Sportsbet Pty Ltd v Moraitis [2008] NTSC 54

PARTIES:	SPORTSBET PTY LTD
	v
	MORAITIS, Stephen
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	138 of 2007 (20733770)
DELIVERED:	22 December 2008
HEARING DATE:	26 June 2008
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

Jurisdiction of Courts (Cross Vesting) Act (NT)

Bankinvest AG v Seabrook (1988) 14 NSWLR 711
Bateman Project Engineering Pty Ltd v Pegasus Gold Australia Pty Ltd [2000] NTSC 3
BHP Billiton Ltd v Schultz (2004) 221 CLR 400
Bond Brewing Holdings v National Australia Bank (1990) 1 ACSR 616
Calvert v William Hill Credit Ltd [2008] EWHC 454 (Cth).
Delfino v Trevis (No1) [1963] NSWR 11191
Huddart Parker v Ship Mill Hill (1950) 81 CLR 502
Issitch v Worrell (2000) 172 ALR 586
James Hardie & Coy Pty Ltd v Barry and Another (2000) 50 NSWLR 357
Leithead v Leithead (1991) 109 FLR 177

Mattock v Mattock (1989) 97 FLR 112
Re Morgan (1887) 35 Ch D 492
Northern Territory Housing Commission v Territory Bricks Pty Ltd (1983) 71 FLR 273
Rickham Pty Ltd & Rosenhain v Duralla Creek Pty Ltd (Unreported, Supreme Court of Victoria, Hansen J, 15 December 1995)
Rick Manietta Pty Ltd v National Mutual Life Association of Australia Ltd (Unreported, Supreme Court of Victoria, McDonald J, 8 September 1995);
Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460
Swanson v Harley (1995) 103 NTR 25
Toren Fishing and Trading Ltd v McKenzie Family Nominees Pty Ltd and Ors (1995) 4 NTLR 195
West's Process Engineering Pty Ltd (Administrator Appointed) v Westralian Sands Ltd (Unreported, Supreme Court of New South Wales, Rolfe J, 6 August 1997
Woodward v H & J Nominees Pty Ltd (1993) 17 Fam LR 327
World Firefighters [2001] QSC 164

REPRESENTATION:

Counsel:

Plaintiff:	T North SC
Defendant:	A Sullivan QC

Solicitors:

Plaintiff:	Minter Ellison
Defendant:	De Silva Hebron

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

Sportsbet Pty Ltd v Moraitis [2008] NTSC 54
No 138 of 2007 (20733770)

BETWEEN:

SPORTSBET PTY LTD
Plaintiff

AND:

STEPHEN MORAITIS
Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 22 December 2008)

Introduction

[1] By summons, under s 5(1) of the Jurisdiction of Courts (Cross Vesting) Act (NT), the defendant applies to have this proceeding transferred to the Federal Court of Australia (New South Wales Registry). The application is opposed.

[2] The plaintiff is a company carrying on business in the Northern Territory of Australia as a sports bookmaker, taking bets by telephone and via the internet on horse racing and other sporting events. The plaintiff is licensed to do so under the Racing and Betting Act (NT). The bets are physically

taken in Darwin. The plaintiff claims $3,867,846 in unpaid bets, plus interest and costs from the defendant.

[3] The defendant was a customer of the plaintiff. The defendant confesses that he is indebted to the plaintiff for the amount claimed but seeks to avoid liability on three alternative grounds: forgiveness of the debt, settlement of the plaintiff's claim, and a set-off. The set-off is not particularised in the defendant's defence which has been filed in this proceeding. The set-off is based on a statement of claim that the defendant has filed in a proceeding he has commenced against the plaintiff and Matthew Terence Tripp in the Federal Court.

[4] Mr Tripp is a director and the Chief Executive Officer of the plaintiff. He resides in Melbourne. The defendant resides in Sydney.

[5] In an attempt to recover his gambling losses to the plaintiff, the defendant has made two claims in the proceeding in the Federal Court. First, under s 51AC, s 82 and s 87 of the Trade Practices Act, the defendant claims an accounting or, alternatively, damages for unconscionable conduct said to have been engaged in by the plaintiff. The defendant says that all bets that he made with the plaintiff should be rescinded because the plaintiff took unfair advantage of his special disability. He is a problem gambler. Secondly, the defendant claims damages for negligence. The defendant says that the plaintiff breached the duty of care it owed to the defendant whom the plaintiff should have known was a problem gambler.

History of the Proceedings

[6] The history of the two proceedings is as follows.

[7] The defendant began placing bets with the plaintiff in 2002 or thereabouts. From time to time the defendant suffered substantial losses to the plaintiff. In the latter part of 2007, the plaintiff began to make demands of the defendant for payment of the amount of $3, 867,846 for unpaid bets. On 10 December 2007, in response to the plaintiff's demands, Mr Ron Finlay, who was then the solicitor for the defendant, wrote a letter to Mr Tripp. In it he alleged that the plaintiff had broken its Responsible Gambling Code of Conduct by allowing the defendant, who is a problem gambler, to re-register as a player after he had voluntarily excluded himself from betting in March 2005. Mr Finlay informed Mr Tripp that the defendant had resolved to recover his gambling losses by commencing a proceeding in the Federal Court.

[8] On 14 December 2007, the plaintiff filed the Writ in this proceeding. On 20 December 2007, the parties entered into a written agreement that provided for a moratorium on taking further steps in any court proceedings until 29 February 2008, or such other date that may be agreed in writing, so the parties could try and negotiate a settlement of their disputes. Clause 2 of the agreement acknowledged that the defendant was at liberty to file and serve any defence and/or cross claim in this proceeding and/or commence proceedings against the plaintiff in any other jurisdiction after the end of the

moratorium. According to the plaintiff the negotiations were unsuccessful and on or about 4 April 2008, the plaintiff advised the defendant that it intended to press on with its claim in this Court.

[9] On 15 April 2008, the solicitors for the defendant wrote to the solicitors for the plaintiff advising them that the defendant would be commencing proceedings in the Federal Court and would be making an application under the cross vesting legislation to transfer this proceeding to the Federal Court. On 1 May 2008, the plaintiff filed the statement of claim in this proceeding. On 28 May 2008, the defendant filed his application in the Federal Court and, on 29 May 2008, the defendant filed his defence in this Court.

[10] On 2 June 2008, the defendant filed the summons seeking an order that under s 5(1) of the Jurisdiction of Courts (Cross Vesting) Act (NT) this proceeding be transferred to the Federal Court. On 13 June 2008, the plaintiff filed a summons in this Court seeking summary judgment. On 26 June 2008, I determined that the defendant's application to transfer this proceeding to the Federal Court should be heard and determined before the plaintiff's summons for summary judgment.

Jurisdiction of Courts (Cross Vesting) Act

[11] Subsection 5(1) of the Jurisdiction of Courts (Cross Vesting) Act (NT) states:

> (1) Where –

(a) a proceeding (in this subsection referred to as the "relevant proceeding") is pending in the Supreme Court; and

(b) it appears to the Supreme Court that –

(i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Federal Court or the Family Court and it is more appropriate that the relevant proceeding be determined by the Federal Court or the Family Court;

(ii) having regard to –

(A) whether, in the opinion of the Supreme Court, apart from this Act and a law of the Commonwealth or another State relating to cross-vesting of jurisdiction and apart from an accrued jurisdiction of the Federal Court or the Family Court, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the Supreme Court and capable of being instituted in the Federal Court or the Family Court;

(B) the extent to which, in the opinion of the Supreme Court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law of the Commonwealth and not within the jurisdiction of the Supreme Court apart from this Act and a law of the Commonwealth or another State relating to cross-vesting of jurisdiction; and

(C) the interests of justice,

it is more appropriate that the relevant proceeding be determined by the Federal Court or the Family Court, as the case may be; or

(iii) it is otherwise in the interests of justice that the relevant proceeding be determined by the Federal Court or the Family Court,

> the Supreme Court shall transfer the relevant proceeding to the Federal Court or the Family Court, as the case may be.

[12] There are three situations in which this Court may be required to transfer a proceeding that has been commenced in this Court to the Federal Court. First, where there are related proceedings pending in this Court and in the Federal Court and it is more appropriate that the proceeding in this Court be determined by the Federal Court: s 5(1)(b)(i) of the Jurisdiction of Courts (Cross Vesting) Act (NT). Secondly, where, but for the jurisdiction conferred on this Court by the Commonwealth and Northern Territory cross vesting legislative arrangements, the relevant proceeding or a substantial part of the proceeding could not have been instituted in this Court; the relevant proceeding is about matters that involve the application, interpretation or validity of a law of the Commonwealth and, otherwise than under the cross vesting legislative arrangements, the matters are not matters within the jurisdiction of the Court; it is in the interest of justice to transfer the proceeding; and it is more appropriate that the relevant proceeding be determined by the Federal Court: s 5(1)(b)(ii) of the Jurisdiction of Courts (Cross Vesting) Act (NT). Thirdly, where it is otherwise in the interests of justice that the relevant proceeding be determined by the Federal Court. That is, when it is considered that this Court is the non-preferred forum for a duly instituted proceeding: s 5(1)(b)(iii) of the Jurisdiction of Courts (Cross Vesting) Act (NT).

[13] The relevant provisions for the transfer of this proceeding are those contained in s 5(1)(b)(i) and s 5(1)(b)(iii) of the Jurisdiction of Courts (Cross Vesting) Act (NT). Section 5(1)(b)(ii) of the Act is of no application as, regardless of the provisions of the cross vesting legislation, this proceeding was capable of being instituted in this Court and the matters for determination are within the ordinary jurisdiction of this Court.

The relevant legal principles

[14] As to s 5(1)(b)(i) of the Jurisdiction of Courts (Cross Vesting) Act (NT), two questions arise: First, is the proceeding in this Court related to the proceeding in the Federal Court? Secondly, which is the more appropriate court for the determination of this proceeding?

[15] In my opinion, the proceeding in the Federal Court is related to the proceeding this Court. Both this Court and the Federal Court may be required to decide the same substantive questions about the alleged unconscionable conduct and negligence of the plaintiff.

[16] Two sets of proceedings are related if there is an interdependency or substantive link or association between the two sets of proceedings or a substantial common question or questions in the two proceedings: *Bateman Project Engineering Pty Ltd v Pegasus Gold Australia Pty Ltd*[1]; *Rickham Pty Ltd & Rosenhain v Duralla Creek Pty Ltd*[2]; *Woodward v H & J Nominees Pty*

[1] [2000] NTSC 3 per Mildren J at pars [13] and [14].
[2] (Unreported, Supreme Court of Victoria, Hansen J, 15 December 1995) at pars [7] to [9].

Ltd[3]; *Leithead v Leithead*[4]; *Mattock v Mattock*[5]. The plaintiff does not contend that the proceedings are unrelated proceedings.

[17] As to the test for determining which is the more appropriate court, the High Court and this Court have approved the test enunciated by the Court of Appeal of New South Wales in *Bankinvest AG v Seabrook*[6]: see *BHP Billiton Ltd v Schultz*[7]; *Swanson v Harley*[8]; *Toren Fishing and Trading Ltd v McKenzie Family Nominees Pty Ltd and Ors*[9]; *Bateman Project Engineering Pty Ltd v Pegasus Gold Australia Pty Ltd*[10]. In *Bankinvest AG v Seabrook* the Court of Appeal of New South Wales adopted a similar test to that enunciated by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd*[11]. The relevant test is which forum is the more appropriate forum for the trial of the proceeding, that is, which court is the most suitable court for the interests of all of the parties and the ends of justice? The courts have held that the more appropriate forum is the forum with the most real and substantial connection with the subject matter of the proceeding: *Bankinvest AG v Seabrook*[12]. There is no presumption in favour of the plaintiff's choice of forum and the party applying to transfer the

[3] (1993) 17 Fam LR 327 at 335.
[4] (1991) 109 FLR 177 at 182 – 3.
[5] (1989) 97 FLR 112 at 114.
[6] (1988) 14 NSWLR 711.
[7] (2004) 221 CLR 400.
[8] (1995) 103 NTR 25 at 31 to 32.
[9] (1995) 4 NTLR 195 at 211.
[10] [2000] NTSC 3 per Mildren J at par [10].
[11] [1987] AC 460.
[12] (1988) 14 NSWLR 711 per Rogers JA at 728.

proceeding does not have to demonstrate that the forum chosen by the plaintiff is an inappropriate forum for the proceeding to be tried.

[18] In contractual cases there are three broad factors to be taken into account when applying the above test. First, the governing law of any contract in dispute. Secondly, the connection between the alleged conduct or the subject matter of the proceeding and the jurisdiction and thirdly, the cost and inconvenience to the parties associated with the forum selected by the plaintiff. In relation to proceedings based on tort the place of the tort is also a relevant factor to be taken into account. As is the residence of the parties.

[19] Matters falling solely within s 5(1)(b)(iii) of the Jurisdiction of Courts (Cross Vesting) Act (NT) are also to be approached by determining which court is the more appropriate court in the sense discussed by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd*[13]: *James Hardie & Coy Pty Ltd v Barry and Another*[14]*; Bankinvest AG v Seabrook*[15].

The defendant's submissions

[20] In support of the defendant's application to transfer this proceeding to the Federal Court, Senior Counsel for the defendant, Mr Sullivan QC, made the following submissions. So far as the legal issues in both proceedings were concerned neither the Supreme Court nor the Federal Court was a more

[13] [1987] AC 460.
[14] (2000) 50 NSWLR 357 per Mason P at par [87].
[15] (1988) 14 NSWLR 711 per Rogers A-JA at 730.

appropriate court. Therefore, in order to determine which court was the more appropriate court to hear this proceeding it was necessary to look at the following matters: the issues in the proceeding; what was likely to be the evidence of each party in relation to each issue; and, where the balance of convenience lay. Such an analysis, it was said, reveals that the balance of convenience is in favour of the Federal Court. The defendant submitted that it follows that the Federal Court is the more appropriate court to hear this proceeding in the interests of justice.

[21] Mr Sullivan said that the following issues arose in this proceeding: (1) were the various betting accounts that the defendant had with the plaintiff conducted in accordance with the plaintiff's Membership and Betting Rules, those rules arguably contemplated that this Court was to have exclusive jurisdiction in matters such as those raised in this proceeding; (2) did the defendant recommence betting with the plaintiff in October 2005; (3) is the defendant entitled to set-off the amounts claimed by him in the Federal Court proceeding against his indebtedness to the plaintiff; (4) did the plaintiff forgive the defendant's debt; and, (5) were the parties' respective claims against each other compromised. As to the defendant's set-off, the two principal issues are: (1) did the plaintiff engage in unconscionable conduct by using its superior bargaining power to take advantage of the defendant's special disability – his compulsive gambling; and (2) did the

plaintiff negligently breach the duty of care that the plaintiff owed to the defendant.

[22] He said that the whole of the defendant's case in both proceedings can be established by calling the following witnesses: the defendant, Mr Ron Finlay, Professor Alexander Blaszcynski, and by tendering: the business records of the plaintiff that related to the bets placed by the defendant with the plaintiff, the specific documents referred to in the statement of claim filed by the defendant in the Federal Court, and the sound recordings of the telephone conversations between the defendant and the employees of the plaintiff. The issues in both proceedings are relatively confined. As a result, the plaintiff's relevant witnesses are John McDonald, Matthew Tripp and Grant Griffith. In addition, the plaintiff may wish to tender various business records of the plaintiff and the recordings of various telephone conversations with the defendant. All of the witnesses reside either in Sydney or Melbourne and the principal legal advisors of the parties also reside in either Sydney or Melbourne. It would be more convenient and less expensive for the proceedings to be heard in the Federal Court in Sydney and Melbourne. The Federal Court has the facilities that enable the Federal Court to sit in both cities.

[23] Finally, Mr Sullivan submitted that the connection of this proceeding with the Northern Territory is tenuous.

The plaintiff's submissions

[24] The plaintiff opposed the defendant's application to transfer this proceeding to the Federal Court on a number of grounds. First, the plaintiff sought to have an application for summary judgment that it filed in this Court heard before the defendant's application to transfer this proceeding to the Federal Court. Secondly, Senior Counsel for the plaintiff, Mr North SC, argued that the conduct of the defendant in commencing the proceeding in the Federal Court before filing his defence in this proceeding, and the fact that the defendant was maintaining inconsistent defences in this proceeding amounted to an abuse of process. Thirdly, Mr North said that there is a preponderance of connecting factors in this proceeding with the Northern Territory. The plaintiff will be calling a number of witnesses who reside in the Northern Territory and virtually all of the relevant documents are in the Northern Territory as there are regulatory requirements in the Northern Territory which necessitate the retention of such documents.

The substantive issues in this proceeding

[25] As there are significant parts of the defendant's defence that are not properly responsive to the statement of claim filed in this proceeding (in particular 3, 4, 8 and 9 of the defence are not properly responsive to the statement of claim), as the set-off on which the defendant relies has not been properly pleaded in this proceeding, and as the plaintiff has not filed a reply to the defence in this proceeding or a defence to the proceeding in the

Federal Court, it is difficult to completely and precisely identify all of the issues in this proceeding. The application to transfer this proceeding to the Federal Court is further complicated by the fact that no evidence has been tendered about the nature, duration or extent of the defendant's alleged gambling problem. There are still matters in this proceeding which may need to be further investigated by the parties. As a result, it is difficult to form a view about the full extent of the evidence which may be relevant in this regard. Nonetheless, I have taken the following matters into consideration.

[26] The following facts are admitted by the defendant in his defence:

- The plaintiff is an incorporation that is capable of suing and being sued.
- The plaintiff is licensed under the Racing and Betting Act (NT) for the purpose of conducting the business of sports bookmaking.
- The plaintiff's place of business and betting facilities are located in Darwin.
- The plaintiff's business is governed by the Racing and Betting Act (NT).
- On or about 30 April 2004, the plaintiff opened betting account No 96589 for the defendant under the defendant's name.
- The plaintiff would receive and negotiate bets placed by the defendant via the telephone and the defendant would open an account with the plaintiff.
- Up until March 2005, the defendant utilised the telephone betting facilities of the plaintiff to place his bets.

- The defendant was sometimes informed orally of the balance of his betting accounts by the plaintiff's telephone operator when he telephoned the plaintiff's betting number.

- The defendant was sometimes informed orally of the balance of his betting accounts by Mr John McDonald when he telephoned his mobile telephone number for the purpose of placing a bet or discussing the balance of his betting accounts.

- The defendant made payments to the plaintiff using: direct cash; cheque deposits; and a telephone payment facility called "BPAY".

- As at 4 July 2007, the defendant owed a debt to the plaintiff in the sum of $2,242,144.

- On 1 October 2005, the defendant resumed betting with the plaintiff. The defendant's bets were processed through betting account No. 96589.

- In about May 2006, the plaintiff opened and operated a betting account No. 117610 under the name of the defendant.

- In about July 2006, the plaintiff opened and operated a betting account No. 124536 under the name of the defendant.

- From about October 2005 to about July 2007, the defendant utilised the telephone betting facilities of the plaintiff to place bets.

- From about October 2005 to July 2007, the defendant was sometimes informed orally of the balance of his betting account by the plaintiff's telephone operator when he telephoned the plaintiff's betting number.

- From about October 2005 to April 2006, the defendant was sometimes informed orally of the balance of his betting account by Mr John McDonald when he telephoned Mr McDonald for the purpose of placing bets or discussing the balance of his betting account.

- From about April 2006 to July 2007, the defendant was sometimes informed orally of the balance of his betting account

by Mr Matthew Tripp when he telephoned Mr Tripp for the purpose of placing bets or discussing the balance of his betting account.

- From October 2005 to about July 2007, the defendant made payments to the plaintiff using: a telephone payment facility called "BPAY"; direct cash; or cheque deposits.

- As at 17 June 2007, the defendant owed the plaintiff a further debt of $1,627,702.

- As at 17 June 2007, the defendant owed the plaintiff a total debt of $3, 867,846.

[27] The defendant does not admit either the 2004 Agreement pleaded in the statement of claim or the 2006 Agreement pleaded in the statement of claim. Nor does the defendant admit the terms of each of these agreements. In par 5 of the defence the defendant denies that in performance of the 2004 Agreement betting account No. 96589 was opened, credit was extended to the plaintiff and the defendant placed bets with the plaintiff. In par 10 of the defence there is a similar denial in relation to the 2006 Agreement.

[28] The following issues potentially arise for determination by the Court in this proceeding:

1. Did the plaintiff and the defendant enter into the 2004 Agreement pleaded in par 3 of the statement of claim?

2. What were the terms of the 2004 Agreement?

3. Were the various matters alleged in par 5 of the statement of claim undertaken in performance of the 2004 Agreement?

4. Did the plaintiff and the defendant enter into the 2006 Agreement pleaded in par 8 of the statement of claim?

5. What were the terms of the 2006 Agreement?

6. Were the various matters alleged in par 10 of the statement of claim undertaken in performance of the 2006 Agreement?

7. Did the plaintiff forgive the defendant the debt of $3,867,846?

8. Did the plaintiff and the defendant reach a settlement or compromise of the claims that they allege against each other?

9. Is the defendant entitled to set-off against his indebtedness to the plaintiff, the amounts claimed by him in the proceeding in the Federal Court?

10. Did the defendant lose substantial sums of money to the plaintiff between 2 September 2002 and March 2005?

11. Prior to March 2005, did the plaintiff adopt and implement a Responsible Gambling Code of Conduct? If so, what were the terms or provisions of the Code and how was the Code implemented and administered?

12. On 15 March 2005, was the defendant voluntarily excluded from placing a bet with the plaintiff? If so, what did that mean? What was the effect of such exclusion?

13. What was the meaning and effect of the letter dated 15 March 2005?

14. On 15 March 2005, was the defendant's betting account with the plaintiff closed?

15. Did the defendant have knowledge of each of the betting accounts that he held with the plaintiff?

16. What was the meaning and effect of the plaintiff's letter dated 24 March 2005?

17. On or about 17 June 2005, did the plaintiff accept payment of the sum of $70,000 and release the defendant from all liability for the defendant's indebtedness to the plaintiff as at that date?

18. How extensive was the defendant's gambling with the plaintiff between 1 October 2005 and July 2007? What were the defendant's losses during this period? What were the defendant's winnings during this period?

19. Did the applicant suffer from a special disadvantage?

20. Was the defendant a "problem gambler"? What is a problem gambler? Could the defendant exercise self control over his gambling?

21. Was the plaintiff aware of the defendant's "condition"?

22. How much credit did the plaintiff extend to the defendant between 1 October 2005 and July 2007 and in what circumstances was the credit extended to the defendant?

23. Was the plaintiff in a superior bargaining position to that of the defendant?

24. Did the plaintiff use its superior bargaining position to take advantage of the defendant's "special disability"?

25. Did the plaintiff engage in unconscionable conduct?

26. Did the plaintiff owe the defendant a duty of care?

27. Did the plaintiff negligently breach its duty of care to the defendant?

28. Did the plaintiff's negligence cause the defendant damage?

[29] So far as the application to transfer these proceedings to the Federal Court is concerned, a further potentially relevant issue is wether the following terms were included in both the 2004 Agreement and the 2006 Agreement pleaded in the statement of claim filed in this proceeding: (1) all bets are considered to be placed and received in the Northern Territory of Australia; and (2) the Membership and Betting Rules shall be governed by and construed in accordance with the laws of the Northern Territory *and the defendant irrevocably submits to the exclusive jurisdiction of the Northern Territory*

Courts [emphasis added] in respect of any dispute or matter arising from or out of the Membership and Betting Rules. Such jurisdiction clauses may be a relevant factor in considering whether a proceeding should be transferred under the cross vesting legislation: *Huddart Parker v Ship Mill Hill*[16]; *West's Process Engineering Pty Ltd (Administrator Appointed) v Westralian Sands Ltd*[17]*; Rick Manietta Pty Ltd v National Mutual Life Association of Australia Ltd*[18]; *World Firefighters*[19] and *Bond Brewing Holdings v National Australia Bank*[20]. However, despite the defendant's mere non admissions, the plaintiff has not, as yet, led sufficient evidence to establish either the 2004 Agreement or the 2006 Agreement pleaded in the statement of claim or the terms of those agreements. Consequently, I have not given this factor any real weight in coming to my decision in this application.

[30] Having considered the pleadings, noted the incomplete state of the pleadings, noted that further enquiries and investigations may still need to be undertaken by the parties, perused the affidavits filed in the application, and heard the arguments of counsel, it is my opinion that the following witnesses, who reside in the following locations, will potentially be required to give evidence in relation to each of the issues that are referred to in par [28] above:

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[16] (1950) 81 CLR 502.
[17] (Unreported, Supreme Court of New South Wales, Rolfe J, 6 August 1997) at pars [12] & [13].
[18] (Unreported, Supreme Court of Victoria, McDonald J, 8 September 1995).
[19] [2001] QSC 164.
[20] (1990) 1 ACSR 616

Issue 1: John McDonald (Melbourne); the defendant (Sydney); Richard Molinari (unknown); a witness who is able to give direct evidence as to whether the plaintiff's Membership and Betting Rules were published on the plaintiff's website on 30 April 2004; a witness through whom the relevant Membership and Betting Rules may be tendered; a witness who is able to give evidence about the procedures undertaken in order to open betting account No. 96589 on the plaintiff's computer; a witness who can establish that the relevant betting statements were sent to the defendant by the plaintiff its servants and agents; a witness who is able to give evidence about the custom and usage of a sports bookmaker in the Northern Territory; various employees of the plaintiff who can give evidence about dealings with the defendant or Richard Molinari in relation to betting account No. 63255; and, a person through whom the recordings of all relevant telephone conversations may be tendered;.

Issue 2: The same witnesses as for issue 1 above; presumably, if the relevant documents are proven, the documents that are said to contain the terms of the 2004 Agreement will largely speak for themselves.

Issue 3: John McDonald; the defendant; staff of the plaintiff who had dealings with the plaintiff over the relevant period who can give evidence about any instructions they were given, the procedures that they followed when dealing with the defendant, their dealings with the defendant, the opening and operation of Betting Account No. 1, and the extension of credit to the defendant; a person through whom the recordings of all relevant telephone conversations maybe tendered; and, a witness who can establish that the relevant settling account statements were sent to the defendant by the plaintiff, its servants and agents.

Issue 4: Matthew Tripp (Melbourne); the defendant; a witness who is able to give direct evidence as to whether the plaintiff's Membership and Betting Rules were published on the plaintiff's website on 14 July 2006; a witness through whom the relevant Membership and Betting Rules may be tendered; a witness who is able to give about the procedures undertaken in order to open of betting accounts No. 117610 and 124536 on the plaintiff's computer; a witness who can establish that the relevant settling account statements were sent to the defendant by the plaintiff, its servants and agents; a witness who is able to give evidence about the custom and usage of a

sports bookmaker in the Northern Territory; and, various employees of the plaintiff who can give evidence about dealings with the defendant in relation to betting accounts 63225, 117610 and 124536; a person through whom the recordings of all relevant telephone conversations maybe tendered.

Issue 5: The same witnesses as for issue 4; presumably, if the relevant documents are proven, the documents that are said to contain the terms of the 2006 Agreement will largely speak for themselves.

Issue 6: Matthew Tripp; the defendant; staff of the plaintiff who had dealings with the plaintiff over the relevant period who can give evidence about any instructions they were given, the procedures that they followed when dealing with the defendant, their dealings with the defendant, the opening and operation of Betting Account No 2, and the extension of credit to the defendant; a person through whom the recordings of all relevant telephone conversations may be tendered; and, a witness who can establish that the relevant settling account statements were sent to the defendant by the plaintiff, its servants and agents.

Issue 7: Matthew Tripp; Mr Tripp Snr (Melbourne); and the defendant.

Issue 8: Grant Griffiths (Victoria); Matthew Tripp; possibly other members of the Board of the plaintiff; any relevant minutes of meetings or resolutions of the Board of the plaintiff; Ron Finlay (Sydney); and, the defendant.

Issue 9: As to issues 9 to 28 referred to in par [28] above –

John McDonald; Matthew Tripp; Toni Griffin (Darwin), who is said to have a discussion with Mr Finlay about the seven day closure period in March 2005; Malcolm Richardson; various staff employed by the plaintiff who had dealings with the defendant during the second betting period; staff through whom the recordings of the various relevant telephone conversations may be tendered; staff of the plaintiff who can prove the terms of the plaintiff's Responsible Gaming Code of Conduct and give evidence about the operation of the Code of Conduct; possibly and still to be determined, employees of other sports betting organisations in the Northern Territory who can give evidence about the defendant's betting patterns, if any, with those organisations and whether the defendant voluntarily excluded himself from those organisations; possibly evidence from other sports betting organisations in the Northern Territory about the betting patterns of other large punters; an expert psychologist or psychiatrist, the

defendant, Ron Finlay and Professor Alexander Blaszcynski (Sydney).

[31] As to issue number 28 which is referred to in par [28] above, the plaintiff says that it will argue that the defendant's gambling with the plaintiff did not cause him any loss or damage because, had the defendant not gambled with the plaintiff, it is likely that he would have gambled with other sports bookmakers: *Calvert v William Hill Credit Ltd*[21]. As a result, it will be necessary for the defendant to call other sports bookmakers in the Northern Territory to give evidence about the defendant's gambling patterns. In par 15 (iii) of the defence filed in this proceeding, there is a suggestion that the defendant may have placed bets with other sports bookmakers. The suggestion arises because what is pleaded as consideration for the plaintiff's forgiveness of the defendant's debt is that, if the defendant resumed betting, he would bet exclusively with the plaintiff. However, at this stage of the proceeding it is unclear whether the defendant did, in fact, bet with any other sports bookmakers. No evidence has been tendered about this to date. It is a matter which still needs to be investigated.

[32] It is likely that the plaintiff will call at least four witnesses from Melbourne or elsewhere in Victoria, two and possibly more witnesses from Darwin and an expert witness who resides somewhere in Australia to give evidence at the hearing of this proceeding. It is likely that the defendant will call at

[21] [2008] EWHC 454 (Cth).

least three witnesses who live in Sydney to give evidence at the hearing of this proceeding.

Consideration

[33] In my opinion, the preponderance of connecting factors is in favour of this proceeding being heard by this Court. This Court is the more appropriate court to hear this proceeding and it is in the interests of justice that it does so. The plaintiff carries on its business in the Northern Territory. That business relevantly involves staff who took the various telephone calls made by the defendant and who dealt with the defendant, staff who managed the recordings of the various telephone calls made by the defendant and staff who supplied the defendant with various betting statements. The licensing and operation of the business is governed by the laws of the Northern Territory. The conduct alleged to have constituted the tort and the unconscionable conduct which are relied on to establish the defendant's set-off against the plaintiff is all likely to have occurred in the Northern Territory.

[34] I accept Mr North SC's submissions that, in addition to John McDonald, Matthew Tripp, Mr Tripp Snr, Grant Griffith, Malcolm Richardson and Toni Griffin, the plaintiff is likely to call a number of other witnesses to give evidence at the hearing of this proceeding and at least some of those witnesses are likely to be residents of the Northern Territory. I have referred to the likely category of those witnesses in par [29] above. Those

witnesses may include various staff employed by the plaintiff, staff employed by other sports betting organisations and staff employed by the Racing and Gaming Authority of the Northern Territory.

[35] In my opinion, it is likely that the defendant has underestimated the witnesses that he will need to call in support of his case. For example, I do not think the defendant has as yet considered all of the witnesses that he may need to call to prove that prior to March 2005, the plaintiff adopted and implemented a Responsible Gambling Code of Conduct, the content of the Code and the purpose and effect of the Code. It may well be that the defendant will need to call someone from the Racing and Gaming Authority or some other person from the Northern Territory to prove these matters.

[36] If the proceedings were to be held in Sydney, it would still be necessary for a minimum of four witnesses to travel to Sydney from Melbourne and for a minimum of two witnesses to travel to Sydney from Darwin. It would also be necessary for counsel from Melbourne and Adelaide to travel to Sydney and for solicitors to travel to Sydney from Melbourne. Most of the people I have mentioned would also need to be accommodated in Sydney. If the Federal Court travelled between Sydney and Melbourne to accommodate witnesses, then at least the Federal Court Judge and his associate and six legal representatives of the parties would have to travel backwards and forwards between Sydney and Melbourne. Regardless of whether the hearing of this proceeding is to be held in Sydney or Darwin, there are going

to be cost consequences that arise from the fact that the key witnesses live in different cities. In my opinion, the most appropriate way for these issues to be managed is by this Court making appropriate directions. Directions can be given by this Court which can accommodate the fact that both witnesses and legal practitioners reside in different jurisdictions, including - counsel may be given leave to appear at interlocutory hearings either by telephone or by way of video conferencing; the evidence in chief of each witness is to be in the form of witness statements or affidavits; copies can be made of documents that have been provided to expert witnesses and consistently collated bundles of the documents can be provided to legal representatives and the Court; likewise with any additional documents that may be relevant for cross examination of the expert witnesses, this can be done in such a way that privilege of the documents is maintained until cross examination commences; expert witnesses may give their evidence by way of video conferencing; all relevant documents can be scanned and copied by appropriate electronic means; and bundles of uncontroversial documents which are to be tendered can also be prepared in a form that is convenient to all parties.

[37] While a number of the witnesses reside interstate, it is not said that they would be seriously inconvenienced if they were required to travel to Darwin or that they cannot afford to travel to Darwin. The evidence of Mr Finlay is likely to be of short duration and it should not be necessary for the

defendant's expert witness to travel to Darwin. The plaintiff's position is that there is no difficulty with any of the plaintiff's witnesses travelling to Darwin.

[38] I have not given a lot of weight to the fact that the parties have chosen legal practitioners who reside interstate to represent them. Both parties appear to have the means to do so. There are any number of legal firms and legal practitioners in the Northern Territory who have the capacity to conduct this proceeding. The Australian legal profession is now a national legal profession and legal practitioners who accept retainers in relation to interstate work must expect to travel.

[39] I do not accept the plaintiff's submission that the defendant's conduct of this proceeding and the proceeding in the Federal Court constitute an abuse of process. Before any proceeding was commenced in this Court the solicitor for the defendant wrote to Mr Tripp advising him that the defendant intended to commence a proceeding against the plaintiff in the Federal Court. Also prior to the plaintiff filing its statement of claim in this proceeding the solicitors for the defendant wrote to the solicitors for the plaintiff raising the prospect of this proceeding being transferred to the Federal Court and foreshadowing that they would be commencing proceedings in the Federal Court and would be making an application to transfer this proceeding to the Federal Court. The defendant does not seek to maintain the same proceeding in two different courts. The defendant's

three defences are pleaded in the alternative. If the defendant succeeds in establishing either that the debt was forgiven or the proceeding was settled that will be the end of the matter. If the defendant fails to prove that he was forgiven or the matter was settled he will rely on his claims for a set-off. A party may, as a general rule, plead inconsistent sets of facts in the alternative: *Issitch v Worrell*[22]; *Delfino v Trevis (No 1)*[23]; *Re Morgan*[24]. Similarly, the rule against departure in pleadings has no application to pleadings in separate proceedings: *Northern Territory Housing Commission v Territory Bricks Pty Ltd*[25]. That being said, and subject to the defendant tendering the necessary further evidence, my preliminary view is that the defendant will have considerable difficulty in establishing the defences of forgiveness of debt or settlement of the parties claims.

Orders

[40] The application to transfer this proceeding to the Federal Court under s 5(1) of the Jurisdiction of Courts (Cross Vesting) Act (NT) is dismissed. I will hear the parties further as to costs.

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[22] (2000) 172 ALR 586 at par [32].
[23] [1963] NSWR 11191 at 196.
[24] (1887) 35 Ch D 492.
[25] (1983) 71 FLR 273.