

CITATION: *Johannsen Drilling Pty Ltd v Legend International Holdings Inc* [2008]
NTMC 068

PARTIES: JOHANNSEN DRILLING PTY LTD
v
LEGEND INTERNATIONAL HOLDINGS INC

TITLE OF COURT: LOCAL COURT

JURISDICTION: Civil

FILE NO(s): 20812709

DELIVERED ON: 17 October 2008

DELIVERED AT: Darwin

HEARING DATE(s): 2 July 2008

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

STAY OF PROCEEDINGS – Jurisdiction of the Local Court – Agreement for
Jurisdiction-Onus of proof

Service and Execution of Process Act (Cth) s20

Local Court Act s 28A

REPRESENTATION:

Counsel:

Plaintiff: Ms Davison
Defendant: Mr Foster

Solicitors:

Plaintiff: Maleys
Defendant: Ward Keller Lawyers

Judgment category classification: B
Judgment ID number: [2008] NTMC 068
Number of paragraphs: 23

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20812709

[2008] NTMC 068

BETWEEN:

JOHANNSEN DRILLING PTY LTD
Plaintiff

AND:

LEGEND INTERNATIONAL HOLDINGS
INC
Defendant

REASONS FOR DECISION

(Delivered 17 October 2008)

Ms Sue Oliver SM:

1. The plaintiff, Johannsen Drilling Pty Ltd, has issued a statement of claim out of the Local Court at Darwin claiming the sum of \$95,178.80 from the defendant, Legend International Holdings Incorporated, for work and labour done and materials provided under an agreement in 2007 in the Northern Territory.
2. Both parties are companies with their registered offices in Victoria. The defendant was served with the statement of claim in these proceedings pursuant to the *Service and Execution of Process Act 1992*. The defendant has entered a notice of conditional defence by which the defendant denies that the Local Court of the Northern Territory has jurisdiction to hear and determine the proceedings and has applied to have the proceedings stayed.
3. Both parties agree and have attached to the respective affidavits of their company officers that that they entered into a written agreement for drilling works in the Northern Territory. Both have attached copies however,

somewhat curiously, neither copy of the agreement bears any sign of execution by the parties nor do the copies contain any date of execution. Each party refers to the agreement having been entered into in or around June or July 2007. The matter has proceeded however on the basis that the parties' agreement is governed by that document.

4. By its notice of conditional defence, the defendant denies that the Local Court has jurisdiction to hear and determine the proceeding on the basis of clause 21 of the agreement which provides as follows:-

21. Governing Law and Jurisdiction

This Agreement shall be governed by and construed according to the laws of the State of Victoria and the contractor hereby submits to the jurisdiction of the Courts of Victoria.

5. The plaintiff is the party described as "the contractor" in the agreement.
6. In its written submissions, the defendant says that it seeks a stay of proceedings under either s 28A of the *Local Court Act* or s 20 of the *Service and Execution of Process Act 1992* (Cth). In their oral submissions, both the plaintiff and the defendant seemed to take the view that s 28A of the *Local Court Act* and s 20 of the *Service and Execution of Process Act 1992* were in the same terms. In my view, that is not the case. Section 14 of the *Local Court Act* relevantly provides that the Court has jurisdiction to hear and determine a cause of action for damages or a debt, provided that the amount claimed is within the jurisdictional limit (currently \$100,000). Section 14(5) provides that a Court does not cease to have jurisdiction in respect of cause of action because of part of the cause of action arose outside the Territory, if a material part of it arose in the Territory. The plaintiff's claim is for a debt arising out of services and material provided within the Northern Territory. In that case, at least the material part of the cause of action arose in the Territory and the Court, on the face of it, has jurisdiction to hear the matter.

7. The application in reliance of Local Court Rule 8.05 which provides that where a defendant claims that the Court does not have jurisdiction to hear the proceeding, the defendant may apply to have the proceeding stayed or the statement of claim set aside. In my view this is not a matter in which the court lacks **jurisdiction** to entertain the proceedings, rather it falls to a question of whether that jurisdiction should be exercised.
8. The written agreement contains a provision (clause 21), by which the parties have agreed that the laws of the State of Victoria will govern the construction of the agreement and the plaintiff has agreed to submit to the jurisdiction of the Courts of the State of Victoria. In my view, s 20 of the *Service and Execution of Process Act 1992* has application. Section 20 provides that if the Court from which the proceeding has originated is satisfied that a Court of another State has jurisdiction to determine all the matters in issue and is the most appropriate Court to determine those matters, it may grant a stay of the proceedings that have been issued. The effect of Clause 21 is to confer on the courts of the State of Victoria jurisdiction to hear a claim arising out of the agreement even if the cause of action arises elsewhere.
9. In my view, that clause is not what is commonly referred to an “exclusive jurisdiction” clause. Even if it were, it would not divest the Local Court of jurisdiction to hear the matter; rather, the question is whether, taking into account the matters under s 20(4) of the *Service and Execution of Process Act 1992*, a Court of the State of Victoria is the most appropriate Court to determine the matter.
10. Section 20(4) sets out matters that the court is to take into account in determining whether that court of another State is the appropriate court for the proceeding. These are :
 - (a) the places of residence of the parties and of the witnesses likely to be called in the proceeding;

(b) the place where the subject matter of the proceeding is situated;

(c) the financial circumstances of the parties, so far as the court is aware of them;

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

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

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

11. These matters are not exclusive and the court in determining an application might take into account such additional matters as it considers relevant. In accordance with section 20(4) I consider the following matters to be relevant.

The places of residence of the parties and of the witnesses likely to be called in the proceeding

12. The parties are companies with their registered offices in Victoria, although I note that the plaintiff has had changes of registered office from time to time.
13. The affidavit of Taal Johansen who is a director of the plaintiff company attests to the fact that he resides in Pine Creek in the Northern Territory. Mr Johansen is the person referred to in Schedule 1 to the agreement as the representative of the contractor (i.e. the plaintiff company). Mr Johansen further attests that “many witnesses relevant to this matter reside and/or work in the Northern Territory”. The affidavit does not state how many witnesses may be required or what the nature of the evidence will be. Based on the nature of the claim it may be reasonably safely assumed that some at least would give evidence of the performance of the services for which

payment is claimed. It follows that at least these would likely be persons who at the least work in the Northern Territory. Travel costs, loss of income and delay in works are said to be the likely result for requiring these witnesses, including Mr Johannsen, to attend court in Victoria. It was indicated in submissions, by a list handed up that around 9 witnesses might be required for the plaintiff including Mr Johannsen.

14. The affidavit of Peter James Lee on behalf of the defendant as its Chief Financial Officer and Company Secretary. Mr Lee states that according to his enquiries the majority of the documentation of the defendant and witnesses likely to be called to give evidence in the proceeding are located in Melbourne, Victoria. Mr Lee does not give any detail of the number of witnesses nor any indication of the nature of their evidence. It is unclear to me how the presence of documentation in Melbourne would disadvantage the defendant if the matter were to be heard in Darwin unless it was of such volume that its transportation would be prohibitive. Given the nature of the proceedings this seems unlikely.

The place where the subject matter of the proceeding is situated

15. The agreement makes clear that the services to be performed under it are all to occur in the Northern Territory. The action is for a debt due in respect of services alleged to have been performed under that agreement.

The financial circumstances of the parties, so far as the court is aware of them

16. Neither party has indicated their financial circumstances. The plaintiff has however indicated that there will be significant cost in transportation of witnesses and for their accommodation if the matter is to be heard in Victoria. Very little cost is associated with the witnesses attending court in Darwin. As the defendant has provided no detail of the number of witnesses they would call at hearing it is not possible to assess the comparative cost to the parties. I accept however that the plaintiff has demonstrated

considerable expense associated with the attendance of its witnesses to a court in Victoria.

Any agreement between the parties about the court or place in which the proceeding should be instituted

17. The starting point in matters of this kind is that parties who have agreed to submit to a specific jurisdiction and law should be held to their agreement unless there are substantial grounds for a departure. *Akai Pty Ltd v People's Insurance Company Limited* (1996) 188 CLR 418; *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197. The effect of that bias is to place a burden on the party seeking to disregard it to show facts that justify allowing him to do so. *Aldred v Australian Building Industries Pty Ltd* (1987) 48 NTR 59 at 64.
18. The plaintiff argues that the agreement is one under which the plaintiff was to undertake drilling work in Foelsche and Selby in the Northern Territory for the defendant. No work under the contract was to be performed elsewhere and since 1996, as I understand the affidavit, all drilling work performed under agreements between the parties has been exclusively within the Northern Territory.
19. Schedule 1 of the Agreement confirms that the services to be provided under the contract are for drilling and other related services at the Northern Australian Projects in the Northern Territory. The agreement provides also in clause 9 that the plaintiff in the performance of the agreement is to observe and ensure compliance with the provisions of any applicable Acts, laws, statutes, rules and regulations for the Northern Territory relating to the performance of the services. Clause 12 provides that conditions specifically applicable to environmental issues are contained within the Northern Territory guidelines for the application of environmental conditions for exploration and mining and prospecting, exploration and mining on pastoral leases. Those guidelines are required to be observed by the plaintiff when

working in areas in which they apply. Notwithstanding then that the parties have agreed that they shall be governed by and have their agreement construed according to the laws of the State of Victoria, the agreement clearly recognises that all work pursuant to the agreement is to be formed within the Northern Territory and provides for the application of particular Northern Territory laws for that purpose. Although then the agreement itself is to be construed according to the laws of Victoria, certain question relating to performance of the agreement my turn to a consideration of compliance with Northern Territory law. The plaintiff's claim is for a debt due for the performance of services. According a question relating to performance of those services may require a consideration of compliance with Northern Territory law. Neither party has indicated whether legislative compliance is an issue that might arise in the proceedings.

20. The application of Victorian law does not seem to me to pose any particular difficulty to a court of the Northern Territory to apply the relevant Victorian laws to the construction of the agreement, there being little if any variation in this particular area between Northern Territory and Victorian law.

Conclusion

21. As I have said the defendant entered a conditional defence on the basis that the Local Court of the Northern Territory lacks jurisdiction to entertain the proceedings. For the reasons set out in paragraph [6] I disagree. I also disagree that this is an exclusive jurisdiction clause by which the parties have agreed that only a court in Victoria has jurisdiction to hear a claim arising out of the agreement. In my view, clause 21 does no more than provide for jurisdiction in a court in Victoria where none may otherwise exist. In that case the bias in favour of requiring the plaintiff to submit to the courts of the State of Victoria is not as strong as in a case where the parties have agreed to vest exclusive jurisdiction over any disputes between them.

22. The defendant has provided no evidence to the court as to whether it considers that it has a defence on the merits to the plaintiffs claim for a debt due. It has not provided any detail of the cost or inconvenience that it says it will suffer if the matter proceeds in the Local Court sufficient to weigh that matter against the plaintiff's evidence of the same.
23. I am satisfied that the Local Court has jurisdiction to hear these proceedings and that this court is the most appropriate court in which the proceedings should be heard. The application for a stay is dismissed. The question of costs of the application is reserved.

Dated this 17th day of October 2008.

Sue Oliver
STIPENDIARY MAGISTRATE