

12/09; [2009] VSC 144

## SUPREME COURT OF VICTORIA

**WHILEY INVESTMENTS (QLD) PTY LTD v PET'S PARADISE**

Davies J

7, 29 April 2009

**CIVIL PROCEEDINGS – PRACTICE AND PROCEDURE – TRANSFER OF PROCEEDINGS – APPLICATION FOR REMOVAL OF PROCEEDINGS FROM THE MAGISTRATES' COURT TO SUPREME COURT – CRITERIA FOR TRANSFER – WHETHER DISCRETIONARY RELIEF SHOULD BE GRANTED – PROCEEDING INVOLVING SPECIAL FEDERAL MATTERS – STAY PENDING TRANSFER – WORDS & PHRASES – "PROCEEDING": COURTS (CASE TRANSFER) ACT 1991, SS16(1), 17; JURISDICTION OF COURTS (CROSS-VESTING) ACT 1987 (VIC), S8; MAGISTRATES' COURT ACT 1989, S101.**

W. sought to refer four debt recovery proceedings commenced by P. to a Designated Judicial Officer of the Magistrates' Court ('DJO') so that the proceedings could be transferred to the Supreme Court and then to the Federal Court. A related proceeding was pending in the Federal Court and W. sought that the Federal Court determine the debt recovery proceedings with the group action. In the Magistrates' Court proceeding, it was stated that as W. raised defences and counterclaims which involved matters based on s47 of the *Trade Practices Act* 1974 such matters were not within the jurisdiction of the Magistrates' Court. The Magistrate refused to refer the proceedings to the DJO on the ground that the Magistrates' Court and the Supreme Court did not have jurisdiction to hear and determine the entirety of the claims. Upon appeal—

**HELD: Appeal upheld. Remitted to the Magistrate to be determined in accordance with the law.**

**1. Section 16(1)(a) of the *Courts (Case Transfer) Act* 1991 ('Act') should be construed on its terms. The subsection does not make it a criterion for transfer that the transferor court has jurisdiction over the whole or, indeed, any part of the proceeding sought to be transferred.**

**2. Secondly, the criterion in paragraph (1)(b) is that the transferee court has authority to hear and determine "it", being the proceeding that is sought to be transferred. The expression "proceeding" is not defined in the *Case Transfer Act* but ordinarily refers to the method permitted by law for moving a Court or judicial officer to some authorised act or the "means or vehicle by which the subject matter of a dispute is brought before a court for adjudication". The word "proceeding" is used in the sense of the action or cause initiated by the appropriate process. The scheme of the Act, which provides for the transfer of civil proceedings, bears out that the Act is concerned with transferring, as between courts, the action or cause.**

**3. The criterion that the transferee court have the authority to hear and determine the proceeding is thus a requirement that the action be within the jurisdiction of the court. To construe the subsection as requiring that the transferee court have the authority to determine all matters involved in the proceeding involves inferring words into the subsection that the context does not warrant. The debt recovery actions were within the jurisdiction of the Supreme Court and it was an irrelevant consideration, under s16(1)(b), that the defences and counterclaims in those actions involved matters under s47 of the *Trade Practices Act* that are outside the jurisdiction of the Supreme Court.**

**4. It followed that the Magistrate was wrong in law to conclude that the criteria for transfer could not be satisfied and wrong in law to refuse the stay on the basis of that conclusion.**

**DAVIES J:**

1. The plaintiffs seek judicial review under Rule 56.01 of the *Supreme Court (General Civil Procedure) Rules* 2005 of a magistrate's refusal:

(a) to refer four debt recovery proceedings commenced by the defendants against the plaintiffs in the Magistrates' Court of Victoria then under s17 of the *Courts (Case Transfer) Act* 1991 ("*Case Transfer Act*") for consideration as to whether the proceedings should be transferred to the Supreme Court of Victoria; and

(b) to stay the proceedings under s101(1)(b) of the *Magistrates' Court Act* 1989 pending the decision as to whether the proceeding should be transferred to the Supreme Court.

2. Section 17(1) of the *Case Transfer Act* provides, relevantly that:

(1) A judicial ... officer of the court in which a proceeding is pending ..., who is of the opinion that the proceeding is or may be suitable for transfer to another court under this Part may refer the matter to the designated judicial officer of the court in which it is pending.

3. Section 101(1)(b) of the *Magistrates' Court Act* provides that:

(1) If a civil proceeding is wholly or partly beyond the jurisdiction of the Court, the Court may—  
...  
(b) order that the proceeding be stayed pending the making of an application under Part 3 of the *Courts (Case Transfer) Act* 1991;

4. Although the debt recovery actions are clearly within the jurisdiction of the Magistrates' Court, the plaintiffs have raised defences and counterclaims which involve matters based on s47 of the *Trade Practices Act* 1974 ("TPA"). Such matters are not within the jurisdiction of the Magistrates' Court. If the proceedings remain in the Magistrates' Court, that Court can only determine the defendants' claim against the plaintiffs and cannot grant relief to the plaintiffs insofar as such relief is based on the s47 claims.<sup>[1]</sup> The court which has jurisdiction in respect of such matters is the Federal Court of Australia<sup>[2]</sup> and, generally, such matters are to be heard and determined by the Federal Court.<sup>[3]</sup>

5. There is a related proceeding pending in the Federal Court. The plaintiffs (with the exception of the natural plaintiffs) are members of a group action brought against the defendants. The Federal Court proceeding arises out of the same subject matter and includes allegations against the defendants based on s47 of the TPA. The plaintiffs want the Federal Court to hear and determine the debt recovery proceedings with the group action.

6. Accordingly, the plaintiffs sought the reference from the Magistrate to the designated judicial officer of the Magistrates' Court under s17 of the *Case Transfer Act* to invoke the process for an order for the transfer of the four proceedings from the Magistrates' Court to the Supreme Court and to have the proceedings stayed in the Magistrates' Court in the meantime.

7. The *Case Transfer Act* does not enable the transfer of cases between a State court and the Federal Court, only from one State court to another.<sup>[4]</sup> Upon transfer to this Court, s6(1) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 ("Cross Vesting Act") would require the transfer of the proceedings to the Federal Court because they involve "special federal matters",<sup>[5]</sup> being the claims under s47 of the TPA, subject to this Court making an order under s6(3) of the Cross Vesting Act.

8. The Magistrate refused to refer the proceeding to the designated judicial officer and to stay the proceedings. His Honour concluded that although he had the power under s17 of the *Case Transfer Act* to refer the proceedings, there was no point as the criteria for transfer under s16 of the *Case Transfer Act* could not be satisfied and therefore there was no point in staying the proceedings under s101(1)(b) of the *Magistrates' Court Act*.

9. In my view, the Magistrate erred in law on the face of the record in so concluding.<sup>[6]</sup> The error of law related to his Honour's construction of s16 and his conclusion, in light of that construction, that no transfer order could be made under the *Case Transfer Act*.

10. Section 16(1) of the *Case Transfer Act* relevantly provides:

**16. Criteria for transfer**

(1) A proceeding may only be transferred under this Part if in the opinion of the designated judicial officers—  
(a) the transferor court does not have exclusive jurisdiction to hear and determine it; and  
(b) the transferee court has the appropriate skill, experience and authority to hear and determine it having regard to its gravity, difficulty and importance; and  
(c) it is just and convenient that it be transferred.

11. Although the reasons are somewhat elliptical, a fair reading of the reasons, and the way in which the case was conducted by both parties before me, is that the Magistrate construed s16 as requiring jurisdiction in the transferor court and the transferee court to hear and determine the entirety of the claims involved in the proceeding.

12. I do not accept that s16 imposes such a requirement in respect of either court.

13. First, paragraph (1)(a) does not, in words, contain a requirement that the proceeding be within the jurisdiction of the transferor court. Rather the criterion in paragraph (a) is that the transferor court “not have exclusive jurisdiction to hear and determine [the proceeding]”.<sup>[7]</sup> That phrase is defined in s3(2). The definition provides that, for the purposes of the Act, a court only has exclusive jurisdiction to hear and determine a proceeding “if it is wholly or partly of a type that neither of the other [State] courts has jurisdiction to hear and determine, whatever amount or value is either claimed or involved”.<sup>[8]</sup> In other words, the only requirement relevant to the transferor court is that the proceeding not be one that only that court can hear and determine. It does not, in my view, impose the antithesis requirement that there be jurisdiction in the transferor court to hear and determine the proceeding. The requirement that the transferor court not have exclusive jurisdiction, expressed as a negative, does not carry with it the implication that it is a requirement that the proceeding be within jurisdiction in order that a transfer order may be made.

14. There is, in my view, no justification for imputing a requirement into s16(1)(a) that the language does not express. In the context of the *Case Transfer Act* and its expressed purpose, which is “to establish a new system for the transfer of civil proceedings between courts in order to improve efficiency in the administration of civil justice in Victoria”,<sup>[9]</sup> such a construction would inhibit, rather than facilitate, efficiency in administration of civil justice.

15. Furthermore, s101(1)(b) of the *Magistrates’ Court Act* is part of the scheme of legislation for the transfer of proceedings between courts. The power to grant a stay pending an order for transfer under the *Case Transfer Act* operates on the statutory foundation that a civil proceeding is “wholly or partly beyond the jurisdiction of the [Magistrates’] Court”.<sup>[10]</sup> It should be presumed that Parliament intended that s101(1)(b) should operate rationally with the *Case Transfer Act*.<sup>[11]</sup> The obvious intent of s101(1)(b) is to give a party the opportunity to obtain a transfer to the court which is asserted to be the appropriate court, without the action in the meantime continuing in the court which is asserted to be the wrong or less appropriate court.

16. In my view, the subsection should be construed on its terms. The subsection does not make it a criterion for transfer that the transferor court has jurisdiction over the whole or, indeed, any part of the proceeding sought to be transferred.

17. Secondly, the criterion in paragraph (1)(b) is that the transferee court has authority to hear and determine “it”, being the proceeding that is sought to be transferred. This raises for consideration the meaning of the expression “proceeding” as used in the context of the *Case Transfer Act*.

18. The expression “proceeding” is not defined in the *Case Transfer Act*. As Smart J observed in *Blake v Norris*<sup>[12]</sup> “[t]he word “proceeding is capable of... a variety of meanings” and “[a]ny assistance as to its meaning has to be derived from the statutory context and the objects of the legislation in question”.<sup>[13]</sup> The expression ordinarily refers to the “method permitted by law for moving a Court or judicial officer to some authorised act”;<sup>[14]</sup> “the means or vehicle by which the subject matter of a dispute [is] brought before [a] court for adjudication”.<sup>[15]</sup>

19. In *Braeside Bearings Pty Ltd v HG Brignell & Associates*<sup>[16]</sup> the Court of Appeal was concerned with the meaning of “proceeding” as used in s60(1) of the *Supreme Court Act* 1986. “Proceeding” is a defined word in the *Supreme Court Act* and means “any matter in the Court other than a criminal proceeding”.<sup>[17]</sup> The Court concluded that word, in the context of that Act, was used in the sense of legal proceeding – “as a generic expression to embrace what was formerly comprehended individually and respectively by the expression “action, “cause” and “matter””.<sup>[18]</sup>

20. The word is similarly defined in the *County Court and Magistrates’ Court Acts*.<sup>[19]</sup>

21. It is plain, in my view, that “proceeding” is used in the same sense in the context of the *Case Transfer Act*, that is, as the action or cause initiated by the appropriate process. The scheme of the Act, which provides for the transfer of civil proceedings, bears out that the Act is concerned with transferring, as between courts, the action or cause.

22. The criterion that the transferee court have the authority to hear and determine the proceeding is thus a requirement that the action be within the jurisdiction of the court. To construe the subsection as requiring that the transferee court have the authority to determine all matters involved in the proceeding, as Counsel for the defendants submitted, involves inferring words into the subsection that the context does not, in my view, warrant.

23. Plainly the debt recovery actions are within the jurisdiction of the Supreme Court. In my view, it is an irrelevant consideration, under s16(1)(b), that the defences and counterclaims in those actions involve matters under s47 of the TPA that are outside the jurisdiction of the Supreme Court.

24. It follows that the Magistrate was wrong in law to conclude that the criteria for transfer could not be satisfied and wrong in law to refuse the stay on the basis of that conclusion.

25. Counsel for the defendant submitted that if there is error amenable to the relief sought, the granting of relief is discretionary and the relief sought should not be granted. It was submitted that the process under the *Case Transfer Act* is not appropriate where the party seeks the removal of proceedings involving a special federal matter from an inferior court of the State to the Federal Court because the *Case Transfer Act* is concerned only with transfers between State courts. It was further submitted that the plaintiffs should have sought an order from this Court under s8 of the *Cross-Vesting Act*. Section 8(1)(b)(ii) provides that where a proceeding is pending in a court other than the Supreme Court and it appears to the Supreme Court that an order should be made under the subsection so that consideration can be given to whether the relevant proceeding should be transferred to another court, the Supreme Court may make an order removing the proceeding to the Supreme Court. The order may be made by the Court on its own motion or on application to the Court by a party to the proceeding. Where such an order is made, the *Cross-Vesting Act* applies to the proceeding as if the proceeding were pending in the Supreme Court (s8(2)).

26. I am not persuaded that the Court's discretion should be against granting the relief sought. Counsel for the defendant did not contend that the process under the *Case Transfer Act* was not available to the plaintiff even if this Court determined that the Magistrate wrongly construed the requirements of s16 of the *Case Transfer Act*. Rather, the contention was that the *Case Transfer Act* process is an "unwieldy and indirect process chosen by the present Plaintiffs for resolving the real issue of whether the proceedings should be transferred to the Federal Court".<sup>[20]</sup> Further, it was put that there was doubt as to whether the defence and counterclaim did involve "special federal matters" because of deficiencies in the statement of claim in the Federal Court proceeding. However, Mansfield J in *Pampered Paws Connection Ltd v Pets Paradise Franchising (Qld) Pty Ltd & ors*<sup>[21]</sup> held, at paragraph 56, that the allegations in the statement of claim based on s47 of the TPA sufficiently plead a cause of action, albeit very generally.

27. The fact that the procedure under the *Cross-Vesting Act* could have been used by the plaintiffs to secure the transfer of the proceeding from the Magistrates' Court into the Supreme Court for the purpose of transfer to the Federal Court is not sufficient reason to refuse the relief sought.

28. For the reasons above the decision of the Magistrate will be set aside. Subject to any submissions by the parties on the form of orders, I propose to make the following orders:

1. The decisions of the ninth defendant made on 12 January 2009 in the Magistrates' Court of Victoria in the following matters:

- 1.1 Court number X02156872;
- 1.2 Court number X02156883;
- 1.3 Court number X02187302; and
- 1.4 Court number X02259175

are set aside.

2. The applications for referral under s17 of the *Case Transfer Act* and for a stay under s101(1)(b) of the *Magistrates' Court Act* be remitted to the Magistrate to be determined in accordance with the law.

3. The 1st to 3rd defendants pay the plaintiffs' costs of the originating motion.

**SCHEDULE OF PARTIES**

BETWEEN

WHILEY INVESTMENTS (QLD PTY LTD (ACN 118 365 843)

PAUL RAYMOND WHILEY

MARSELLE PTY LTD (ACN 121 474 039)

ROCHELLE TERENA SEMMLER

AKKAYDRAH PTY LTD (ACN 116 225 293)

KIMBERLEY GEORGE RUTHERFORD

And

PETS PARADISE FRANCHISING (QLD) PTY LTD (ACN 054 406 272)

GLOBAL PET PRODUCTS PTY LTD (ACN 005 666 599)

PETS PARADISE FRANCHISING (SA) PTY LTD (ACN 069 620 391)

MAGISTRATES' COURT OF VICTORIA

First Plaintiff

Second Plaintiff

Third Plaintiff

Fourth Plaintiff

Fifth Plaintiff

Sixth Plaintiff

First Defendant

Second Defendant

Third Defendant

Ninth Defendant

[1] S32 of the *Supreme Court Act* 1986 (Vic).[2] S86 of the *Trade Practices Act* 1974 (Cth).[3] See definition of "special federal matters" in s3(1) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Vic) and s3(1) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth).[4] S3(1) of the *Courts (Case Transfer) Act* 1991 (Vic) which defines "Court" to mean "the Supreme Court, County Court or Magistrates' Court".[5] S3(1) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Vic) and s3(1) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth).[6] See s10 of the *Administrative Law Act* 1978 (Vic).[7] S16(1)(a) of the *Case Transfer Act* 1991 (Vic).[8] S3(2) *Courts (Case Transfer) Act* 1991 (Vic).[9] S1(a) *Courts (Case Transfer) Act* 1991 (Vic).[10] S101(1) *Magistrates' Court Act* 1989 (Vic).[11] See eg, *Commissioner of Stamp Duties v Permanent Trustee Co Ltd (Trustee for Anzareno Dal Bon and Silvanio Dal Bon)* (1987) 9 NSWLR 719, 723-724; (1987) 19 ATR 74 (Kirby P); *Abdi v Release on Licence Board and Others* (1987) 10 NSWLR 294, 295; 31 A Crim R 436 (Kirby P); *Hore v Albury Radio Taxis Co-operative Society Ltd* [2002] NSWSC 1130; 172 FLR 443; (2002) 56 NSWLR 210; [2003] ATPR 41-917, Campbell J, 6 December 2002) 9; *Shaw v Yarranova Pty Ltd and Another* [2006] VSCA 291; (2006) 15 VR 289, 308 and 310; [2007] V Conv R 54-730.[12] *Blake v Norris* (1990) 20 NSWLR 300.[13] *Ibid* 306 (Smart J).[14] *Cheney v Spooner* [1929] HCA 12; (1929) 41 CLR 532, 536-537; 35 ALR 173; (1929) 3 ALJR 30 (Isaacs and Gavin Duffy JJ).[15] *Braeside Bearings Pty Ltd v HG Brignell & Associates* [1996] VicRp 3; [1995] 1 VR 17.

[16] [1996] VicRp 3; [1995] 1 VR 17.

[17] *Ibid* 18 (Tadgell JA).[18] *Ibid* 20 (Tadgell JA).[19] See definition of "proceeding" in s3(1) of the *County Court Act* 1958 Vic and s3(1) of the *Magistrates Court Act* 1989 Vic.

[20] Paragraph 2(b) supplement any submissions of the 1st, 2nd and 3rd defendants.

[21] [2009] FCA 138.

**APPEARANCES:** For the plaintiffs Whiley Investments: Mr D Williams, counsel. Piper Alderman, solicitors. For the defendants Pet's Paradise: Mr D Crennan, counsel. Robert James Lawyers.