

# FEDERAL COURT OF AUSTRALIA

**Quotila Pty Ltd v South Australian Marine Products Industries Pty Ltd (No 2)**

**[2011] FCA 29**

Citation: Quotila Pty Ltd v South Australian Marine Products Industries Pty Ltd (No 2) [2011] FCA 29

Parties: **QUOTILA PTY LTD (ACN 005 763 502) v SOUTH AUSTRALIAN MARINE PRODUCTS INDUSTRIES PTY LTD (ACN 107 786 201), CHARLES JOHN FRANCHINA and TERRY STEPHEN ROMARO**

File number: SAD 131 of 2010

Judge: **BESANKO J**

Date of judgment: 28 January 2011

Date of hearing: 25 January 2011

Place: Adelaide

Division: GENERAL DIVISION

Category: No catchwords

Number of paragraphs: 10

Counsel for the Plaintiff: Mr S D Ower

Solicitor for the Plaintiff: Jenkins Anderson

Counsel for the Defendants: Mr K A Dundo

Solicitor for the Defendants: Q Legal

**IN THE FEDERAL COURT OF AUSTRALIA  
SOUTH AUSTRALIA DISTRICT REGISTRY  
GENERAL DIVISION**

**SAD 131 of 2010**

**BETWEEN: QUOTILA PTY LTD (ACN 005 763 502)  
Plaintiff**

**AND: SOUTH AUSTRALIAN MARINE PRODUCTS INDUSTRIES  
PTY LTD (ACN 107 786 201)  
First Defendant**

**CHARLES JOHN FRANCHINA  
Second Defendant**

**TERRY STEPHEN ROMARO  
Third Defendant**

**JUDGE: BESANKO J**

**DATE OF ORDER: 28 JANUARY 2011**

**WHERE MADE: ADELAIDE**

**THE COURT ORDERS THAT:**

1. The defendants' notice of motion dated 19 January 2011 be dismissed.
2. The defendants pay the plaintiff's costs of the said notice of motion.
3. The proceeding be listed for further directions on 9 May 2011 at 9.15 am.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.  
The text of entered orders can be located using Federal Law Search on the Court's website.

**IN THE FEDERAL COURT OF AUSTRALIA  
SOUTH AUSTRALIA DISTRICT REGISTRY  
GENERAL DIVISION**

**SAD 131 of 2010**

**BETWEEN: QUOTILA PTY LTD (ACN 005 763 502)  
Plaintiff**

**AND: SOUTH AUSTRALIAN MARINE PRODUCTS INDUSTRIES  
PTY LTD (ACN 107 786 201)  
First Defendant**

**CHARLES JOHN FRANCHINA  
Second Defendant**

**TERRY STEPHEN ROMARO  
Third Defendant**

**JUDGE: BESANKO J**

**DATE: 28 JANUARY 2011**

**PLACE: ADELAIDE**

**REASONS FOR JUDGMENT**

1 This is an application by the defendants to a proceeding before this Court for an order directing that the proceeding be continued in the Western Australia District Registry of this Court. The order is sought under s 48(1) of the *Federal Court of Australia Act 1976* (Cth).

2 The claims made by the plaintiff against the defendants are summarised in my reasons for judgment on an application by the plaintiff for an interlocutory injunction: *Quotila Pty Ltd v South Australian Marine Products Industries Pty Ltd* [2010] FCA 1141. I will not repeat what I said in those reasons.

3 On the present application the defendants rely on an affidavit sworn by the second defendant on 19 January 2011. In that affidavit, the second defendant states that the first defendant conducts a business at Port Lincoln in South Australia. The registered office of the first defendant is an address in Burswood, Western Australia, and it has a place of business for the purpose of its administrative functions in Fremantle, Western Australia. The second defendant states that the first defendant has a working capital deficiency and requires financial support which, at this time, is provided by FishTrade International Pty Ltd

(‘FishTrade’). The second defendant states that without FishTrade’s financial support, the first defendant would not be able to meet its debts as and when they fall due. The first defendant’s accounts as at 31 December 2010 show a working capital deficiency of \$545,139, and outstanding trade creditors of \$219,108. The second defendant states that the witnesses to be called on behalf of the defendants at the trial of this proceeding will be himself, the third defendant and Daniel McRorie, all of whom are resident in Western Australia. He believes that the plaintiff may call Mr Peter Lombardo as a witness and he states that Mr Lombardo is a resident of Western Australia. The second defendant refers to the fact that the relevant directors’ meeting of the first defendant was held in Western Australia.

4           The plaintiff relies on an affidavit of its solicitor, dated 24 January 2011. In that affidavit the solicitor deposes to the fact that Mr Peter Laughton, the director of the plaintiff, is resident in South Australia. He also deposes to the fact that his firm is located in Port Lincoln, South Australia. He states that his firm does not have an office or any ‘affiliates’ in Western Australia. The plaintiff’s counsel is a member of the South Australian bar. The solicitor states that Mr Laughton will be a witness at trial, but, at this stage, no decision has been made as to other witnesses. The solicitor states that he has been informed by counsel that the trial will occupy one to two days.

5           The relevant principles are clear. They are set out in the decision of the Full Court of this Court in *National Mutual Holdings Pty Ltd v The Sentry Corporation* (1988) 19 FCR 155. The Court said (at [162]):

A party commences a proceeding by filing an application in a particular registry of the Court. If that party or another party wishes to have the proceeding conducted or continued in another place he may apply to the Court for an order under s 48 or O 10, r 1(2)(f) or O 30, r 6 as the case may be. There is no onus of proof in the strict sense to be discharged by the party seeking to conduct or continue the proceedings elsewhere. It should be noted that the Court may exercise its powers under O 30, r 6 either on the application of a party or of its own motion. The Court must, however, be satisfied, after considering all relevant matters, that there is sound reason to direct that the proceeding be conducted or continued elsewhere. Its starting point is that the proceeding has been commenced at a particular place. Why should it be changed? On the one hand, if the party who commenced the proceeding chose that place capriciously the Court would be justified in giving no weight to the choice of place. At the other end of the scale, a proceeding may have continued for some time at the place of commencement with many steps having been taken there, for example, filing of pleadings and affidavits, discovery and inspection. Due weight would be given by the Court to such matters before directing that the proceeding should continue at a different place.

The balance of convenience is important, but its weight must vary from case to case. Ultimately the test is: where can the case be conducted or continued most suitably bearing in mind the interests of all the parties, the ends of justice in the determination of the issues between them, and the most efficient administration of the Court. It cannot and should not, in our opinion, be defined more closely or precisely.

6           The parties also referred me to *Australian Competition and Consumer Commission v Pauls Ltd* [2002] FCA 71 (*'Australian Competition and Consumer Commission v Pauls'*); *Vasta v Tuni Engineering Pty Ltd* [2006] FCA 1780 and *Rafferty v Time 2000 West Pty Limited* [2008] FCA 1925; *Mortimer v Opes Prime Stockbroking Limited (ACN 086 294 028) (Administrators Appointed) (In Liquidation)* [2009] FCA 227. I have also had regard to the passages from the reasons for judgment of Gummow J sitting as a member of this Court in *Cycles and Wheelman Pty Ltd v Beltech Corporation Ltd* (1988) 80 ALR 279 referred to by O'Loughlin J in *Australian Competition and Consumer Commission v Pauls*.

7           The trial of this proceeding will not be a long one. The estimate of one to two days may be optimistic, but I think that on the evidence presently before me the case is likely to be completed within days rather than weeks. Evidence may be given by video link although, having regard to the nature of the issues, I think that I should proceed on the basis that the second and third defendant will give evidence in person rather than by video link. However, it may be possible for Mr McRorie to give evidence by video link. That means there are two witnesses who would have to travel from Western Australia to South Australia if the defendants' application is unsuccessful, or one witness who would have to travel from South Australia to Western Australia if it is successful. While it is true that the registered office of the first defendant is in Western Australia and it has an administrative office in Western Australia, the principal operating business of the first defendant is conducted from premises in South Australia. It is also true that the impugned resolution of the directors was passed at a directors meeting held in Western Australia. At the same time, the proceeding involves the *Corporations Act 2001* (Cth) and the fiduciary obligations of directors, and I do not understand it to be suggested that there is any chance the law to be applied may differ according to the venue.

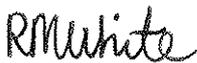
8           I place little weight on the location of the plaintiff's solicitors and counsel as there is no reason to think that the plaintiff cannot be adequately represented if the trial proceeds in

the Western Australia District Registry. It is true that the defendants are likely to incur additional costs if the trial is conducted in this Registry, but the trial is likely to be a relatively short one and there is no reason to think that the defendants will not be able to conduct a defence of the proceeding at a trial in this Registry.

9           The plaintiff's choice of venue is not a capricious one and there must be a sound reason to transfer the proceeding. Although at this stage the balance of convenience in terms of the location of witnesses favours an order for transfer, that matter is not a sufficiently weighty matter when considered with the other matters I have identified to persuade me that there is a sound reason to order a transfer of the proceeding.

10           The defendants' notice of motion must be dismissed with costs.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate: 

Dated: 28 January 2011