PARTIES:	POWER AND WATER AUTHORITY v MacMAHON CONTRACTORS PTY LTD and ADVANCED PIPELINE TECHNOLOGY PTY LTD AND OTHERS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS:	No. 101 of 1995
DELIVERED:	Darwin 21 September 1995
HEARING DATES:	6 July 1995
JUDGMENT OF:	Angel J

CATCHWORDS:

PRACTICE AND PROCEDURE - Cross vesting - Application to transfer proceeding to another State supreme court - Whether "in the interests of justice" to be transferred - Principles to be applied - matters to be considered

Jurisdiction of Court (Cross Vesting) Act NT, s5(2)(b)(iii)

Bankinvest A-G v Seabrook (1988) 14 NSWLR 711, applied

Arrowcrest GRP v Advertiser News Weekend (1993) 113 FLR 57, applied

Midland Montagu Australia Ltd v O'Connor (1992) 2 NTLR 86, followed

Swanson v Harley, unreported, Supreme Court of the Northern Territory, Martin CJ, 22 March 1995, followed

Toren Fishing and Trading Pty Ltd v McKenzie Family Nominees Pty Ltd & Ors, unreported, Supreme Court of the Northern Territory, Kearney J, 3 May 1995, followed

Nilsen Electric (WA) Pty Ltd v Jovista Pty Ltd, unreported, Supreme Court of Victoria, 8 March 1995, followed

Dawson v Barker (1994) 120 ACTR 11, referred to

Pikos v Australia Boat Sales Pty Ltd, unreported, Supreme Court of the Northern Territory, 26 July 1995, Thomas J

REPRESENTATION:

Counsel:

Plaintiff:	T Riley QC
First Defendants:	A Goldberg QC
Second Defendant:	J Stewart
Third Defendant:	B Collins QC

Solicitors:

Plaintiff:	Philip & Mitaros
First Defendants:	Clayton Utz
Second Defendant:	Ward Keller
Third Defendant:	Middletons Moore & Bevins

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 101 of 1995

BETWEEN:

POWER AND WATER AUTHORITY
Plaintiff

AND:

MacMAHON CONTRACTORS PTY LTD and ADVANCED PIPELINE TECHNOLOGY PTY LTD
First Defendants

AND:

MITSUI & CO (AUST) LTD
Second Defendant

AND:

TUBEMAKERS OF AUSTRALIA PTY LTD
Third Defendant

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 21 September 1995)

The first defendants (hereafter "MacAPT") by interlocutory summons seek that these proceedings be transferred from the Supreme Court of the Northern Territory to the Supreme Court of Queensland. The application is made pursuant to s5(2)(b)(iii) of the Jurisdiction of Courts (Cross Vesting) Act (NT) (hereafter "Cross-Vesting Act").

The second defendant (hereafter "Mitsui") and the third defendant (hereafter "Tubemakers") joined and supported the application. The plaintiff (hereafter "PAWA") opposed the application, submitting that the Supreme Court of the Northern Territory is the appropriate court to hear the trial of the action.

On 5 June 1995, PAWA issued a writ claiming damages in respect of the construction of a pipeline from Daly Waters to McArthur River in the Northern Territory of Australia. The Statement of Claim is substantial and contains several causes of action.

The construction of the pipeline involved a pipe jointing technique, "Zap-lok", in combination with a pipe burial technique, "direct burial by ploughing". PAWA contracted with MacAPT to construct such a pipeline. Mitsui was contracted to supply suitable pipe. Tubemakers was contracted to manufacture the pipe and to warrant the fitness of the "Zap-lok" technique, providing expert assistance as needed.

It is alleged that, after some 61 kilometres of the pipeline had been constructed, leaks in the "Zap-lok" joints appeared necessitating substantial repair or replacement. It is alleged PAWA determined that the "Zap-lok" and "Direct Burial" techniques should be replaced with an alternative technique, called "weld and trench", the details of which it is presently unnecessary to relate.

Additionally, PAWA contends that it was in reliance upon a representation by MacAPT, namely, that if the work was completed on a "cost plus" basis, the total cost of the pipeline would be $15,596,815.00. It is said the parties varied the terms of the contract to incorporate such. In fact, it is said, the total cost of the pipeline was certified at $18,284,433.00.

PAWA has brought actions pursuant to the Trade Practices Act (C'wth), The Consumer Affairs and Fair Trading Act (NT), for breach of contract, including breach of warranty and for negligence, and additionally, for misrepresentation in respect of the "cost plus" term of the contract.

The relevant provision under the Cross Vesting Act is s5(2) which provides:

> "Where -
>
> (a) a proceeding (in this subsection referred to as the 'relevant proceeding') is pending in the Supreme Court (in this subsection referred to as the 'first court'); and
>
> (b) it appears to the first court that -
>
> (i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Supreme Court of another State or of a Territory and it is more appropriate that the relevant proceeding be determined by that other Supreme Court;
>
> (ii) having regard to -
>
> (A) whether, in the opinion of the first court, apart from this Act and a law of the Commonwealth or another State

relating to cross-vesting of jurisdiction, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the first court and capable of being instituted in the Supreme Court of another State or Territory;

(B) the extent to which, in the opinion of the first 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 that other State or Territory and not within the jurisdiction of the first 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 that other Supreme Court; or

(iii) it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of another State or of a Territory,

the first court shall transfer the relevant proceeding to that other Supreme Court."

The present application for removal is brought pursuant to s5(2)(b)(iii).

Street CJ said in *Bankinvest A-G v Seabrook* (1988) 14 NSWLR 711 at 713:

"The cross-vesting legislation in effect brings together the eight State and Territory Supreme Courts, the Federal Court and the Family Court into an organisational

> relationship. Very broadly speaking, the legislation now operative throughout Australia achieves two objectives: first it enables any one of these courts to exercise the jurisdiction of, and to apply the law that would be applied by, any one of the other nine; secondly it enables any one of those courts in which proceedings are commenced to transfer them to any one of the other nine.
>
> The introduction of this scheme is a significant move towards providing throughout our nation the services of an integrated court system transcending the boundaries, both geographic and jurisdictional that have in the past obstructed the courts in meeting the requirements of the Australian public.
>
> The cross-vesting legislation passed by the Commonwealth, the States and the Territories both conferred on each of the ten courts Australia-wide jurisdiction and set up the mechanism regulating the transferring of proceedings from one of these ten courts to another. In relation to transfer, the common policy reflected in each of the individual enactments is that there must be a judicial determination by the court in which proceedings are commenced either to transfer or not to transfer the proceedings to one of the other nine based, broadly speaking, upon consideration of the interests of justice. To describe it as a judicial determination, should not be permitted to obscure the real purport of the decision. The determination must, of course, be made with full regard to principles governing an adjudication. But, in its effect, an order granting or refusing a transfer is an administrative decision."

See also *Midland Montagu* (1992) 2 NTLR 86 at 90.

Street CJ, isolated the essence of what each court must determine when he said, at 714:

> "... it can be seen to be highly desirable that the judicial administration of the day to day working of the cross-vesting scheme is not encumbered by an encrustation of judge-made pronouncements of principles to be applied when considering making a transfer order. It calls for what I might describe as a 'nuts and bolts' management decision as to which court, in the pursuit of the interests of justice, is the more appropriate to hear and determine the substantive dispute. Consideration of textured principle and deep learning - in particular

> principles of international law such as forum non conveniens - have no place in a cross-vesting adjudication. There is, in substance, no principle to be enunciated other than the necessity of applying the specific considerations stated in the cross-vesting legislation, primary amongst which is the pursuit of the interests of justice."

As this case involves s5(2)(b)(iii) of the Cross-Vesting Act, the following statement of Miles CJ in *Arrowcrest GRP v Advertiser News Weekend* (1993) 113 FLR 57 at 61 is relevant:

> "I do not think that a discussion of the cases is necessary. I do think that it was intended that an application for transfer under the Cross-Vesting Act should be dealt with expeditiously and cheaply, without the need for discussion on each and every occasion of the underlying philosophy or the nature of the Federal compact and without the need for the development or consideration of a body of case law.
>
> The applicant does not have to show that justice cannot be obtained in the court in which the proceedings commenced, nor that the court to which transfer is sought is the only court in Australia in which justice may be obtained. The applicant bears no onus. The Court may order the transfer on its own motion, without an application by any party (s5(7)). Moreover the decision whether or not to transfer the proceedings, although appearing at first to be in the nature of a discretion, is on close analysis not so. The court considering the question has to make a value judgment on whether it is in the interests of justice that the proceeding be decided by the court of another State or Territory. If the court, after taking such matters as it considers relevant into consideration, makes the decision that the transfer is in the interests of justice, there is no option: the court must transfer the proceeding. Furthermore, the decision is unappealable whether it be to grant or to refuse transfer (s13(a)).

See also *Midland Montagu Australia Ltd v O'Connor*, supra, *Swanson v Harley*, unreported, Supreme Court of the Northern Territory, Martin CJ, 22 March 1995), and *Toren Fishing and Trading Pty Ltd v McKenzie Family Nominees Pty Ltd & Ors*,

unreported, Supreme Court of the Northern Territory, Kearney J, 3 May 1995.

What must be determined on the present application is which court is most accommodating to the overall requirements of justice. I use the word "accommodating" as such a decision inevitably involves some degree of compromise: see *Nilsen Electric (WA) Pty Ltd v Jovista Pty Ltd*, unreported, Supreme Court of Victoria, 8 March 1995, Byrne J, at 8.

Mr Goldberg QC for MacAPT urged the court to start its consideration to all the circumstances of the case with a "clean sheet" or "clean slate"; that is, without any presumption or predilection to the court chosen by the plaintiff. The test of "Forum Non Conveniens", it was said, has no application in respect of cross-vesting legislation at all, other than to raise some considerations as being relevant: see *Bankinvest A-G v Seabrook*, supra, Street CJ at 714, Rodgers AJA at 723-5; *Midland Montagu Australia Ltd v O'Connor*, supra, Kearney J at 90-1, 94; *Dawson v Barker* (1994) 120 ACTR 11 at 25; *Toren Fishing and Trading Pty Ltd v McKenzie Family Nominees Pty Ltd & Ors*, unreported, Supreme Court of the Northern Territory, 3 May 1995, Kearney J; *Pikos v Australia Boat Sales Pty Ltd*, unreported, Supreme Court of the Northern Territory, 26 July 1995, Thomas J.

Mr Goldberg QC submitted that in the present case a primary matter of concern to the court ought be the witnesses. He submitted that in the plaintiff's answering material 17 of the 23 witnesses listed live or work outside the Northern Territory. His best estimate of the total number of witnesses for trial was 'around 50'.

It followed, Mr Goldberg QC submitted, the cost of running a trial and bringing all witnesses together to the most convenient court should be a pre-eminent concern.

Counsel for the defendants all acknowledged Queensland has no connection with this case, yet it was said its logistical convenience was irresistible in terms of efficiency, cost effectiveness and convenience to witnesses. The defendants all agree that the Supreme Court of Queensland should hear the trial.

Mr Goldberg QC relied upon the supporting affidavit of Andrew John Stephenson dated 22 June 1995 in which it was deposed that: (paraphrasing)

5. MacAPT is a joint venture between the first and second defendants, MacMahon Contractors Pty Ltd and Advanced Pipeline Technology Pty Ltd. MacMahon's head office is in Adelaide, with other offices in Brisbane, Sydney and Perth.

6. Clayton Utz, solicitors for MacAPT, has offices in Sydney, Melbourne and Brisbane, but no office in the Northern Territory. There has, however, since the filing of the affidavit, been a public announcement in Darwin that the Darwin legal firm of Philip and Mitaros now works "in association with Clayton Utz".

7. Advanced Pipeline Technology has an office in Cooma, New South Wales, but its principal office is in Victoria.

8. Mitsui has offices in Sydney and Brisbane, but not in the Northern Territory.

9. Tubemakers has its principal office in Sydney.

12. The estimated length of the trial could conservatively be three months, or as long as six months.

14. MacMahon has a small office in Darwin, arising from the construction of the pipeline which it intends to close this year. MacMahon's Northern Territory State Manager is now in Perth.

15. There were approximately 200 employees and sub-contractors of MacAPT at the time of the construction of the pipeline. It is not known as yet how many of these people will be required as witnesses. These employees reside mainly in Queensland and South Australia.

16. Two chief witnesses of MacAPT reside in Melbourne.

20. Mitsui has its principal witnesses located in Brisbane.

21. In respect of Tubemakers, none of its representatives involved with the pipeline reside in the Northern Territory of Australia.

22. The PAWA's principal witnesses are most likely to be employees of the superintendent under the contract, CMPS & F Pty Ltd, whose service address is in Brisbane. The principal offices of that company are in Sydney and the Northern Territory, the employees of the latter having had no involvement in the pipeline construction.

23. The two representatives of the pipeline operator, Eastern Pipelines, seconded to CMPS & F Pty Ltd, are now based in Canberra. Similarly, CMPS & F Pty Ltd engaged an expert construction inspector who now resides in Queensland.

24. Inconvenience would be visited upon the parties, were they to attend Darwin by reason of expense, travel time and flight schedule availability.

33- The attendance of witnesses will increase significantly
34. the overall litigation cost; that is, owing to the greater collective disadvantage experienced by the defendants as opposed to the plaintiff by reason of

airfares, accommodation and the set-up of offices in Darwin that would be necessitated.

Mr Goldberg QC concluded stating that only two matters ought be in consideration; on the one hand, the issue of costs, and on the other hand, the disruption to all parties and witnesses involved.

Mr Collins QC, counsel for Tubemakers supported the application by MacAPT. First, he addressed the issue of a choice of forum clause in the contract. In effect, it was said, the draftsman showing the contract had a choice of stating two things: (1) an exclusive jurisdiction clause, probative in nature which prevents the parties going to other forums; or (2) isolating Darwin as one of the appropriate places in which any possible litigation or proceedings may be conducted. It was submitted that it was the latter which was intended by the draftsman.

Mr Collins QC also submitted that the fate of the present application turned on three things - witnesses, convenience and cost; and that the only court able to entertain this proceeding is the Supreme Court, not the Federal Court. This was so, it was said, by virtue of the Cross-Vesting Act s5(2)(b)(iii).

Mr Collins QC then submitted that the vast majority of witnesses (some 95% from Brisbane and Sydney) would come from

the eastern seaboard of Australia, and as a result, the cost and convenience in balancing the interests of justice should lead, by common sense, to the transfer of this proceeding to the Supreme Court of Queensland.

He also noted that the plaintiff had engaged the services of CMPS & F Pty Ltd, a large firm of Brisbane-based engineers who oversaw the construction of the pipeline; this was a Queensland connection, it was said, albeit somewhat tenuous.

Mr Collins QC discussed the supporting affidavit of Mr Nathans, dated 6 July 1995 which echoed similar considerations to those of Mr Stephenson's deposition. These dealt with logistical inconvenience, the nature of evidence and complexity, the anticipated expense of the litigation, airline scheduling and the residences of key witnesses on the eastern seaboard. The number of witnesses to be called, he also said, should be around fifty. These considerations, it was argued, supported the transfer of the proceeding to the Supreme Court of Queensland for such a lengthy trial.

Mr Stewart, counsel for the second defendant, Mitsui, supported the application for transfer to the Supreme Court of Queensland and adopted aspects of the affidavit of Mr Stephenson, sworn 22 January 1995.

Mr Stewart noted that CMPS & F Pty Ltd who acted for the plaintiff in the execution and procuring of the contract by

the second defendant, is based in Brisbane. In turn, he noted that the second defendant's general manager resides and works in Brisbane; a further Queensland connection, it was said.

Mr Riley QC appeared for the plaintiff, PAWA. He submitted that the Supreme Court of Queensland has no connection at all with any elements of this litigation. Accordingly it was urged that the court may only weigh up the differences between two courts if they have both jurisdiction and connections with the litigation. The Supreme Court of the Northern Territory, it was said, is the only court that has jurisdiction.

Mr Riley QC disagreed with the defendants as to the importance of location of witnesses. He submitted that the bulk of identified witnesses are in Darwin; that is, identified in terms of their evidence. The others, it was said, are both throughout Australia and overseas.

Mr Riley QC submitted that the primary concern is not the convenience to the parties, but the suitability or appropriateness of the relevant jurisdiction; that is, a broader frame of reference than a mere concentration on convenience and expense. Mr Goldberg QC and Mr Collins QC, in reply, strongly opposed this stating that such an assertion has its origins in the test of "Forum Non Conveniens". It was submitted that it has no place in Cross-Vesting legislation as

a proposition of law. I agree with the defendants' submissions.

The next submission of the plaintiff concerned the forum and arbitration clauses. It was stated that the parties when entering into the contract agreed between themselves that, were there to be litigation, it would be resolved in the Northern Territory and conducted pursuant to its laws. However the forum clause is not an exclusive jurisdiction clause.

A non exclusive jurisdiction clause is indicative, not determinative: see *Nilsen Electric (WA) Pty Ltd v Jovista Pty Ltd*, supra.

It was submitted that there would be a forensic advantage in procedure that would benefit the plaintiff under Northern Territory law. The defendants submitted likewise, were the Supreme Court of Queensland to be the forum for trial. It is common ground that the substantive law to be applied should be that of the Commonwealth and the Northern Territory, though no substantial difference between Northern Territory law and Queensland law was alleged.

It was submitted that the Northern Territory has a greater connection with the litigation than does Queensland. The construction of the pipeline was in the Northern Territory and the damages which flow from the breaches and complaints

made against the defendants will have to be assessed in the Northern Territory; that is, the cost of repairing the pipe and its being re-laid for the total defective length. It was said by Mr Riley QC that, pursuant to the Energy Pipelines Act the Minister, even having granted a licence for a period of two years, had directed that it be replaced after that time.

It was also submitted that there was Northern Territory public interest in this litigation as it concerned a substantial dispute over Northern Territory public assets; accordingly, it should be heard in the Northern Territory.

In respect of witnesses, Mr Riley QC submitted that each witness would be required only once, so whether they travel from interstate or overseas, is not determinative.

It was said that the nature of the evidence and number of witnesses of the defendants are not presently known. That was said to be dependant on the defences. The cost and convenience of those witnesses, it was submitted, is only one factor. Some witnesses, it was said, could easily be dealt with by video-link; however, those witnesses would be no less important than the principal witnesses whose expertise would require them to be present for long periods at the trial. No distinction was sought to be made between these principal witnesses and the legal representatives who, of necessity,

would have to be present and accommodated for the trial's duration.

It was pointed out also that some of the witnesses, though residing in one place now, due to the transience of their profession, could well be residing elsewhere by the time of the hearing; and so, to speak of such now, six to twelve months from trial, is in the realm of speculation. However, it was conceded by Mr Riley QC that "most of the witnesses" reside in Queensland.

The final submission dealt with priority hearing lists. It was submitted that in Queensland the waiting period to go to trial would be between 12 and 18 months; in the Northern Territory it would be three to four months. On that administrative level, the Supreme Court of the Northern Territory should be considered more suitable, it was said.

The decision that needs to be made is in answer to one simple question. Do the interests of justice determine that the trial and proceeding ought to be heard in the Supreme Court of the Northern Territory or the Supreme Court of Queensland? There is no presumption in favour of any one particular court. No party bears an onus in this application. I need only be satisfied on the balance viewing all submissions that there is a perceptible difference in favour of one particular supreme court. Satisfied of that, then the

decision to appoint one supreme court to hear the trial and proceeding, is automatic pursuant to s5 of the Cross-Vesting Act.

I note, again, that the Cross-Vesting legislation creates one Australia-wide jurisdiction within which there are many "courts of call". I have only to decide the more appropriate court bearing in mind the interests of justice.

The trial will be lengthy. The issues are many and relatively complex. It is a construction case. The number of witnesses are anticipated to be around 50. The nature of the evidence will vary from the menial and procedural to the detailed and technical, including expert testimony.

The preponderance of witnesses reside or work along the eastern seaboard of Australia. The inconvenience and cost would be greater were the proceeding to occur in the Supreme Court of the Northern Territory of Australia. Of the four parties, three are defendants. The inconvenience for each of these three to bring their counsel, legal representatives, cases and witnesses to the Supreme Court of the Northern Territory would be greater than that of the plaintiff, the PAWA, were it to take its counsel, legal representatives, case and witnesses to the eastern seaboard, namely the Supreme Court of Queensland. Some 17 of the 23 witnesses identified by the PAWA reside outside the Territory, in any case.

The defendants named certain people involved at different levels in the construction of the pipeline. Not one was a resident of the Northern Territory. Those senior executives, engineers or experts that would be called reside, as I have said, in the eastern states of Australia, save only a few in South Australia and Western Australia.

PAWA, submitted that in *Nilsen Electric*, supra, the court ordered the transfer of the proceeding from the Supreme Court of Victoria to the Supreme Court of Western Australia, because the pipeline was constructed in WA. The defendants, however, submitted that the case was transferred because the preponderance of witnesses were from WA. Byrne J at 6, said:

> "The main factors which lead me to a conclusion in favour of the Western Australia court are the location of the preponderance of major witnesses, as well as the presence of minor witnesses in Western Australia whose evidence will deal with the day to day events on site. Add to this the fact that the site documents are in Western Australia. The cost of discovery in this case will, in any event, be significant. To my mind it will be substantially increased if it is to be undertaken in Victoria so far from the site. It may be, too, that a view will be necessary, ... but I am not sure of this."

This case is similar. It was urged by the plaintiff, the PAWA, that as the damages that flow from the defective pipeline constructed are in the Northern Territory then its supreme court is more appropriate. I do not agree. Evidence led on this question could include photographs and written assessment reports. A view is possible.

Mr Riley QC, for the PAWA also submitted that the interlocutory stages could more easily be administered in the Northern Territory. As each defendant has an agent in Darwin there would be no need, it was said, for legal teams to fly to Darwin at each stage of that interlocutory process. Again I turn to Byrne J when, at 8, he said:

> "In any major litigation there is inconvenience, perhaps great inconvenience for those involved, as well as delays and considerable expense. The great advantage of the flexibility conferred on this Court by the cross-vesting legislation is that it is now possible to locate the interlocutory and trial process where in Australia this inconvenience, delay and expense is least, and the course of the legislation thereby facilitated. To my mind the circumstances of this case point to Western Australia as the appropriate venue and I shall make the appropriate orders sought by the defendant."

My view is that the total cost of the litigation will be substantially increased if the action proceeds in the Supreme Court of the Northern Territory. The total costs can not be quantified. Not even the interlocutory stages have commenced. The inconvenience visited upon at least three of the four parties involved in this litigation would be greater were interlocutory steps to proceed in the Supreme Court of the Northern Territory and the trial to be heard there.

What do the interests of justice dictate? In my view, on the material before me, it seems reasonably clear that the trial ought be heard in the Supreme Court of Queensland. The substantive law of the Northern Territory can be applied there. There is no substantive law applicable to the dispute

that is peculiar either to the Northern Territory or Queensland. There is no forensic advantage, procedural or otherwise, which any party might gain or lose by a transfer. The pipeline was constructed in the Northern Territory and the parties contractually chose Northern Territory law to be applicable to the dispute. It may be that there will be some delay in the proceedings if transferred. This is relevant but outweighed by the incurred inconvenience and cost to the parties and witnesses if the action is not transferred. The cost and inconvenience of the litigation and the disruption to all parties would be less than if the action were to proceed in the Supreme Court of the Northern Territory.

I order that this action be transferred to the Supreme Court of Queensland pursuant to s5(2)(b)(iii) of the Cross-Vesting Act.

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