello Pty Ltd v Feeney* [2011] FCA 1334  
*DC Payments Pty Ltd & Anor v Fitzpatrick* [2013] FCCA 1415  
*Dixon v Bendigo and Adelaide Bank* [2015] FCA 737  
*Franklin v GHF Pty Ltd* [2014] FCA 793  
*Hoskin v Ernst & Young Services Pty Ltd & Ors* [2010] FMCA 947  
*Koh v Erwin & Anor* [2010] FMCA 278  
*Metricon Homes Pty Ltd v Vista Design Architects Pty Limited & Ors* [2011] FMCA 788  
*Mulhern v Pearce & Anor* [2012] FMCA 1186  
*National Australia Bank Ltd v Commissioner of Taxation* [2011] FCA 44  
*National Mutual Holdings v Sentry Corporation* (1988) 83 ALR 434; (1988) 19 FCR 155  
*Orbach & Schroder* [2014] FCCA 3056  
*Picos v HealthEngine Pty Ltd & Anor* [2014] FCCA 640  
*Re Peter George Beckwith and Valerie Ross Beckwith v Ros Palmer Interiors Pty Ltd & Ors* [1990] FCA 171  
*Sherwood Overseas Co Pty Ltd v Jaymac International Pty Ltd* [2008] FMCA 495  
*The WH Books Ltd & Ors v Miller & Anor* (1998) 41 IPR 364

Applicant:

ROBERT ALAN CRAWFORD

Respondent: MAS AUSTRALASIA PTY LTD  
File Number: SYG 3709 of 2017  
Judgment of: Judge Driver  
Hearing date: Decided without oral hearing  
Date of Last Submission: 21 March 2018  
Delivered at: Sydney  
Delivered on: 11 April 2018

## **REPRESENTATION**

Solicitors for the Applicant: Mr S Wescott of Patron Legal

Solicitors for the Respondent: Ms L Nickels of DLA Piper

## **ORDERS**

- (1) The Application in a Case filed on 13 February 2018 is dismissed.

**FEDERAL CIRCUIT COURT  
OF AUSTRALIA  
AT SYDNEY**

**SYG 3709 of 2017**

**ROBERT ALAN CRAWFORD**  
Applicant

And

**MAS AUSTRALASIA PTY LTD**  
Respondent

**REASONS FOR JUDGMENT**

**Introduction and background**

1. By application lodged on 24 November 2017, Mr Crawford seeks relief under the *Fair Work Act 2009* (Cth) (Fair Work Act) against his former employer, MAS. The proceedings were commenced in the Sydney registry of this Court.
2. By Application in a Case filed on 13 February 2018, MAS seeks the transfer of the proceedings to the Perth registry of the Court under rule 8.01 of the *Federal Circuit Court Rules 2001* (Cth) (Federal Circuit Court Rules). With the agreement of the parties and in accordance with orders I made on 28 February 2018, the transfer application has been dealt with on the papers.
3. The transfer application is supported by the affidavit of Joanne Patricia Leveridge made on 14 March 2018 and the earlier affidavit of Ms Leveridge made on 12 February 2018. Mr Crawford relies upon the affidavit of Shane Wescott made on 7 March 2018.
4. In addition to the affidavit material, I have had regard to Mr Crawford's original application, MAS' response to it and Mr Crawford's reply filed on 27 February 2018.

## Consideration

5. The general principles concerning a transfer of proceedings between registries of this Court are not in dispute and have been dealt with by the parties in their submissions.
6. Section 52 of the *Federal Circuit Court of Australia Act 1999* (Cth) (Federal Circuit Court Act) allows the Court to sit at any place in Australia. The Court may, at any stage of the proceeding, order that all or any part of a proceeding, be conducted or continued at a place specified in the order, subject to any conditions that the Court may impose.<sup>1</sup>
7. When considering an application to transfer the proceedings, the Court must have regard to the criteria set out in rule 8.01(2) of the Federal Circuit Court Rules.<sup>2</sup> The criteria are as follows:<sup>3</sup>
  - a) the convenience of the parties;
  - b) the limiting of expense and the cost of the proceeding;
  - c) whether the matter has been listed for final hearing; and
  - d) any other relevant matter.
8. In applying rule 8.01 of the Federal Circuit Court Rules, “the Court has traditionally taken into account the matters that were dealt with by the Full Court of the Federal Court in *National Mutual Holdings Pty Ltd & Ors v Sentry Corporation & Anor* (1988) 83 ALR 434” (*Sentry Corporation*).<sup>4</sup> The test from *Sentry Corporation* is “where can the case be conducted or continued most suitably, bearing in mind the interests of all the parties, the ends of justice in the determination of the issues between them, and the most efficient administration of the Court”<sup>5</sup>

---

<sup>1</sup> Section 52 of the Federal Circuit Court Act

<sup>2</sup> *Sherwood Overseas Co Pty Ltd v Jaymac International Pty Ltd* [2008] FMCA 495 at [21] per Lucev FM (as he then was) as cited in *Picos v HealthEngine Pty Ltd & Anor* [2014] FCCA 640 at [80]

<sup>3</sup> Rule 8.01(2) of the Federal Circuit Court Rules

<sup>4</sup> *National Mutual Holdings Pty Ltd & Ors v Sentry Corporation & Anor* (1988) 19 FCR 155; (1988) 83 ALR 434 at 435 as cited in *DC Payments Pty Ltd & Anor v Fitzpatrick* [2013] FCCA 1415 at [2]

<sup>5</sup> *Sentry Corporation* (1988) 19 FCR 155 at 162 as cited in *Picos* at [76]

9. The Federal Court in *Sentry Corporation* identified a number of factors to be taken into account, including:
- a) residence of the parties;
  - b) residence of the witnesses;
  - c) expense to the parties;
  - d) the place where the cause of action arose; and
  - e) the convenience of the court itself.<sup>6</sup>
10. Other factors which may warrant consideration and are relevant in this matter include:
- a) the governing law of any contract;<sup>7</sup> and
  - b) the location of counsel, solicitors and other advisers, particularly those with actual knowledge and relevant experience.<sup>8</sup>
11. As stated at [7] above, in determining whether to order a change in venue, the Court must consider the matters identified in rule 8.01 of the Federal Circuit Court Rules,<sup>9</sup> which provides:

*Change of venue*

- (1) *A party who files an application or response in a proceeding may apply to have the proceeding heard in another registry of the Court.*
- (2) *In considering an application, the Court must have regard to:*
  - (a) *the convenience of the parties; and*
  - (b) *the limiting of expense and the cost of the proceeding; and*

---

<sup>6</sup> Ibid at [77]

<sup>7</sup> *Australian Steel Company (Operations) Pty Ltd v Steel Foundations Ltd & Anor* [2003] FCA 374; (2003) 58 IPR 69 at [87] per Kenny J; as cited in *Picos* at [78(c)]

<sup>8</sup> *Australian Competition and Consumer Commission v Internic Technology Pty Ltd & Anor* (1998) 42 IPR 225 at 232 per Lindgren J as cited in *Picos* at [78(f)]

<sup>9</sup> *Mulhern v Pearce & Anor* [2012] FMCA 1186 at [5] citing *Sherwood Overseas Co* at [7]-[19]; *CNH Capital Australia Pty Ltd v Pratley (No 2)* [2009] FMCA 455 at [16]

- (c) *whether the matter has been listed for final hearing; and*
- (d) *any other relevant matter.*

12. An applicant is entitled to start a proceeding in a registry of its choice.<sup>10</sup>
13. A party seeking a transfer bears the onus of convincing the Court that an order for transfer should be made.<sup>11</sup> Rule 1.04 of the Federal Circuit Court Rules supports this assertion in that it defines the “appropriate registry” for a proceeding as the registry in which the application starting the proceeding was filed.
14. The Federal Court in *Sentry Corporation* noted that the Court must be satisfied, after considering all relevant matters, that there is a sound reason to direct that the proceeding be conducted or continued elsewhere, and went on to state:

*In deciding applications in the nature of “change of venue” in a national court such as the Federal Court of Australia, the test of manifest preponderance of convenience was not appropriate and the proper test is: Where can the case be conducted or continued most suitably bearing in mind the interests of all the parties, the ends of justice in the determination of the issues between them, and the most efficient administration of the Court?*

15. The balance of convenience is generally a relevant consideration, but not necessarily determinative of each case.<sup>12</sup>
16. MAS seeks the transfer of the proceedings to the Perth registry for the following reasons.

### **Connection to Perth**

17. It is said to be more convenient for this matter to be heard in Perth due to the following connections to the jurisdiction:

---

<sup>10</sup> *National Australia Bank Ltd v Commissioner of Taxation* [2011] FCA 44 at [3]

<sup>11</sup> See also *Australian Steel Company* at [74], *Re Peter George Beckwith and Valerie Ross Beckwith v Ros Palmer Interiors Pty Ltd & Ors* [1990] FCA 171 at [4], *Metricon Homes Pty Ltd v Vista Design Architects Pty Limited & Ors* [2011] FMCA 788 at [5]

<sup>12</sup> *DC Payments* at [11] citing *Sentry Corporation* at 441; *Comello Pty Ltd v Feeney* [2011] FCA 1334 at [11]



- a) MAS is based in Perth, Western Australia with its registered office located at 34 Clune Street, Bayswater, Western Australia and its head office located at Level 1, 18-32 Parliament Place, West Perth, Western Australia;<sup>13</sup>
- b) the two instructors of MAS work at MAS' head office at Level 1, 18-32 Parliament Place, West Perth, Western Australia;<sup>14</sup>
- c) MAS' solicitors with carriage and actual knowledge of this matter are based at Level 31, Central Park, 152-158 St Georges Terrace, Perth, Western Australia;<sup>15</sup>
- d) the majority of MAS' likely witnesses reside in Perth, Western Australia although most are employed on a fly-in and fly-out basis to work at the Ichthys Gas Plant in Darwin, Northern Territory;<sup>16</sup>
- e) at the commencement of his employment, Mr Crawford was resident in Western Australia at 29 Denton Road, Collie;<sup>17</sup>
- f) the contract of employment is governed by the laws in force in Western Australia and the parties submitted to the non-exclusive jurisdiction of the courts of Western Australia when they entered into the contract;<sup>18</sup> and
- g) Mr Crawford indicated in his application dated 24 November 2017 at [57] that he intended to move to Western Australia.<sup>19</sup>

### **“Tenuous connection” to Sydney**

18. MAS contends that a significant factor in this matter, similar to the case of *Hoskin v Ernst & Young Services Pty Ltd & Ors*<sup>20</sup> at [38], is that “the subject matter of the litigation has no connection” with the place in which the proceedings have been issued, in this case Sydney:

---

<sup>13</sup> Affidavit of Joanne Patricia Leveridge dated 12 February 2018 (JPL Affidavit) at [6]

<sup>14</sup> Affidavit of Joanne Patricia Leveridge dated 14 March 2018 (JPL Further Affidavit) at [6]

<sup>15</sup> JPL Further Affidavit at [10]

<sup>16</sup> JPL Further Affidavit at [7]

<sup>17</sup> [9(b)] and Annexure "JPL1" of the JPL Further Affidavit

<sup>18</sup> [9(a)] and Annexure "JPL1" of the JPL Further Affidavit

<sup>19</sup> JPL Affidavit at [13]

<sup>20</sup> [2010] FMCA 947

- a) Mr Crawford currently resides in Quilpie, Queensland;<sup>21</sup>
  - b) Mr Crawford worked for MAS from the Ichthys Gas Plant in Darwin, Northern Territory during his employment which is where his alleged cause of action arose;<sup>22</sup> and
  - c) Mr Crawford's witnesses are located in the Northern Territory.<sup>23</sup>
19. Notwithstanding that DLA Piper Australia wrote to Mr Crawford's lawyer on 2 February 2018 seeking details of Mr Crawford's connection to New South Wales,<sup>24</sup> Mr Westcott's affidavit does not identify details of any connection that the proceedings or Mr Crawford has to Sydney or New South Wales other than the fact that Mr Crawford's solicitor's place of business is in Sydney.<sup>25</sup>
20. The convenience of the parties overall is said to weigh in favour of the matter being transferred to Perth where the majority of MAS' witnesses reside, where MAS has its head office and instructors and where MAS' solicitors are based.

### **The limiting of expense and the cost of the proceeding**

21. MAS contends that it would incur considerable expense if the matter proceeded to a hearing in Sydney, including:
- a) return flights for a solicitor and/or counsel from Perth to Sydney;
  - b) return flights for a representative from MAS' HR or management team (to provide instructions) from Perth to Sydney;
  - c) return flights for witnesses to Sydney;
  - d) accommodation for a solicitor and/or counsel and each witness for at least two days;
  - e) car hire and/or taxi charges over those days; and

---

<sup>21</sup> Affidavit of Shane Wescott dated 7 March 2018 (SW Affidavit) at [5]

<sup>22</sup> JPL Affidavit at [7]

<sup>23</sup> SW Affidavit at [15(c)]

<sup>24</sup> JPL Affidavit at [14]

<sup>25</sup> JPL Further Affidavit at [8]

- f) meal and sundries allowance for those parties over those days.<sup>26</sup>
22. Even if the matter remains in the Sydney registry, Mr Crawford will incur significant travel costs flying himself from Queensland to Sydney and his witnesses from the Northern Territory to Sydney.<sup>27</sup>
23. The costs of flying from the Northern Territory to Sydney and the Northern Territory to Perth are said to be virtually the same,<sup>28</sup> therefore the cost to Mr Crawford in having his witnesses attend the hearing in either Sydney or Perth will be neutral.
24. MAS further submits that if the matter is held in Perth, MAS will only incur costs in relation to travel, meals and accommodation for any witnesses who are not already in Perth at the time of the hearing because its solicitors, instructors from MAS and the majority of its witnesses are already in or reside in Perth.
25. MAS accepts that its solicitors, DLA Piper Australia, are a national law firm with an office in Sydney.<sup>29</sup> However, as set out at [17] above, MAS' solicitors with carriage and actual knowledge of this matter are based in Perth.
26. If the hearing were to be held in Sydney, MAS would either need to incur the cost of flying its Perth based solicitors to Sydney or brief solicitors in the Sydney office which would itself be significant, impracticable where MAS' head office is based in Perth, and likely prejudicial to MAS, notwithstanding the relatively early stage of the proceedings.<sup>30</sup>
27. The limitation of cost and expense in relation to the proceedings favours the change of venue from Sydney to Perth.

### **Whether the matter has been listed for final hearing**

28. The proceedings are at an early stage, they have not yet been listed for hearing and the Court has not yet had to consider any substantive issues other than this interlocutory application. There should be no

---

<sup>26</sup> JPL Affidavit at [11]

<sup>27</sup> Annexures SW6 and SW7 of the SW Affidavit

<sup>28</sup> Annexure SW7 to the SW Affidavit

<sup>29</sup> SW Affidavit at [10]

<sup>30</sup> *Picos* at [86]

difficulty with transferring the matter to Perth (or elsewhere) for a substantive hearing.<sup>31</sup>

29. The transfer is opposed by Mr Crawford for the following reasons.

### **Convenience of the parties**

30. Mr Crawford challenges MAS' assertion that the parties' convenience would be best served by transferring the proceedings from the Sydney registry to the Perth registry on the following basis:

- a) MAS asserts that the location of its head office and registered office in Western Australia<sup>32</sup> generates a sufficient connection with that jurisdiction to warrant the transfer of the proceedings. The case authority indicates that this is not so.<sup>33</sup> Furthermore, to suggest that MAS is tied to Western Australia is at odds with its status as a subsidiary of a company which operates across Australia and through South-East Asia;<sup>34</sup>
- b) the lack of an actual connection between the proceedings and Western Australia is further emphasised by MAS' argument that the Perth registry is a more convenient location because Mr Crawford worked and lived in Darwin when employed by MAS.<sup>35</sup> Mr Crawford now resides in central Queensland. He has no connection with Perth, or Western Australia generally. He is not working or seeking employment there.<sup>36</sup> Travelling to Sydney from Brisbane is said to be cheaper and quicker for Mr Crawford compared to travelling to Perth, given that:
  - i) there are more flight connections each day between Brisbane and Sydney, than there are between Brisbane and Perth;<sup>37</sup>
  - ii) the flight from Brisbane to Perth is significantly longer than the flight from Brisbane to Sydney;<sup>38</sup> and

---

<sup>31</sup> *DC Payments* at [14]

<sup>32</sup> JPL Affidavit at [6]

<sup>33</sup> *Dixon v Bendigo and Adelaide Bank* [2015] FCA 737 at [9]

<sup>34</sup> SW Affidavit at [9], Annexure SW2, Annexure SW3

<sup>35</sup> JPL Affidavit at [7], [8(b)]

<sup>36</sup> SW Affidavit at [5]-[6], Annexure SW1

<sup>37</sup> SW Affidavit at [15], Annexure SW6

- iii) a flight from Brisbane to Sydney is cheaper than a flight from Brisbane to Perth;<sup>39</sup>
- c) while MAS asserts that the place of residence of the witnesses it is likely to call at trial is a relevant matter, it has placed conflicting material before the court in that:
  - i) initial affidavit evidence from MAS' solicitor stated "[t]he majority of the Respondent's witnesses are currently located at the Ichthys Gas Plant in Darwin, Northern Territory",<sup>40</sup> and
  - ii) subsequent affidavit evidence from MAS' solicitor stated "...while the majority of the Respondent's witnesses currently work at the Ichthys Gas Plant in Darwin, Northern Territory, their usual place of residence is Perth, Western Australia".<sup>41</sup> Despite making these conflicting assertions, MAS has not placed any evidence before the Court to substantiate the likely number of witnesses to be called, or their usual places of residence.

In any event, if MAS' witnesses are working in Darwin, there is a real possibility that, if this matter proceeds to trial, they will need to travel to either Perth or Sydney to give evidence. In those circumstances, Mr Crawford contends that the material indicates that Sydney would be a more convenient forum for MAS' witnesses because:

- iii) there are significantly more flights from Darwin to Sydney each day than there are between Darwin and Perth;<sup>42</sup> and
  - iv) the flight between Darwin and Sydney is shorter than the flight between Darwin and Perth;<sup>43</sup>
- d) additionally, several of the witnesses whom Mr Crawford is likely to call to give evidence at trial are also based in Darwin, along

---

<sup>38</sup> SW Affidavit at [15], Annexure SW6

<sup>39</sup> SW Affidavit at [15], Annexure SW6

<sup>40</sup> JPL Affidavit at [9]

<sup>41</sup> JPL Further Affidavit at [7]

<sup>42</sup> SW Affidavit at [15], Annexure SW7

<sup>43</sup> SW Affidavit at [15], Annexure SW7

with witnesses located in Brisbane and Wollongong, New South Wales. Accordingly, it would be more convenient for Mr Crawford's witnesses to fly to Sydney for any hearing than it would be for them to fly to Perth;

- e) MAS is represented by an international law firm which has offices throughout the country, including in Sydney.<sup>44</sup> It is reasonable to assume that if the matter were to remain in the Sydney registry, MAS' solicitors would be able to utilise the firm's offices, people and resources already located in Sydney. These factors were considered relevant in *DC Payments*.<sup>45</sup> Conversely, Mr Crawford is not represented by a law firm with a national footprint. If the matter is transferred to Perth, Mr Crawford's solicitors will not have the same advantage as MAS' legal representatives of having offices, people and resources in Perth;
- f) it must also be emphasised that MAS chose to engage a Perth based law firm for this proceeding. This is despite the fact that the proceeding was commenced in Sydney and it was open to MAS to engage a Sydney based firm. Such a consideration was considered relevant in *Koh v Erwin & Anor*.<sup>46</sup>
- g) MAS relies upon clause 10.6 of Mr Crawford's contract of employment as a basis for transferring the proceedings to Perth. Clause 10.6 states that the contract is governed by the laws of Western Australia and that the parties will submit to the non-exclusive jurisdiction of Western Australian courts and courts of appeal from any of them.<sup>47</sup> However, contrary to MAS' assertions, the Federal Court in *Australian Steel Company*<sup>48</sup> indicated that alone, a contractual choice of law clause is not an especially significant factor when considering whether to transfer proceedings. Furthermore, as the Federal Court highlighted in *Franklin v GHF Pty Ltd*,<sup>49</sup> such a clause relates to the choice of

---

<sup>44</sup>SW Affidavit at [10], Annexure SW4. Similar factors were considered relevant in *Hoskin* at [14]

<sup>45</sup> at [13]

<sup>46</sup> [2010] FMCA 278 at [16]

<sup>47</sup> Further JPL Affidavit at [9], Annexure JPL1

<sup>48</sup> at [87]

<sup>49</sup> [2014] FCA 793 at [7]

law, rather than identification of the most suitable venue for the hearing; and

h) to this end, Mr Crawford's claim involves the Fair Work Act. Given that it is a federal statute, the matter can be heard equally conveniently either in Perth or Sydney.<sup>50</sup>

31. Mr Crawford submits that the status quo should be maintained, as keeping the proceedings in the Sydney registry is of greater convenience to the parties than transferring them to Perth. As already noted, MAS' main reason for the transfer is the location of its offices, and those of its solicitors, in Western Australia. For the reasons detailed above, Perth would not be a convenient location for Mr Crawford, or any of the witnesses which the parties propose to call at the hearing.

### **The limiting of expense and the cost of the proceeding**

32. MAS asserts that it will incur considerable expenses if the matter proceeds in Sydney, including the cost of return flights to, and accommodation in, Sydney for solicitors, counsel, MAS' representative and witnesses.<sup>51</sup>

33. MAS will also allegedly incur car hire charges, taxi charges and meal and sundries allowances if the matter is not transferred to the Perth registry.<sup>52</sup>

34. Transfer of the matter to the Perth registry will allegedly limit these expenses.<sup>53</sup>

35. In response to these assertions, Mr Crawford submits the following:

a) if the matter is transferred to Perth, Mr Crawford will need to incur similar expenses to relocate his legal team and to transport his witnesses. Where one of either of the parties will be forced to incur travel and incidental costs regardless of whether the

---

<sup>50</sup> *Metricon Homes* at [5]

<sup>51</sup> JPL Affidavit at [11]

<sup>52</sup> JPL Affidavit at [11]

<sup>53</sup> JPL Affidavit at [11]

proceedings are heard in Sydney or Perth, such a factor should be considered neutral.<sup>54</sup>

- b) in relation to the car hire and taxi charges and the costs of meals and sundries, such costs will likely be incurred by MAS regardless of whether the matter remains in the Sydney registry or is transferred to Perth;
  - c) similarly, regardless of whether the matter remains in the Sydney registry or is transferred to Perth, MAS will still incur the cost of transporting its witnesses from Darwin. Maintaining the status quo is a more economical option for MAS in this regard, given that there are more flights each day between Darwin and Sydney, and they are cheaper and shorter than the flights from Darwin to Perth;<sup>55</sup> and
  - d) Mr Crawford will also need to incur costs associated with transporting witnesses from Darwin, Brisbane and Wollongong which will be increased, should the matter be transferred to the Perth registry.<sup>56</sup>
36. When considering the issue of expense and the cost of the proceedings, it is significant that MAS is a subsidiary of a large, national company with a share capital of over \$6 million.<sup>57</sup> It has retained the services of a global law firm with offices throughout the country, including in Sydney. Clearly, MAS' financial resources are much greater than those available to Mr Crawford, and as a result it is better placed to absorb the travel costs identified.<sup>58</sup>

### **Whether the matter has been listed for final hearing**

37. As noted above, the matter is yet to be listed for final hearing.
38. If the proceedings continue in the Sydney registry, any cost and/or inconvenience to MAS associated with appearing at interim hearings

---

<sup>54</sup> *National Australia Bank* at [12]

<sup>55</sup> SW Affidavit at [15], Annexure SW7

<sup>56</sup> SW Affidavit at [15], Annexure SW7

<sup>57</sup> SW Affidavit, Annexure SW2

<sup>58</sup> The size and nature of the businesses concerned was identified as a relevant consideration in *WH Books Ltd & Ors v Miller & Anor* (1998) 41 IPR 364, 365 as cited in *Sherwood Overseas Co* at [13]. See also *Australian Steel Company* at [76]-[77], [90]. A party's capacity to absorb expense was considered relevant in *Hoskin* at [26], [27]



could be mitigated by its solicitors seeking leave to appear by telephone or video link. Mr Crawford has indicated that he will consent to such orders being made.<sup>59</sup>

39. Furthermore, such a course of action accords with the Court's object, namely to operate as informally as possible and use streamlined procedures,<sup>60</sup> including the use of electronic means of attendance such as telephone and video link.<sup>61</sup>

### **Any other relevant matter**

40. Mr Crawford submits that the Court's Sydney registry arguably has a greater number of resources available to its disposal than the Perth registry. To this end, Mr Crawford notes that:
- a) there are presently two judges of the Federal Circuit Court based in Perth;
  - b) there are currently 16 judges of the Federal Circuit Court based in Sydney (10 of whom normally deal with general federal law proceedings).
41. Mr Crawford submits that if the proceedings remain in Sydney, an expedited trial date is more likely given the greater number of judges present in that jurisdiction compared to Perth. The expedited conduct of proceedings in a particular registry was an issue considered to be relevant in *Mulhern v Pearce & Anor*.<sup>62</sup>
42. Mr Crawford also notes that he has previously offered to agree to transfer the proceedings to the Northern Territory registry of the Court, given the location of the majority of the parties' witnesses.<sup>63</sup> As the offer was not accepted, it may suggest that MAS' application to transfer the proceedings is motivated by factors other than the cost and convenience of the matter being heard in Sydney, as opposed to Perth.

---

<sup>59</sup> SW Affidavit at [19], Annexure SW5

<sup>60</sup> Section 3 of the Federal Circuit Court of Australia Act

<sup>61</sup> *Orbach & Schroder* [2014] FCCA 3056 at [17]

<sup>62</sup> at [29]

<sup>63</sup> SW Affidavit at [13], Annexure SW5

## Resolution

43. It is apparent that in this matter, wherever the proceedings are conducted, it is likely that there will be some inconvenience and expense for the parties. Mr Crawford lives in south western Queensland about half way between Brisbane and Alice Springs as the crow flies. He might have instituted the proceedings in his closest registry (Brisbane) but he elected to commence them in Sydney. That was his choice. He has engaged a firm of solicitors located in Sydney. That firm does not have an office in Perth. MAS is based in Perth and has chosen to instruct solicitors in Perth in a national firm with offices in other major cities.
44. MAS seeks a transfer to Perth on the basis that it would be more convenient for MAS and would help to limit its expenses of the proceedings. Conversely, a transfer to Perth would be less convenient to Mr Crawford and would increase his costs and expenses of the proceedings.
45. The arguments for and against a transfer are finely balanced but, in my opinion, MAS has not established that the proceedings should be transferred to Perth.
46. The proceedings are at an early stage. Directions can be dealt with in court by telephone or, if necessary, by video link. If a mediation is conducted, that would ordinarily take place in Sydney but, hypothetically, the parties could agree on an alternative location, subject to the availability of a mediator.
47. The main issue impacting on cost and convenience is the location of the hearing. This is a national court and the judges of it can sit in any appropriate location. For example, in order to suit the convenience of the parties and to limit the expenses of a trial, Mr Crawford's evidence could be taken in Brisbane (or if he prefers, Sydney) and the evidence of MAS' witnesses could be taken either in Darwin where they work or in Perth where they live. Oral submissions would ordinarily be heard in Sydney but submissions could be made orally on behalf of MAS by video link from Perth or alternatively the parties could rely upon written submissions.

48. In my opinion, where there is no obviously preferable single location for the conduct of the proceedings, and where a transfer from one registry to another will not necessarily represent an improvement, the preferable course is for the Court to adopt a flexible approach to the conduct of proceedings in order to assist the parties to minimise the expense and inconvenience of the proceedings. That is the course which I will take. It follows that the case for a transfer of the proceedings to Perth is not made out.
49. I will order that the Application in a Case be dismissed.
50. The costs of the application will be costs in the proceedings generally.

---

**I certify that the preceding fifty (50) paragraphs are a true copy of the reasons for judgment of Judge Driver**

Associate:



Date: 11 April 2018