PARTIES:	PASPALEY PEARLS PTY LTD
	v
	ARTSHEEN PTY LTD PLUMBEACH PTY LTD GEMBROOK PTY LTD DAKIN NOMINEES PTY LTD CHALKFARM PTY LTD NEW BROOME PTY LTD ACADIA BAY PTY LTD BEVERLEY ANN KINNEY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	215 of 1997 (9720472)
DELIVERED:	22 September 1997
HEARING DATES:	18, 19, 20 September 1997
JUDGMENT OF:	Kearney J

REPRESENTATION:

Counsel:

Plaintiff:	M.D.A.Maurice Q.C., A.Wyvill
Defendants:	J. C. Kelly

Solicitors:

Plaintiff:	Brian S. Cooney
Defendants:	De Silva Hebron

Judgment category classification:	
Judgment ID Number:	kea97025
Number of pages:	6

kea97025

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

No. 215 of 1997 (9720472)

BETWEEN:

PASPALEY PEARLS PTY LTD
Plaintiff

AND:

ARTSHEEN PTY LTD
PLUMBEACH PTY LTD
GEMBROOK PTY LTD
DAKIN NOMINEES PTY LTD
CHALKFARM PTY LTD
NEW BROOME PTY LTD
ACADIA BAY PTY LTD
BEVERLEY ANN KINNEY
Defendants

CORAM: KEARNEY J

RULING

(Delivered 22 September 1997)

The application

I rule this morning on an application by the defendants, pursuant to s5(2)(b)(iii) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (NT), to transfer these proceedings to the Supreme Court of Western Australia.

The background to the application

On Monday 15 September 1997 the plaintiff caused a writ to be issued out of this Court, the indorsement on which indicated that its claim arose from an oral "joint venture agreement" of "early 1987" which was "reduced or partly reduced to writing" some "18 months after the joint venture commenced" [in a "Management Agreement" dated 1 July 1989], and from "various extensions of the joint venture", which was a "pearl culture project" at "Deepwater Point pearl farm at King Sound in Western Australia" and "elsewhere" in that State and the Northern Territory. The plaintiff sought declaratory relief as to the defendants' obligations under the Management Agreement, on its "true construction". Alternatively, it sought rectification of clause 9.1 of the Management Agreement, as to the period during which the obligations of the parties under that agreement were to remain in force. Alternatively, it sought declaratory relief to the effect that the parties had agreed to "extend the operation of the Management Agreement", in certain respects. It also sought an order for the specific performance of the Management Agreement as so declared or rectified. It also sought other relief, including in par5:

> "An injunction:
>
> (i) restraining the Defendants by their servants, agents or otherwise however from further proceeding with the 1997 harvest or the subsequent harvests other than under the supervision and direction of the Plaintiff;
>
> (ii) ordering the Defendants to allow the Plaintiff by its servants or agents to supervise the 1997 harvest and the subsequent harvests; and

(iii) *ordering the Defendants to deliver the cultured pearls gained from the 1997 harvest* and the subsequent harvests *to the Plaintiff for sale pursuant to the Management Agreement*." (emphasis added)

The plaintiff specified Darwin as the place of trial.

On 16 September the defendants entered an Appearance in the proceedings.

On the morning of Wednesday 17 September the plaintiff by summons returnable on 18 September sought inter alia the following interlocutory relief, supported by various affidavits:

"1. The defendants deliver forthwith to the plaintiff for marketing, the pearls harvested by the defendants this year from the Deepwater Point pearl farm, near Broome in Western Australia and known to the plaintiff and the defendants as: the 1995 1Rs, the 1995 2Rs and the 1995 3Rs ("the Pearls");

2. In the interim, the defendants be restrained from selling, mortgaging, charging, dealing with, disposing of or creating any third party interests in the Pearls"

On the afternoon of Wednesday 17 September by summons also returnable on 18 September and supported by affidavit the defendants sought the following relief:

"1. That these proceedings be transferred to the Supreme Court of Western Australia at Perth pursuant to Section 5(2)(b)(ii) and (iii) of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cwth)."

At the hearing of this application it was made clear that the relief sought was under the identical Northern Territory Act, not the Commonwealth Act, and that only s5(2)(b)(iii) of that Act was relied upon.

Both summonses of 17 September came on for hearing before the Chief Justice at 10am on 18 September; his Honour disqualified himself from hearing either of them, and stood them down. They came on before me late that afternoon. After hearing argument, I ruled that the defendants' application to transfer the proceedings should be heard first. Ms Kelly had sought to have the hearing of that application deferred to Thursday 26 September; I ruled, however, that it should commence at 2pm on Friday 19 September. The application was argued on Friday afternoon, and also on Saturday 23 September, as Ms Kelly was otherwise committed today.

I rule today on the defendants' application of 17 September.

Conclusions

I have heard argument at considerable length on the reasons for and against a transfer of the proceedings to the Supreme Court of Western Australia. I have been taken in considerable detail, in the course of argument, through most of the affidavit material.

In this jurisdiction the approach to applications such as this is spelt out in *Swanson v Harley* (1994-95) 103 NTR 25 at 30-35. I apply the principles outlined therein. I note and apply in particular the statement at 31:

> "In considering what [is] the appropriate forum, the court looks for the jurisdiction in which the action has the most real and substantial connection as may be found in looking for connecting factors, including those affecting convenience or expense, the law governing the relevant transaction and the places where the parties respectively reside or carry on business. The list of factors [is] not intended to be exclusive: …"

I also note and apply the citation at 32 from *Midland Montagu Australia Ltd v O'Connor* (1992) 2 NTLR 86 at 94:

> "On such an application the criteria for deciding whether an order should be made are those prescribed by the Act, having regard to the legislative purpose of the cross-vesting scheme. The questions to be answered are: which court is the most appropriate forum to determine the proceedings; which court is pointed to as the appropriate forum, by the interests of justice. The guiding principle is: what do the interests of justice dictate should be done. There is no presumption that the court the jurisdiction of which has been properly invoked, the "first court", should exercise that jurisdiction. The question of transfer cannot be decided by looking simply to the jurisdiction of the respective courts; that is, to whether one court could give relief or make a determination more completely than the other. There is no onus on a party to satisfy the court that an order for transfer should or should not be made."

The respective arguments and factors relied on are neatly summarised in the parties' respective written submissions. Time does not permit the setting out here of a consideration of the arguments advanced; they have nevertheless been carefully considered over the weekend as I am very conscious that there is no appeal from a decision on the question of a transfer.

It is sufficient to say that at the end of the day I consider that the decision on the question of which court the interests of justice point to as the most appropriate forum in which to determine these proceedings, the Supreme Court of Western Australia or this Court, is fairly finely balanced, when the principal factors are weighed up. Those factors are the forum with which the action has the most real and substantial connection, and the cost and convenience as between Perth and Darwin of the venue for trial as regards the parties, their probable witnesses, and their legal advisors.

In the result I consider that the balance comes down in favour of the proceedings being tried in Darwin. Accordingly, I refuse the defendants' application of 17 September 1997.

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